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REFERENCES

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Halsbury's Statutes of England, Second Edition

The reference 26 Halsbury's Statutes (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

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The reference 31 Digest (Repl.) 244, *3794*, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

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CASES REPORTED IN VOLUME 3

	PAGE
ABBOTT *v.* REFUGE ASSURANCE CO., LTD. [C.A.]	1074
ABRAHAM, PERFORMANCE CARS, LTD. *v.* [C.A.]	413
ALLEN *v.* ALLEN [C.A.]	385
ANNAMUNTHODO *v.* OILFIELDS WORKERS' TRADE UNION [P.C.]	621
ANNISON *v.* DISTRICT AUDITOR FOR THE METROPOLITAN BOROUGH OF ST. PANCRAS [Q.B.D. DIVL. CT.]	914
ANSBACHER (HENRY) & CO. *v.* INLAND REVENUE COMRS. [C.A.]	211
ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* BRITISH TRANSPORT COMMISSION [C.A.]	495
ASHMAN, OLIVER *v.* [C.A.]	323
ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD., HILDER *v.* [Q.B.D.]	709
ATTFIELD, R. *v.* [C.C.A.]	243
ATTORNEY-GENERAL *v.* CRAYFORD URBAN DISTRICT COUNCIL [CH.D]	1002
ATTORNEY-GENERAL FOR CEYLON *v.* SCINDIA STEAM NAVIGATION CO., LTD. [P.C.]	684
ATTORNEY-GENERAL FOR NORTHERN IRELAND, BRATTY *v.* [H.L.]	523
ATTORNEY-GENERAL FOR NORTHERN IRELAND *v.* GALLAGHER [H.L.]	299
AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMR. [P.C.]	1051
BAGLEY & CO., LTD., BASTOW *v.* [C.A.]	1101
BAKER (INFANTS), Re [C.A.]	276
BAKER, R. *v.* [C.C.A.]	703
BALTIC SAWMILLS CO., LTD., BUNCOMBE (VALUATION OFFICER) *v.* [C.A.]	272
BASTOW *v.* BAGLEY & CO., LTD. [C.A.]	1101
BENNETT, BUTTER (INSPECTOR OF TAXES) *v.* [CH.D.]	1041
BERKSHIRE (FOREST) JUSTICES, R. *v. Ex parte* DALLAIRE [Q.B.D. DIVL. CT.]	1138
BERRY *v.* BRITISH TRANSPORT COMMISSION [C.A.]	65
BLACK BOLT AND NUT ASSOCIATION OF GREAT BRITAIN'S AGREEMENT (NO. 2), Re [R.P.C.]	316
BLAKE (VALUATION OFFICER) *v.* HENDON CORPN. [C.A.]	601
BLAKE, R. *v.* [C.C.A.]	125
BLOHN *v.* DESSER [Q.B.D.]	1
BLOOM, R. *v.* [C.C.A.]	88
BOARD OF TRADE, QUALTER, HALL & CO., LTD. *v.* [C.A.]	389
BOWES-LYON *v.* GREEN [H.L.]	843
BRASSINGTON *v.* BRASSINGTON [C.A.]	988
BRATTY *v.* ATTORNEY-GENERAL FOR NORTHERN IRELAND [H.L.]	523
BREEN (OTHERWISE SMITH) *v.* BREEN [DIV.]	225
BREWER *v.* BREWER [C.A.]	957
BRISTOL SOUTH EAST PARLIAMENTARY ELECTION, Re [Q.B.D. DIVL. CT.]	354
BRITISH TRANSPORT COMMISSION, ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* [C.A.]	495
BRITISH TRANSPORT COMMISSION, BERRY *v.* [C.A.]	65
BRITISH TRANSPORT COMMISSION, EAST BARNET URBAN DISTRICT COUNCIL *v.* [Q.B.D. DIVL. CT.]	878
BRITISH TRANSPORT COMMISSION, MERCHANDISE TRANSPORT, LTD. *v.* [C.A.]	495
BRITISH VINEGARS, LTD., WIGLEY *v.* [C.A.]	418
BRONESTER, LTD. *v.* PRIDDLE [C.A.]	471
BROWN *v.* BULLOCK (INSPECTOR OF TAXES) [C.A.]	129
BULLARD *v.* R. (1957) [P.C.]	470
BULLOCK (INSPECTOR OF TAXES), BROWN *v.* [C.A.]	129
BUNCOMBE (VALUATION OFFICER *v.* BALTIC SAWMILLS, CO., LTD. [C.A.]	272
BUTTER (INSPECTOR OF TAXES) *v.* BENNETT [CH.D.]	1041
C. H. W. (HUDDERSFIELD), LTD. *v.* INLAND REVENUE COMRS. [CH.D.]	551
CAPLAN (I. & H.), LTD. *v.* CAPLAN [H.L.]	1174
CARTLEDGE *v.* JOPLING (E.) & SONS, LTD. [C.A.]	482
CHAPMAN *v.* CHAPMAN [DIV.]	1105
CHAPPLE *v.* ELECTRICAL TRADES UNION [CH.D.]	612
CHOONG FAH RUBBER MANUFACTORY, CHOW YOONG HONG *v.* [P.C.]	1163
CHOW YOONG HONG *v.* CHOONG FAH RUBBER MANUFACTORY [P.C.]	1163
CLARKE'S WILL TRUSTS, Re [CH.D.]	1133
CLAYTON (VALUATION OFFICER), EAST YORKSHIRE MOTOR SERVICES, LTD. *v.* [C.A.]	758
CLAYTON (VALUATION OFFICER), KINGSTON-UPON-HULL CORPN. *v.* [H.L.]	118
CLAYTON *v.* WOODMAN & SON (BUILDERS), LTD. [Q.B.D.]	249
CLIFFORD *v.* CLIFFORD [DIV.]	231
CLIFFORD, CRITCHLEY *v.* [C.A.]	288
CLIFFORD-TURNER *v.* WATERMAN [Q.B.D. DIVL. CT.]	974
COOK *v.* NATIONAL COAL BOARD [C.A.]	220
COOPER *v.* COOPER [C.A.]	539
COOPER'S SETTLEMENT, Re [CH.D.]	636
COUTTS & CO. *v.* INLAND REVENUE COMRS. [CH.D.]	158
COX, R. *v.* [C.-M.A.C.]	1194
CRAYFORD URBAN DISTRICT COUNCIL, ATTORNEY-GENERAL *v.* [CH.D.]	1002
CRITCHLEY *v.* CLIFFORD [C.A.]	288
CROOK *v.* DERBYSHIRE [C.A.]	786
CULLIMORE *v.* LYME REGIS CORPN. [Q.B.D.]	1008
CURE & DEELEY, LTD., CUSTOMS AND EXCISE COMRS. *v.* [Q.B.D.]	641
CURRAN *v.* NEILL (WILLIAM) & SON (ST. HELENS), LTD. [C.A.]	108
CUSTOMS AND EXCISE COMRS. *v.* CURE & DEELEY, LTD. [Q.B.D.]	641
DALLAIRE, *Ex parte*, R. *v.* BERKSHIRE (FOREST) JUSTICES [Q.B.D. DIVL. CT.]	1138
DANIEL (W.J.) & CO., LTD., WHITTAM *v.* [C.A.]	796
DANIELS *v.* JONES [C.A.]	24
DANIELS, LINCOLN *v.* [C.A.]	740
DANQUAH, WUTA-OFEI *v.* [P.C.]	596
DAVIS INVESTMENTS (EAST HAM), LTD., Re [C.A.]	926
DERBYSHIRE, CROOK *v.* [C.A.]	786
DESSER, BLOHN *v.* [Q.B.D.]	1
DIRECTOR OF PUBLIC PROSECUTIONS, SYKES *v.* [H.L.]	33
DISTRICT AUDITOR FOR THE METROPOLITAN BOROUGH OF ST. PANCRAS, ANNISON *v.* [Q.B.D. DIVL. CT.]	914
DISTRICT AUDITOR FOR THE METROPOLITAN BOROUGH OF ST. PANCRAS, TAYLOR *v.* [Q.B.D. DIVL. CT.]	914
DIXON, R. *v.* [GLAMORGANSHIRE ASSIZES]	460
DREW, TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* [H.L.]	49
DSANE *v.* HAGAN [CH.D.]	380
DU CROS' SETTLEMENT, Re [CH.D.]	193
DUKE, R. *v.* [C.C.A.]	737
E.Y.L. TRADING CO., LTD. *v.* INLAND REVENUE COMRS. [CH.D.]	1121
EAST BARNET URBAN DISTRICT COUNCIL *v.* BRITISH TRANSPORT COMMISSION [Q.B D. DIVL. CT.]	878
EAST YORKSHIRE MOTOR SERVICES, LTD. *v.* CLAYTON (VALUATION OFFICER) [C.A.]	758
EAVES *v.* MORRIS MOTORS, LTD. [C.A.]	233
EDGWARE TRUST, LTD. *v.* LAWRENCE [Q.B.D.]	141
EDWARD'S QUESTIONS, Re [CH.D.]	580
EDWICK *v.* SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL [Q.B.D.]	10

PAGE

ELECTRICAL TRADES UNION, CHAPPLE *v.* [CH.D.] 612
ESSEX QUARTER SESSIONS, R. *v. Ex parte* LARKIN [Q.B.D. DIVL. CT.] 930
FAIREY AVIATION CO., LTD., SPARROW *v.* [C.A.] 452
FAIRWEATHER, ST. MARYLEBONE PROPERTY CO., LTD. *v.* [C.A.] 560
FIELDRANK, LTD. *v.* STEIN [C.A.] 681
FINKLE *v.* STRZELCZYK [C.A.] 409
FLACK *v.* WITHERS [H.L.] 388
FLEMING, MEEK *v.* [C.A.] 148
FLYNN, R. *v.* [C.C.A.] .. .. 58 ~~49~~
G. *v.* G. (OTHERWISE H.) [DIV.] 247
GALLAGHER, ATTORNEY-GENERAL FOR NORTHERN IRELAND *v.* [H.L.] 299
GARDANO & GIAMPARI *v.* GREEK PETROLEUM GEORGE MAMIDAKIS & CO. [Q.B.D.] 919
GARDINER *v.* MOTHERWELL MACHINERY AND SCRAP CO., LTD. [H.L.] 831
GARLAND & FLEXMAN (A FIRM) *v.* WISBECH CORPN. [Q.B.D.] 342
GARSIDE *v.* INLAND REVENUE COMRS. [CH.D.] .. 551
GOOCH, NATIONAL BENZOLE CO., LTD. *v.* [C.A.] .. 1097
GOULD, SUNROSE, LTD. *v.* [C.A.] 1142
GREEK PETROLEUM GEORGE MAMIDAKIS & CO., GARDANO & GIAMPARI *v.* [Q.B.D.] 919
GREEN, BOWES-LYON *v.* [H.L.] 843
GUEST, R. *v. Ex parte* METROPOLITAN POLICE COMMISSIONER [VACATION CT.] 1118
GUILDFORD GODALMING AND DISTRICT WATER BOARD, LONGHURST *v.* [H.L.] 545
HAGAN, DSANE *v.* [CH.D.] 380
HAINES, *Ex parte*, R. *v.* PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL [Q.B.D. DIVL. CT.] 1047
HALES, WEG MOTORS, LTD. *v.* [C.A.] 181
HARPUR'S WILL TRUSTS, Re [C.A.] 588
HEDLEY BYRNE & CO., LTD. *v.* HELLER & PARTNERS, LTD. [C.A.] 891
HELLER & PARTNERS, LTD., HEDLEY BYRNE & CO., LTD. *v.* [C.A.] 891
HENDON CORPN., BLAKE (VALUATION OFFICER) *v.* [C.A.] 601
HENTY & CONSTABLE (BREWERS), LTD. *v.* INLAND REVENUE COMRS. [C.A.] 1146
HIGGINBOTHAM, R. *v.* [C.C.A.] 616
HILDER *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. [Q.B.D.] 709
HIRTENSTEIN, MITCHELL (INSPECTOR OF TAXES) *v.* [H.L.] 49
HODGE (J.B.) & CO. (GLASGOW), LTD. (IN VOLUNTARY LIQUIDATION), I.R. COMRS. *v.* [H.L.] 172
HUNT (INSPECTOR OF TAXES), LUCY & SUNDERLAND, LTD. *v.* [CH.D.] 1062
HYMAN, ZAMET *v.* [C.A.] 933
INLAND REVENUE COMRS., ANSBACHER (HENRY) & CO. *v.* [C.A.] 211
INLAND REVENUE COMR., AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* [P.C.] 1051
INLAND REVENUE COMRS., C. H. W. (HUDDERSFIELD), LTD. *v.* [CH.D.] 551
INLAND REVENUE COMRS., COUTTS & CO. *v.* [CH.D.] 158
INLAND REVENUE COMRS., E.Y.L. TRADING CO., LTD. *v.* [CH.D.] 1121
INLAND REVENUE COMRS., GARSIDE *v.* [CH.D.] .. 551
INLAND REVENUE COMRS., HENTY & CONSTABLE (BREWERS) LTD. *v.* [C.A.] 1146
INLAND REVENUE COMRS. *v.* HODGE (J.B.) & CO. (GLASGOW), LTD. (IN VOLUNTARY LIQUIDATION) [H.L.] 172
INLAND REVENUE COMRS., LITTLEWOODS MAIL ORDER STORES, LTD. *v.* [C.A.] 258
INLAND REVENUE COMRS., RENNELL (LORD) *v.* [C.A.] 1028
INLAND REVENUE COMRS., RIDGE NOMINEES, LTD. *v.* [C.A.] 1108
INLAND REVENUE COMRS., SPENCER *v.* [CH.D.] .. 551
INLAND REVENUE COMRS., VESTEY *v.* [CH.D.] .. 978
INLAND REVENUE COMRS., WINTER (EXECUTORS OF SIR ARTHUR MUNRO SUTHERLAND (*decd.*) *v.* [H.L.] 855
IVEAGH (EARL) *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT [Q.B.D.] 98
JEWISON'S WILL TRUSTS, Re [CH.D.] 1022
JOHNSON, R. *v.* [C.C.A.] 969
JOHNSON *v.* REA, LTD. [C.A.] 816
JONES, DANIELS *v.* [C.A.] 24
JONES, R. *v.* [C.C.A.] 668
JOPLING (E.) & SONS, LTD., CARTLEDGE *v.* [C.A.] 482
KINGSTON-UPON-HULL CORPN. *v.* CLAYTON (VALUATION OFFICER) [H.L.] 118
KIRKE *v.* KIRKE [DIV.] 1059
KOLB'S WILL TRUSTS, Re [CH.D.] 811

PAGE

L. *v.* L. [DIV.] 20
——, [C.A.] 834
LANGLEY'S SETTLEMENT TRUSTS, Re [C.A.] .. 803
LARKIN. *Ex parte*, R. *v.* ESSEX QUARTER SESSIONS [Q.B.D. DIVL. CT.] 930
LATHAM (*decd.*), Re [CH.D.] 903
LAWRENCE, EDGWARE TRUST, LTD. *v.* [Q.B.D.] 141
LEECH BRAIN & CO., LTD., SMITH *v.* [Q.B.D.] .. 1159
LIMBRICK, PIDDUCK AND, PIDDUCK *v.* [DIV.] .. 481
LINCOLN *v.* DANIELS [C.A.] 740
LITTLEWOODS MAIL ORDER STORES, LTD. *v.* INLAND REVENUE COMRS. [C.A.] 258
LLEWELLYN, MAXFIELD *v.* [C.A.] 95
LONGHURST *v.* GUILDFORD GODALMING AND DISTRICT WATER BOARD [H.L.] 545
LUCY & SUNDERLAND, LTD. *v.* HUNT (INSPECTOR OF TAXES) [CH.D.] 1062
LYME REGIS CORPN., CULLIMORE *v.* [Q.B.D.] .. 1008
MCBRIDE, R. *v.* [C.C.A.] 6
MACFOY *v.* UNITRD AFRICA CO., LTD. [P.C.] .. 1169
MCGREGOR, WHITE & CARTER (COUNCILS), LTD. *v.* [H.L.] 1178
MCKIE (INSPECTOR OF TAXES) *v.* WARNER [CH.D.] 348
MCMATH *v.* RIMMER BROS. (LIVERPOOL), LTD. [C.A.] 1154
MADDEN, NEVILLE ESTATES, LTD. *v.* [CH.D.] .. 769
MALES, R. *v.* [C.C.A.] 705
MARSHALL, MITCHELL (INSPECTOR OF TAXES) *v.* [H.L.] 49
MASON, SCARSBROOK *v.* [Q.B.D.] 767
MATTHEWS'S WILL TRUSTS, Re [CH.D.] 869
MAXFIELD *v.* LLEWELLYN [C.A.] 95
MEEK *v.* FLEMING [C.A.] 148
MERCHANDISE TRANSPORT, LTD. *v.* BRITISH TRANSPORT COMMISSION [C.A.] 495
METHARAM, R. *v.* [C.C.A.] 200
METROPOLITAN POLICE COMMISSIONER, *Ex parte*, R. *v.* GUEST [VACATION CT.] 1118
MILLER-MEAD, WARWICK RURAL DISTRICT COUNCIL *v.* [VACATION CT.] 542
MINISTER OF HOUSING AND LOCAL GOVERNMENT, IVEAGH (EARL) *v.* [Q.B.D.] 98
MITCHELL (INSPECTOR OF TAXES) *v.* HIRTENSTEIN [H.L.] 49
MITCHELL (INSPECTOR OF TAXES) *v.* MARSHALL [H.L.] 49
MITCHELL (INSPECTOR OF TAXES) *v.* ROSS [H.L.] 49
MORRIS MOTORS, LTD., EAVES *v.* [C.A.] 233
MOTHERWELL MACHINERY & SCRAP CO., LTD., GARDINER *v.* [H.L.] 831
MUSLU, PHONOGRAPHIC EQUIPMENT (1958), LTD. *v.* [C.A.] 626
NASH, SUNSHINE PORCELAIN POTTERIES PROPRIETARY, LTD. *v.* [P.C.] 203
NATIONAL BENZOLE CO., LTD. *v.* GOOCH [C.A.] .. 1097
NATIONAL COAL BOARD, COOK *v.* [C.A.] 220
NATIONAL FEDERATION OF RETAIL NEWSAGENTS, BOOKSELLERS & STATIONERS, AND NEWSPAPER PROPRIETORS' ASSOCIATION, LTD., Re AGREEMENT BETWEEN [R.P.C.] 428
NEILL (WILLIAM) & SON (ST. HELENS), LTD., CURREN *v.* [C.A.] 108
NEVILLE ESTATES, LTD. *v.* MADDEN [CH.D.] .. 769
NEWSPAPER PROPRIETOR'S ASSOCIATION, LTD. & NATIONAL FEDERATION OF RETAIL NEWSAGENTS, BOOKSELLERS & STATIONERS, Re AGREEMENT BETWEEN, [R.P.C.] 428
OILFIELDS WORKERS' TRADE UNION, ANNAMUNTHODO *v.* [P.C.] 621
OLIVER *v.* ASHMAN [C.A.] 323
PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL, R. *v. Ex parte* HAINES [Q.B.D. DIVL. CT.] 1047
PARKS, R. *v.* [C.C.A.] 633
PAULING'S SETTLEMENT TRUSTS, Re [CH.D.] .. 713
PERFORMANCE CARS, LTD. *v.* ABRAHAM [C.A.] .. 413
PERRY CHAIN CO., LTD., WITHERS *v.* [C.A.] .. 676
PETRIE (*decd.*) Re [C.A.] 1067
PHONOGRAPHIC EQUIPMENT (1958), LTD. *v.* MUSLU [C.A.] 626
PIDDUCK *v.* PIDDUCK AND LIMBRICK [DIV] .. 481
PONTIN *v.* WOOD [Q.B.D.] 992
PORRITT, R. *v.* [C.C.A.] 463
PRACTICE DIRECTION (DIVORCE SUMMONS: TRANSFER FROM SOLICITORS' TO COUNSEL'S LIST) [DIV.] 171
PRACTICE DIRECTION (SOLICITOR: WITHDRAWAL: APPLICATION FOR ORDER WHERE NO NOTICE OF CHANGE GIVEN) [CH.D.] 64
PRACTICE NOTE (APPEAL: FORM OF ORDER) [C.C.A.] 552
PRIDDLE, BRONESTER, LTD. *v.* [C.A.] 471

PAGE

QUALTER, HALL & CO., LTD. v. BOARD OF TRADE [C.A.] 389
QUINN, R. v. [C.C.A.] 88
R. v. ATTFIELD [C.C.A.] 243
R. v. BAKER [C.C.A.] 703
R. v. BERKSHIRE (FOREST) JUSTICES, *Ex parte* DALLAIRE [Q.B.D. DIVL. CT.] 1138
R. v. BLAKE [C.C.A.] 125
R. v. BLOOM [C.C.A.] 88
R., BULLARD v. (1957) [P.C.] 470
R. v. COX [C.-M.A.C.] 1194
R. v. DIXON [GLAMORGANSHIRE ASSIZES] .. 460
R. v. DUKE [C.C.A.] 737
R. v. ESSEX QUARTER SESSIONS, *Ex parte* LARKIN [Q.B.D. DIVL. CT.] 930
R. v. FLYNN [C.C.A.] 58
R. v. GUEST, *Ex parte* METROPOLITAN POLICE COMMISSIONER [VACATION CT.] 1118
R. v. HIGGINBOTHAM [C.C.A.] 616
R. v. JOHNSON [C.C.A.] 969
R. v. JONES [C.C.A.] 668
R. v. MCBRIDE [C.C.A.] 6
R. v. MALES [C.C.A.] 705
R. v. METHARAM [C.C.A.] 200
R. v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL, *Ex parte* HAINES [Q.B.D. DIVL. CT.] 1047
R. v. PARKS [C.C.A.] 633
R. v. PORRITT [C.C.A.] 463
R. v. QUINN [C.C.A.] 88
R. v. R. AND I. [DIV.] 461
R. SHOUKATALLIE v. [P.C.] 996
R. v. SMITH [C.C.A.] 972
R. v. TILLEY [C.C.A.] 406
REA, LTD., JOHNSON v. [C.A.] 816
REFUGE ASSURANCE CO., LTD., ABBOTT v. [C.A.] 1074
RENNELL (LORD) v. INLAND REVENUE COMRS. [C.A.] 1028
RIDGE NOMINEES, LTD. v. INLAND REVENUE COMRS. [C.A.] 1108
RIMMER BROS. (LIVERPOOL), LTD., MCMATH v. [C.A.] 1154
ROSS, MITCHELL (INSPECTOR OF TAXES) v. [H.L.] 49
ROYAL VICTORIA PAVILION, RAMSGATE, Re [CH.D.] 83
RYCROFT'S SETTLEMENTS, Re [CH.D.] 581
S. v. S. (O. OTHERWISE P. (BY HER GUARDIAN) INTERVENING) B. CITED [DIV.] 133
ST. JOHN-IN-BEDWARDINE, WORCESTER, Re [CT. OF ARCHES] 216
ST. MARYLEBONE PROPERTY CO., LTD. v. FAIRWEATHER [C.A.] 560
ST. PANCRAS METROPOLITAN BOROUGH (DISTRICT AUDITOR), ANNISON v. [Q.B.D. DIVL. CT.] .. 914
ST. PANCRAS METROPOLITAN BOROUGH (DISTRICT AUDITOR), TAYLOR v. [Q.B.D. DIVL. CT.] .. 914
SCARSBROOK v. MASON [Q.B.D.] 767
SCINDIA STEAM NAVIGATION CO., LTD., ATTORNEY-GENERAL OF CEYLON v. [P.C.] .. 684
SEALE'S MARRIAGE SETTLEMENT, Re [CH.D.] .. 136
SHAWINIGAN, LTD. v. VOKINS & CO., LTD. [Q.B.D.] 396
SHOUKATALLIE v. R. [P.C.] 996
SILVER, WYLD v. [CH.D.] 1014

PAGE

SMITH v. LEECH BRAIN & CO., LTD. [Q.B.D.] .. 1159
SMITH, R. v. [C.C.A.] 972
SMITH'S WILL TRUSTS, Re [CH.D.] 824
SPARROW v. FAIREY AVIATION CO., LTD. [C.A.] .. 452
SPENCER v. INLAND REVENUE COMRS. [CH.D.] .. 551
STEIN, FIELDRANK, LTD. v. [C.A.] 681
STERN'S WILL TRUSTS, Re [CH.D.] 1129
STRZELCZYK, FINKLE v [C.A.] 409
SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL, EDWICK v. [Q.B.D.] 10
SUNROSE, LTD. v. GOULD [C.A.] 1142
SUNSHINE PORCELAIN POTTERIES PROPRIETARY, LTD. v. NASH [P.C.] 203
SYKES v. DIRECTOR OF PUBLIC PROSECUTIONS [H.L.] 33
TARNESBY, TAYLOR-GOOBY (INSPECTOR OF TAXES) v. [H.L.] 49
TAYLOR v. DISTRICT AUDITOR FOR THE METROPOLITAN BOROUGH OF ST. PANCRAS [Q.B.D. DIVL. CT.] 914
TAYLOR-GOOBY (INSPECTOR OF TAXES) v. DREW [H.L.] 49
TAYLOR-GOOBY (INSPECTOR OF TAXES) v. TARNESBY [H.L.] 49
TILLEY, R. v. [C.C.A.] 406
TRADESMAN, THE [ADM.] 661
TURNER v. TURNER [C.A.] 944
UNITED AFRICA CO., LTD., MACFOY v. [P.C.] .. 1169
VESTEY v. INLAND REVENUE COMRS. [CH.D.] .. 978
VOKINS & CO., LTD., SHAWINIGAN, LTD. v. [Q.B.D.] 396
WALKER v. WALKER [DIV.] 14
WARAGOWSKI, YEOMAN CREDIT, LTD. v. [C.A.] .. 145
WARNER, MCKIE (INSPECTOR OF TAXES) v. [CH.D.] 348
WARWICK RURAL DISTRICT COUNCIL v. MILLER-MEAD [VACATION CT.] 542
WATERMAN, CLIFFORD-TURNER v. [Q.B.D. DIVL. CT.] 974
WEG MOTORS, LTD. v. HALES [C.A.] 181
WHITE & CARTER (COUNCILS), LTD. v. MCGREGOR [H.L.] 1178
WHITTAM v. DANIEL (W.J.) & CO., LTD. [C.A.] .. 796
WIGLEY v. BRITISH VINEGARS, LTD. [C.A.] .. 418
WINTER (EXECUTORS OF SIR ARTHUR MUNRO SUTHERLAND (*decd.*)) v. INLAND REVENUE COMRS. [H.L.] 855
WISBECH CORPN., GARLAND & FLEXMAN (A FIRM) v. [Q.B.D.] 342
WITHERS, FLACK v. [H.L.] 388
WITHERS v. PERRY CHAIN CO., LTD. [C.A.] .. 676
WOLVERHAMPTON BOROUGH COUNCIL'S ALDERMANIC ELECTION, Re [Q.B.D. DIVL. CT.] .. 446
WOOD, PONTIN v. [Q.B.D.] 992
WOODMAN & SON (BUILDERS), LTD., CLAYTON v. [Q.B.D.] 249
WUTA-OFEI v. DANQUAH [P.C.] 596
WYLD v. SILVER [CH.D.] 1014
YEOMAN CREDIT, LTD. v. WARAGOWSKI [C.A.] .. 145
YOUNG v. YOUNG [C.A.] 695
YOUNG v. YOUNG (NO. 2) [DIV.] 793
ZAMET v. HYMAN [C.A.] 933

INDEX

PAGE

ABANDONMENT
Criminal appeal, of. *See* QUARTER SESSIONS (Appeal to).

ABSOLUTE PRIVILEGE
See LIBEL (Privilege).

ACCOMMODATION
Provision—*Income tax. See* INCOME TAX (Income).

ACTION
Competence to bring. *See* PRACTICE (Parties—*Capacity—Local authority*).
Felony—*Duty to prosecute before bringing civil action. See* MALICIOUS PROSECUTION (Malice—*Motive*).

ADMINISTRATION OF ESTATES
Death duties—*Incidence. See* DEATH DUTY (Incidence).
Marshalling—*Devise of property in Australia—Sale and application of proceeds partly in paying Australian death duty not ultimately payable out of proceeds of sale—Remittance of moneys forming part of estate to England—Balance of proceeds of sale not set aside and separately invested nor appropriated—Devisee's right to compensation in a fixed sum (being amount of balance) notwithstanding depreciation of remitted assets—No notional appropriation for want of consents required by Land Transfer Act*, 1897 (*c.* 65), *s.* 4 (1) [Re MATTHEWS'S WILL TRUSTS] 869

ADMIRALTY
Stay of proceedings—*Arbitration. See* ARBITRATION (Stay of proceedings).

ADMISSION
Crime, of. *See* CRIMINAL LAW (Evidence—*Admissibility*).

ADULTERY
See DIVORCE.

ADVANCEMENT
See TRUST AND TRUSTEE (Powers of trustee).

ADVERTISEMENT
Contract for—*Repudiation. See* CONTRACT (Repudiation—*Election not to accept repudiation*).

AFFIDAVIT
Company—*Winding-up. See* COMPANY (Winding-up—*Compulsory winding-up—Contributory's application—Just and equitable—Deadlock*).

AGENT
Driver of motor vehicle as agent of passengers—*Liability of passengers. See* ROAD TRAFFIC (Negligence—*Liability of passenger*).

ALDERMAN
Election. *See* ELECTIONS (Local government).

ALIBI
Defence to crime, as—*Burden of proof. See* CRIMINAL LAW (Burden of proof).

AMENDMENT
See PRACTICE (Parties).

ANNUITY
Income tax—*Capital element. See* SURTAX (Annual payment—*Capital or income—Purchase price payable by instalments*).

APPEAL
Court of Appeal, to. *See* COURT OF APPEAL.
Criminal appeal. *See* CRIMINAL LAW.
Divorce proceedings, in. *See* DIVORCE.
Evidence—*Further evidence. See* COURT OF APPEAL (Evidence).
House of Lords, to. *See* CRIMINAL LAW; HOUSE OF LORDS.
Quarter sessions, to. *See* QUARTER SESSIONS (Appeal to).
Reinstatement of dismissed appeal. *See* COURT OF APPEAL (Reinstatement of dismissed appeal).

ARBITRATION
Agreement—*Arbitration clause in contract—Validity of contract in question—Enforceability of arbitration clause. See* Stay of proceedings—*Protocol agreement, post.*
Stay of proceedings—*Protocol agreement—Contract for towage containing arbitration clause alleged to be a nullity—Action brought for negligence—Whether stay of action should be granted—Exercise of discretion if arbitration had not been pursuant to protocol agreement—Arbitration Act*, 1950 (*c.* 27), *s.* 4 [THE TRADESMAN] 661

ARCHITECT
Negligence—*Independent contractor—Building owner not liable* [CLAYTON *v.* WOODMAN & SON (BUILDERS), LTD.] 249
Instructions to builders' workmen. See NEGLIGENCE (Duty to take care—*Proximity of relation—Statements*).

ARMY
Offences. *See* COURT-MARTIAL.

ART GALLERY
Rateability. *See* RATES (Rateable occupation).

ASSESSMENT
Damages—*Court of Appeal. See* COURT OF APPEAL (Damages).

ATTEMPT
Crime. *See* CRIMINAL LAW.

ATTORNEY-GENERAL
Charity proceedings. *See* PRACTICE (Parties—*Charity*).

AUDIT
Local government. *See* LOCAL GOVERNMENT.

AUSTRALIA
Estate duty. *See* DEATH DUTY (Incidence).
See also PRIVY COUNCIL.

AUTOMATISM
Defence to criminal charge. *See* CRIMINAL LAW.

BAIL
See MAGISTRATES (Examining magistrates—*Remand*).

BANK
Manager—*Club subscriptions—Income tax. See* INCOME TAX (Deduction in computing profits—*" Expenses incurred wholly, exclusively and necessarily in the performance of . . . duties "*).
Statement in answer to inquiry—*Financial references given honestly but without due care—Bank giving reference to other bank—Use by second bank's customer expected—First bank financing customer whose reference given—Whether first bank liable to second bank's customer* [HEDLEY BYRNE & CO., LTD. *v.* HELLER & PARTNERS, LTD.] 891

BAR COUNCIL
Complaint to—*Whether privileged. See* LIBEL (Privilege—*Absolute privilege—Qualified privilege—Communications to Bar Council*).

BARRISTER
See COUNSEL.

BILL OF LADING
See SHIPPING.

BREACH OF DUTY
Statutory—*Limitation of action. See* LIMITATION OF ACTION (Breach of statutory duty).
See also STATUTORY DUTY.

BREACH OF TRUST
See TRUST AND TRUSTEE.

BUILDING
Building regulations—*Breach—Employers and employee both in breach—Apportionment of responsibility where faults not co-extensive—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948 *No.* 1145), *reg.* 4, *reg.* 29 (4) [MCMATH *v.* RIMMER BROS. (LIVERPOOL), LTD.] 1154
Collapse—Avoidance of danger—Failure to take precautions—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 94 (2) [CLAYTON *v.* WOODMAN & SON (BUILDERS), LTD.] 249
Scaffolding—Gutter under construction—Part of permanent building—Hook holding support of gutter defective—Latent defect—Accident not foreseeable—Working place—No guard-rail—Absence of guard-rail not cause of accident—Whether gutter a " gangway "—Whether work could " safely be done " (*reg.* 5)—*Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948 *No.* 1145), *regs.* 3 (2), 5, 7 (1), (4), 8 (1), 12 (2), 24 (1) [CURRAN *v.* WILLIAM NEILL & SON (ST. HELENS), LTD.] 108
Burial ground, on. *See* BURIAL (Burial ground).
Negligence—*Orders and instructions issued by architect—Personal injuries sustained by workman. See* NEGLIGENCE (Duty to take care—*Proximity of relation—Statements*).

BUILDING PRESERVATION ORDER
See TOWN AND COUNTRY PLANNING.

BUILDING REGULATIONS
See BUILDING.

BURDEN OF PROOF
See CRIMINAL LAW; LIMITATION OF ACTION.

BURIAL
Burial ground—*Disused—Whole of ground set apart for interments but not all used for that purpose—Legacy to erect lodge for sexton on unconsecrated part not so used—Whether building on part not yet used for burial forbidden as building on disused burial ground—Disused Burial Grounds Act,* 1884 (*c.* 72), *s.* 2, *s.* 3—*Open Spaces Act,* 1887 (*c.* 32), *s.* 4—*Open Spaces Act,* 1906 (*c.* 25), *s.* 20 [Re JEWISON'S WILL TRUSTS] 1022

BURIAL GROUND
See BURIAL.

BUSINESS PREMISES
Lease. *See* LANDLORD AND TENANT (Lease).
New tenancy. *See* LANDLORD AND TENANT (New tenancy).
Notice to quit. *See* LANDLORD AND TENANT (Notice to quit).

CAPITAL
Income tax—*Capital or income. See* SURTAX (Annual payment—*Capital or income*).

CARRIAGE OF GOODS
See SHIPPING (Carriage by sea).

CAUSATION
See MASTER AND SERVANT (Liability of master); STATUTORY DUTY (Breach).

CEYLON
See PRIVY COUNCIL.

CHAMBERS
Divorce—*Custody—Agreement for reference to. See* DIVORCE (Practice—*Custody*).

CHARITY
Action—*Parties. See* PRACTICE (Parties).
Hospital—*Uncertainty. See* Uncertainty—*Hospital, post.*

CHARITY—*continued.* PAGE

Religion—*Public benefit—Synagogue—Ancillary social activities* [NEVILLE ESTATES, LTD. *v.* MADDEN] 769

Sale of charity estate—*Consent of Charity Commissioners—"Wholly maintained by voluntary contributions"—Charity partially maintained by voluntary contributions and partially by endowment—Transfer at time when not a "mixed charity"—Charitable Trusts Act,* 1853 (*c.* 137), *s.* 62 [NEVILLE ESTATES, LTD. *v.* MADDEN] 769

Uncertainty—*Gift to institution whose main object charitable but whose other objects might or might not be charitable—Charitable Trusts (Validation) Act,* 1954 (*c.* 58), *s.* 1 (1) [Re HARPUR'S WILL TRUSTS] 588

Hospital—Gift to "hospital" and/or hospitals and/or charitable institutions—Whether gift void [Re SMITH'S WILL TRUSTS] 824

Unincorporated association—*Trust for members of synagogue—No limit as to time* [NEVILLE ESTATES, LTD. *v.* MADDEN] 769

Validation by Charitable Trusts (Validation) Act, 1954—*Imperfect trust provision—Gift to institution whose main object charitable but whose other objects might or might not be charitable—Whether trust validated—Charitable Trusts (Validation) Act.* 1954 (*c.* 58), *s.* 1 (1) [Re HARPUR'S WILL TRUSTS] 588

Preservation of rights of adverse claimants—Unascertained class of next of kin—Date when rights accrue—Charitable Trusts (Validation) Act, 1954 (*c.* 58), *s.* 3 (1), (2), (3) [Re HARPUR'S WILL TRUSTS] 588

CHILD

Education. *See* EDUCATION.

En ventre sa mère. *See* WILL (Gift—"*Born in the lifetime of*" *the testator*).

Negligence—*Occupier's liability for acts of children on his land. See* OCCUPIER (Negligence).

CHOSE IN ACTION

Assignment—*Bill of lading. See* SHIPPING (Bill of lading—*Transfer of rights*).

COAL MINING

Statutory duty—*Breach—Road—Obstruction—Duty to keep free from obstructions—Rope forming part of haulage system left in situ when haulage system not in use—Whether rope an "obstruction"—Mines and Quarries Act,* 1954 (*c.* 70), *s.* 34 (1) (*b*) [COOK *v.* NATIONAL COAL BOARD] 220

COAST PROTECTION

See WATER AND WATERCOURSES.

COMMISSION

Remuneration of employee. *See* MASTER AND SERVANT (Remuneration).

COMPANY

Contributory. *See* Winding-up—*Compulsory winding-up, post.*

Conveyance by—*Stamp duty. See* STAMP DUTY (Conveyance on sale).

Estate duty—*Valuation of shares. See* ESTATE DUTY.

Practice—*Winding-up—Affidavit in support of petition. See* Winding-up—*Compulsory winding-up—Contributory's application—Just and equitable—Deadlock, post.*

Private company—*Deadlock. See* Winding-up—*Compulsory winding-up—Contributory's application—Just and equitable, post.*

Exempt private company—Loss of exemption—Body corporate holder of shares—Exception for banking or finance company providing capital—Capital reorganisation—Arrangement with finance company to purchase new issue of shares from members entitled thereto—Companies Act, 1948 (*c.* 38), *s.* 129 (4), *Sch.* 7, *para.* 7 (1), *para.* 9 [QUALTER, HALL & CO., LTD. *v.* BOARD OF TRADE] 389

Shares—*Transfer—Compulsory transfer—Companies Act,* 1948 (*c.* 38), *s.* 209—*Whether sale. See* STAMP DUTY (Conveyance on sale—*Transfer of stock—Compulsory transfer under statutory provision*).

Surtax. *See* SURTAX.

Winding-up—*Compulsory winding-up—Contributory's application—Just and equitable—Deadlock—Evidence—Statutory affidavit only evidence—Articles of association not in evidence—Possible courses open to shareholders and directors not shown—Private company having two shareholders—Dismissal of petition—Companies Act,* 1948 (*c.* 38), *s.* 222 (*f*) [Re DAVIS INVESTMENTS (EAST HAM), LTD.] 926

COMPROMISE

Appeal—*Consent to dismissal. See* COURT OF APPEAL (Appeal).

See also HOUSE OF LORDS.

CONFLICT OF LAWS

Foreign judgment—*Enforcement—Action in England—Whether foreign judgment against partnership a final and conclusive judgment on which to found action against individual partner* [BLOHN *v.* DESSER] 1

Jurisdiction of foreign court—Partnership abroad—Sleeping partner in United Kingdom—Action in personam against debtor not resident in foreign country but carrying on business there through partnership [BLOHN *v.* DESSER] 1

Recognition—Status—Guardianship order conferring status of incompetence on settlor of English settlement and appointing guardian of his estate and person—Settlor not under incapacity by English law—Withdrawal of funds under power reserved to settlor by settlement—Notice of withdrawal executed by settlor and guardian—Whether notice effective—Extent to which English court will recognise effects of foreign order imposing status [Re LANGLEY'S SETTLEMENT TRUSTS] 803

Nullity. *See* NULLITY (Foreign marriage).

Settlement—*Beneficial trusts—Charge by statute—Canadian settlement—Charge by way of indemnity to limited owner paying principal amount of United Kingdom estate duty—Whether Canadian courts would interfere with beneficial interests to give effect to charge. See* ESTATE DUTY (Deduction of debt—*Reimbursement—Duty leviable on death of life tenant of trust funds settled by Canadian settlement*).

CONSISTORY COURT

See ECCLESIASTICAL LAW.

CONSULTANT

Hospital—*Income tax. See* INCOME TAX (Deduction in computing profits—*Expenses*).

CONTRACT
Breach—*Anticipatory breach—Repudiation—Refusal to accept repudiation. See* Repudiation—*Election not to accept repudiation, post.*
Damages—Hire-purchase agreement. See HIRE-PURCHASE (Damages for breach of contract).
Loan. *See* MONEY (Loan).
Penalty—*Hire-purchase agreement. See* HIRE-PURCHASE (Penalty).
Repudiation—*Election not to accept repudiation—Effect—Contract remains fully effective—Innocent party entitled to perform contract and enforce contractual rights—Contract for advertisements to be exhibited over three years commencing at a future date—Advertiser expressly repudiated contract on the day on which it was made—Contractor published advertisements in accordance with contract and claimed payment in full—No step taken to minimise loss to advertiser—Whether contractor entitled to recover payment* [WHITE & CARTER (COUNCILS), LTD. *v.* MCGREGOR] 1178

CONTRIBUTION
Joint tortfeasors. *See* TORT.

CONTRIBUTORY NEGLIGENCE
See NEGLIGENCE.

CONVEYANCE
Stamp duty. *See* STAMP DUTY (Conveyance on sale).

COSTS
Criminal cases—*Difference between costs in civil and criminal cases—Whether defendant's costs in criminal cases awarded to indemnify defendants—Whether difference between costs incurred and costs awarded constitute special damage for action for malicious prosecution* [BERRY *v.* BRITISH TRANSPORT COMMISSION] 65

COUNSEL
Criminal trial—*Withdrawal of prosecution if no evidence to go to jury* [ABBOTT *v.* REFUGE ASSURANCE CO., LTD.] 1074
Duty—*Conduct of litigation—Duty to court—Concealment of matter relevant to credit of party on vital point. See* COURT OF APPEAL (New trial—*Misleading the court at trial*).
Professional misconduct—*Jurisdiction—Benchers of Inn of Court—Complaint to Bar Council—Whether privileged* [LINCOLN *v.* DANIELS] 740
Summons—*Counsel's list—Transfer to. See* DIVORCE (Practice—*Summons*).

COURT
Misleading the court. *See* COURT OF APPEAL (New trial).

COURT-MARTIAL
Jurisdiction—*Civil offence—Act or omission abroad not punishable by law of England—Driving without due care and attention on road in Germany—Whether civil offence within Army Act,* 1955 (*c.* 18), *s.* 70 (2)—*Road Traffic Act,* 1960 (*c.* 16), *s.* 3 (1) [R. *v.* COX] 1194

COURT OF APPEAL
Appeal—*Consent to dismissal without costs—Consent initialled by president of court—No order drawn up or entered—Compromise for good consideration—No ground for setting it aside—Appeal not allowed to proceed* [NATIONAL BENZOLE CO., LTD. *v.* GOOCH] 1097
Damages—*Assessment by judge alone—Test for intervention by appellate court—Disparity with assessment in similar case by another Division of Court of Appeal* [BASTOW *v.* BAGLEY & CO., LTD.] 1101
Evidence—*Further evidence—Evidence obtainable with reasonable diligence for the trial—Relevance emerging towards end of opponent's case* [CROOK *v.* DERBYSHIRE] 786
Judge's note—*Liverpool Court of Passage—No shorthand note—Judge's note of evidence and note of reasons should be available for Court of Appeal* [JOHNSON *v.* REA, LTD.] 816
Leave to appeal to House of Lords. *See* HOUSE OF LORDS (Appeal to—*Leave to appeal*).
New trial—*Apprehension of prejudgment of issues—Respondent in divorce suit alleging that judge had made up his mind after hearing petitioner's evidence—Withdrawal of respondent from trial before giving evidence—Burden of justifying withdrawal when applying to Court of Appeal for new trial* [BRASSINGTON *v.* BRASSINGTON] 988
Misleading the court at trial—Concealment of material matter relevant to credit of party—Duty of advocate to court—Action for false imprisonment—Defendant police officer reduced in rank while action pending—Disciplinary charge leading to reduction showing deception of court in relation to another arrest—Concealment of reduction in rank during trial of action—Miscarriage of justice [MEEK *v.* FLEMING] 148
Reinstatement of dismissed appeal—*Final judgment not entered—Appeal as to damages—Disparity with subsequent assessment in similar case by Court of Appeal* [BASTOW *v.* BAGLEY & CO., LTD.] 1101
Solicitor—*Withdrawal pending appeal. See* SOLICITOR (Withdrawal).

COURT OF CRIMINAL APPEAL
Practice. *See* CRIMINAL LAW (Appeal).

COVENANT
Running with land—*Sale of theatre and cinema properties—Covenant to "procure" that theatre retained by vendors should not be open save for certain performances—Vendors' interest in retained theatre a leasehold interest—Successors in title not mentioned in covenant—Whether covenant personal or binding land—Whether contrary intention excluding Law of Property Act,* 1925 (*c.* 20), *s.* 79 [Re ROYAL VICTORIA PAVILION, RAMSGATE] 83
Successors in title. *See* Running with land—*Sale of theatre and cinema properties, ante.*

CRANE
Harbour—*Obligation to allow public to use. See* HARBOUR (Quay).

CRIMINAL LAW
Alibi. *See* Burden of proof, *post.*
Appeal—*Abandonment of appeal. See* QUARTER SESSIONS (Appeal to).
Evidence—Fresh evidence—Principles on which the Court of Criminal Appeal will act in exercising its discretion whether to allow fresh evidence to be called—Criminal Appeal Act, 1907 (*c.* 23), *s.* 9 [R. *v.* PARKS] 633
House of Lords—Jurisdiction—Whether appeal limited to point of law certified by court below—Administration of Justice Act, 1960 (*c.* 65), *s.* 1 (2) [ATTORNEY-GENERAL FOR NORTHERN IRELAND *v.* GALLAGHER] 299

CRIMINAL LAW—Appeal—*continued.* PAGE

Insanity—Special verdict of guilty of act but insane at time of its commission—Whether right of appeal against finding of guilty of act—Trial of Lunatics Act, 1883 (*c.* 38), *s.* 2 (1)—*Criminal Appeal Act,* 1907 (*c.* 23), *s.* 3 [R. *v.* DUKE] 737

Leave to appeal—Order—Form of order—Reasons not to be given [PRACTICE NOTE] 522

Misdirection—Re-trial—Disagreement of jury at first trial—Whether there should be, in relation to second trial, an application of the proviso to Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1) [R. *v.* JOHNSON] 969

Practice—Application for leave to appeal not to be treated as the appeal unless counsel for the applicant consents [PRACTICE NOTE] 522

Sentence—Power to increase sentence [PRACTICE NOTE] 522

Attempt—*Merger—Indictment charging attempt—Conviction of attempt when evidence showed full offence (felony of housebreaking) committed—Whether conviction of the misdemeanour, the attempt, permissible—Criminal Procedure Act,* 1851 (*c.* 100), *s.* 12 [R. *v.* MALES] .. 705

Automatism—*Alternative defences of automatism and insanity—Evidence—No defence of automatism when only cause alleged for unconscious state is disease of the mind within the M'Naghten rules—Evidence forming a proper foundation for automatism necessary before issue can be left to jury—Burden of proof—No other pathological cause than psychomotor epilepsy put forward—Psychomotor epilepsy a disease of the mind—Issue of automatism not left to jury* [BRATTY *v.* ATTORNEY-GENERAL FOR NORTHERN IRELAND] 523

Bail—*Examining magistrates. See* MAGISTRATES (Examining magistrates—*Remand*).

Burden of proof—*Alibi* [R. *v.* JOHNSON] 969

Standard of proof required—Summing-up—Direction that jury should be satisfied and sure of prisoner's guilt [R. *v.* ATTFIELD] 243

Defence—*Alibi—Burden of proof. See* Burden of proof, *ante.*

Disorderly house—*Definition—Indecent performances and exhibitions—Offence of keeping a disorderly house by giving such performances—Whether essential that persons viewing such performances should participate in acts of indecency—Whether common nuisance an essential element of offence* [R. *v.* QUINN. R. *v.* BLOOM] 88

Evidence—*Admissibility—Admission to police officer while in custody, obtained in conversation without caution—Discretion of court to admit such evidence—Judges' Rules, r.* 3 [R. *v.* SMITH] 972

Burden of proof. See Burden of proof, *ante.*

Character of accused—Imputation from nature of defence and accused's evidence as to character of prosecution witness—Discretion—Whether cross-examination of accused as to previous convictions should be allowed—Criminal Evidence Act, 1898 (*c.* 36), *s.* 1, *proviso* (*f*) (*ii*) [R. *v.* FLYNN] 58

Cross-examination—Previous charge—Similar circumstances—Whether cross-examination of accused as to circumstances of previous charge admissible—Criminal Evidence Act, 1898 (*c.* 36), *s.* 1, *proviso* (*f*) *and exception* (*i*) [R. *v.* JONES] 668

Previous conviction—Cross-examination of accused as to similar acts—Existence of previous conviction of some offence shown by accused's evidence in chief—Admissibility of questions in cross-examination—"Tending to show"—Criminal Evidence Act, 1898 (*c.* 36), *s.* 1, *proviso* (*f*) *and exception* (*i*) [R. *v.* JONES] 668

Film—Reconstruction of crime [R. *v.* QUINN. R. *v.* BLOOM] 88

Handwriting—Necessity for expert evidence to assist jury—Criminal Procedure Act, 1865 (*c.* 18), *s.* 8 [R. *v.* TILLEY. R. *v.* TILLEY] 406

Insanity. See Insanity, *post.*

Previous convictions—Relevancy of previous convictions of dishonesty to complainant's credibility as to identification of accused charged with having indecently assaulted her [R. *v.* PARKS] 633

Firearms. *See* FIREARMS.

Grievous bodily harm—*Direction to jury—Intent only to interfere seriously with health or comfort not sufficient—Offences against the Person Act,* 1861 (*c.* 100), *s.* 18 [R. *v.* METHARAM] .. 200

Housebreaking—*Attempt—Conviction of full offence. See* Attempt—*Merger, ante.*

Indictment—*Joinder of counts—Dangerous driving—Causing death by dangerous driving—Drunk in charge—Road Traffic Act,* 1960 (*c.* 16), *s.* 1, *s.* 2, *s.* 6 [R. *v.* MCBRIDE] 6

Insanity—*Evidence of insanity tendered by prosecution—No defence of diminished responsibility—Defence should be raised by accused and witnesses called on his behalf* [R. *v.* DIXON] .. 460

Time to which test by M'Naghten rules should be related—Disease of the mind not impairing knowledge when quiescent—Psychopathic condition—Explosive outburst induced by drink [ATTORNEY-GENERAL FOR NORTHERN IRELAND *v.* GALLAGHER] 299

Misdemeanour—*Merger. See* Attempt, *ante.*

Misdirection. *See* Appeal, *ante.*

Misprision of felony—*Whether offence exists—Whether active concealment essential ingredient of offence* [SYKES *v.* DIRECTOR OF PUBLIC PROSECUTIONS] 33

Murder—*Insanity. See* Insanity, *ante.*

Provocation—Summing-up—Issue to be left to jury although defence of provocation not raised and although accused did not testify that he was provoked—Homicide as culmination of evening of gang warfare—Homicide Act, 1957 (*c.* 11), *s.* 3 [R. *v.* PORRITT] 463

[BULLARD *v.* R.] 470

Official secrets—*Sentence. See* Sentence—*Consecutive sentences, post.*

Practice—*Appeal. See* Appeal, *ante.*

Handwriting—Need for expert evidence. See Evidence—*Handwriting, ante.*

Insanity. See Insanity, *ante.*

Sentence—Hospital order—Restriction on discharge—Inquiry as to facilities for legal custody—Mental Health Act, 1959 (*c.* 72), *s.* 60, *s.* 65 [R. *v.* HIGGINBOTHAM] 616

Withdrawal of prosecution—Counsel's duty to apply for leave to withdraw prosecution if no evidence to go to jury [ABBOTT *v.* REFUGE ASSURANCE CO., LTD.] 1074

Provocation. *See* Murder, *ante.*

Remand. *See* MAGISTRATES (Examining magistrates).

Road traffic offences. *See* ROAD TRAFFIC.

Sentence—*Appeal. See* Appeal—*Sentence, ante.*

CRIMINAL LAW—Sentence—*continued.*
Consecutive sentences—Discretion to impose—Whether maximum sentences imposed on several convictions each for a separate like offence can be directed to run consecutively—Official Secrets Act, 1911 (*c.* 28), *s.* 1 (1) (*c*)—*Official Secrets Act*, 1920 (*c.* 75), *s.* 8 (1) [R. *v.* BLAKE] 125
Whether sentence of life imprisonment to run consecutively with sentence of imprisonment then being served permissible and desirable [R. *v.* JONES] 668
Misprision of felony—Term of sentence [SYKES *v.* DIRECTOR OF PUBLIC PROSECUTIONS] 33
Preventive detention—Road traffic offences. See ROAD TRAFFIC (Dangerous driving—*Sentence*).
Remission—Regard not had to the earning of remission when awarding sentence [R. *v.* BLAKE] 125
Trial—*Jury—Intimidation or threat—Jury in West Indies told by judge to remember their oath—Direction to put aside extraneous matters, to make up their minds one way or the other and to accept reason one from the other—Not told that they were at liberty to disagree—Whether such coercion as to invalidate jury's verdict* [SHOUKATALLIE *v.* R.] 996
Summing-up—Burden of proof. See Burden of proof, *ante.*
Evidence—Whether fatal defect if evidence not reviewed by judge in summing-up [R. *v.* ATTFIELD] 243
Handwriting—Need for expert evidence. See Evidence—*Handwriting, ante.*
Murder—Provocation. See Murder—*Provocation, ante.*
Wounding—*Intent to do grievous bodily harm. See* Grievous bodily harm, *ante.*

CROSS-EXAMINATION
Criminal proceedings, in. *See* CRIMINAL LAW (Evidence).
Divorce. *See* DIVORCE (Evidence).

CRUELTY
Persistent cruelty. *See* MAGISTRATES (Husband and wife).

CUSTODY
Child. *See* DIVORCE (Practice)

CUSTOMS
Commissioners of Customs and Excise—*Acts and exercise of powers—Demand authorised by proper officer but made by officer not authorised—Customs and Excise Act*, 1952 (*c.* 44), *s.* 4 (1) [COMRS. OF CUSTOMS AND EXCISE *v.* CURE & DEELEY, LTD.] 641

DAMAGES
Assessment—*Appeal or new trial. See* COURT OF APPEAL.
Breach of statutory duty—*Apportionment. See* STATUTORY DUTY (Breach—*Causation—Breach by both employer and employee—Faults not co-extensive*).
Divorce suit. *See* DIVORCE.
Fatal Accidents Acts, under. *See* FATAL ACCIDENT.
Hire-purchase—*Breach of contract by hirer's not paying instalments. See* HIRE-PURCHASE (Damages for breach of contract).
Instalments—*Divorce. See* DIVORCE (Damages—*Co-respondent*).
Malicious prosecution. *See* MALICIOUS PROSECUTION.
Measure of damages—*Personal injury. See* NEGLIGENCE.
Separate tortfeasors—Successive torts—Each tort, if occurring alone, would render necessary the same work of repair—Judgment for damages, including cost of repair, recorded against first tortfeasor but unsatisfied—Whether second tortfeasor's liability in damages included the cost of that work [PERFORMANCE CARS, LTD. *v.* ABRAHAM] 413
Mitigation—*Collateral matters—Exclusion. See* Measure of damages—*Separate tortfeasors—Successive torts, ante.*
Remoteness of damage—*Negligence—Foreseeability—Type, but not extent, of injury foreseeable—Burn on person in pre-malignant condition—Development of cancer resulting in death—Whether defendants liable in damages for loss of expectation of life and under Fatal Accidents Acts* [SMITH *v.* LEECH BRAIN & CO., LTD.] 1159
Tort—*Separate tortfeasors—Successive torts. See* Measure of damages—*Separate tortfeasors, ante.*

DANGEROUS CONDITIONS
Creation of dangerous conditions—*Duty to take precautions for the safety of others—Extent of duty, whether merely to warn or to take steps to protect others from injury—Stevedores loading cargo on to ship—Shed floor rendered slippery by soda ash in cargo—No steps taken to remedy this—Lorry man bringing cargo injured through slipping on floor* [JOHNSON *v.* REA, LTD.] .. 816

DANGEROUS DRIVING
See ROAD TRAFFIC.

DANGEROUS MACHINERY
See FACTORY.

DEATH DUTY
Incidence—*Real property—Contrary intention—Australian federal estate duty—New South Wales probate duty—"Expenses incident to the execution of the preceding trusts"—"Debts"—"Testamentary expenses"—Whether testamentary direction to pay these showed intention to exonerate realty from death duty* [Re MATTHEWS'S WILL TRUSTS] 869
See also ESTATE DUTY.

DEBT
Damages. *See* HIRE-PURCHASE (Damages for breach of contract).

DEMAND
Making a demand—*Officer authorised under statute to make demand approved it—Letter of demand signed and sent by another officer not so authorised. See* CUSTOMS (Commissioners of Customs and Excise—*Acts and exercise of powers*).

DEPRECIATION
Clause. *See* HIRE-PURCHASE (Penalty).

DE-RATING
See RATES.

DESERTION
See DIVORCE.

PAGE

DEVELOPMENT
See TOWN AND COUNTRY PLANNING (Permission for development).

DISMISSAL
Appeal—*Consent to dismissal of appeal to Court of Appeal. See* COURT OF APPEAL (Appeal—*Consent to dismissal without costs).*

DISORDERLY HOUSE
See CRIMINAL LAW.

DISTRIBUTION CHARGE
See PROFITS TAX (Distribution).

DISTURBANCE
Market, of. *See* MARKETS AND FAIRS.

DIVORCE
Adultery—*Cross-examination. See* Evidence, *post.*
Insanity—Whether ignorance that act was wrong was a defence [S. *v.* S. (O. OTHERWISE P. (BY HER GUARDIAN) INTERVENING) B. CITED] 133
Appeal—*Divisional Court—Jurisdiction—Application for re-hearing—Appeal by unsuccessful party to Court of Appeal on ground of misdirection—Whether " error of the court at the hearing " alleged—Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 36 (1) [TURNER *v.* TURNER] 944
Judge indicating view after evidence of one party. See COURT OF APPEAL (New trial—*Apprehension of prejudgment of issues).*
Cruelty—*Adultery—Reasonable belief in husband's adultery deliberately induced in wife's mind by husband. See* MAGISTRATES (Husband and wife—*Cruelty—Persistent cruelty).*
Cross-examination as to adultery. See Evidence, *post.*
Evidence—Magistrates' court order. See Evidence—*Magistrates' court order on similar issue, post.*
Custody—*Chambers. See* Practice—*Custody, post,*
Damages—*Co-respondent—Instalments—Whether court has jurisdiction to order payment by instalments* [PIDDUCK *v.* PIDDUCK AND LIMBRICK] 481
Desertion—*Termination—Conduct of deserted spouse causing deserting spouse to desist from attempting reconciliation—Impact on mind of deserting spouse—Question of fact—Communication of refusal of reconciliation having no effect on mind of deserting spouse—Whether desertion terminated* [BREWER *v.* BREWER] 957
Evidence—*Cross-examination—Adultery—Petition on ground of cruelty—Cross-prayer on ground of desertion—No allegation of adultery in pleadings—Admissibility of cross-examination as to adultery—Matrimonial Causes Act,* 1950 (*c.* 25), *s.* 32 (3) [CLIFFORD *v.* CLIFFORD] .. 231
Magistrates' court order on similar issue—Probative value of findings—Corroboration—Weight to be given thereto at subsequent trial of divorce petition for cruelty—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 7 (2) [TURNER *v.* TURNER] 944
Injunction—*Divorced wife writing to child. See* INJUNCTION (Divorce).
Insanity—*Adultery—Defence. See* Adultery—*Insanity, ante.*
Incurable unsoundness of mind—Care and treatment for five years immediately preceding the presentation of the petition—Respondent husband left hospital on discharge less than twenty-eight days before presentation of the petition—Care and treatment ended—Interval before presentation of a petition not an " interruption " in care and treatment—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 1 (1) (*d*)—*Divorce (Insanity and Desertion) Act,* 1958 (*c.* 54), *s.* 1 (3) [CHAPMAN *v.* CHAPMAN (BY HIS GUARDIAN)] 1105
Maintenance—*Application—Leave of judge—Claim not included in wife's answer—Answer claiming costs but no specific matrimonial relief—Whether leave needed—Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3) [G. *v.* G. (OTHERWISE H.)] 247
Maintenance—*Wife—Dismissal by consent—Acceptance of lump sum in full satisfaction of present and future rights—Subsequent application by wife for maintenance and secured provision—Whether subsequent application competent—Whether subsequent application precluded by agreement—Matrimonial Causes Act,* 1950 (*c.* 25), *s.* 19 (2), (3) (*as amended*)—*Matrimonial Causes (Property and Maintenance) Act,* 1958 (*c.* 35), *s.* 1 (1) [L. *v.* L.] 834
Dismissal in 1958 *by consent of wife's claims for maintenance and secured provision contained in petition—Lump sum accepted by wife in full satisfaction of all present and future rights to maintenance for herself—Subsequent application by wife in* 1961 *for maintenance and secured provision—Leave required to make application—Matrimonial Causes Act,* 1950 (*c.* 25), *s.* 19 (2), (3) (*as amended*)—*Matrimonial Causes (Property and Maintenance) Act,* 1958 (*c.* 35), *s.* 1 (1)—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3), *proviso* (ii) [L. *v.* L.] 20
Practice—Application to High Court while magistrates' court's order existing—Copy of maintenance order of magistrates' court to be lodged [PRACTICE DIRECTION] 1200
Variation of order—Re-marriage of wife—No power to order refund by wife of money received by her under the order after her re-marriage—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 28 (1) [YOUNG *v.* YOUNG (NO. 2)] 793
Re-marriage of wife—Wife having custody of child—Additional expenditure by wife due to custody of child—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 19 (3), *s.* 28 (3) [KIRKE *v.* KIRKE] 1059
Petition—*Form of petition—Prayer for such further and other relief as may be just—Whether needed—Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 4 (4) [G. *v.* G. (OTHERWISE H.)] 247
Practice—*Application for maintenance. See* Maintenance—*Wife—Practice, ante.*
Custody—Chambers—Agreement by parties that matter be referred to chambers—Judge's rejection of application for reference—Order for custody made at hearing—Respondent's non-appearance in reliance on agreement—Order not open to objection [COOPER *v.* COOPER] .. 539
Pleading—Prayer—" Such further and other relief as may be just "—Whether needed [G. *v.* G. (OTHERWISE H.)] 247
Summons—Transfer from solicitors' to counsel's list [PRACTICE DIRECTION] 171
Trial—Judge indicating view before evidence concluded—Danger of apprehension of prejudgment. See COURT OF APPEAL (New trial—*Apprehension of prejudgment of issues).*
Re-hearing—*Jurisdiction of Divisional Court. See* Appeal—*Divisional Court—Jurisdiction, ante.*
Variation of settlement. *See* VARIATION OF SETTLEMENT (MATRIMONIAL CAUSES).

PAGE

DUTY
Statutory—*Limitation of action.* *See* LIMITATION OF ACTION (Breach of statutory duty).
See also COAL MINING (Statutory duty); FACTORY (Dangerous machinery); STATUTORY DUTY.

ECCLESIASTICAL LAW
Consistory court—*Jurisdiction—Faculty proceedings for confirmation of re-siting—Disregard of faculty previously granted—Whether court had jurisdiction to make mandatory order to secure observance of faculty previously granted* [Re ST. JOHN-IN-BEDWARDINE, WORCESTER] .. 216
Faculty—*Enforcement.* *See* Consistory court—*Jurisdiction—Faculty proceedings for confirmation of re-siting, ante.*

EDUCATION
School attendance—*Enforcement—Remedies—Wardship proceedings—Mother's refusal to send children to school—Local education authority's proceedings—Two convictions unavailing—Application to have children made wards of court—Directions sought as to their education—Chancery court's jurisdiction—Education Act,* 1944 (*c.* 31), *s.* 36, *s.* 37, *s.* 40 (2)—*Law Reform (Miscellaneous Provisions) Act,* 1949 (*c.* 100), *s.* 9 [Re BAKER (INFANTS)] 276

ELECTION COURT
See ELECTIONS.

ELECTIONS
Election court—*Jurisdiction—Succession to peerage—Election petition alleging disqualification of candidate for election to Parliament—Jurisdiction to determine succession to peerage* [Re BRISTOL SOUTH EAST PARLIAMENTARY ELECTION] 354
Local government—*Aldermen—Mayor also candidate for election as alderman—Vacation of mayoral chair by mayor and an alderman chosen to preside—Vote made by mayor—Mayor's vote counted, making equality of votes each for seven candidates including himself—Presiding alderman gave casting vote for candidates for whom mayor had voted and declared them duly elected—Whether mayor was entitled to be present and vote at meeting of council over which he did not preside—Whether the seven aldermen duly elected—Local Government Act,* 1933 (*c.* 51), *Sch.* 3, *Part* 2, *para.* 3 [Re WOLVERHAMPTON BOROUGH COUNCIL'S ALDERMANIC ELECTION] 446
Parliamentary—*Disqualification of candidate—Peer—Disqualification attributable to status and not dependent on receiving writ of summons to House of Lords—Disqualification made known to electors before votes cast—Majority of votes cast for disqualified candidate—Validity of election of sole opponent* [Re BRISTOL SOUTH EAST PARLIAMENTARY ELECTION] 354
Trade union—*Pleading—Particulars.* *See* PRACTICE (Particulars).

EMPLOYMENT
Benefits—*Provided for directors and others—Taxation.* *See* INCOME TAX (Income—*Accommodation and benefits provided to directors and others*).
Health—*Whether duty to refuse where employment at some risk to employee's health.* *See* MASTER AND SERVANT (Duty of master—*Employment of servant*).
Remuneration—*Commission.* *See* MASTER AND SERVANT (Remuneration).

ENFORCEMENT NOTICE
See TOWN AND COUNTRY PLANNING.

ENGAGEMENT TO MARRY
Undue influence—*Engaged couple.* *See* EQUITY (Undue influence).

EQUITY
Reimbursement. *See* ESTATE DUTY (Deduction of debt—*Reimbursement*).
Undue influence—*Engaged couple—Presumption—Elderly parties—Waiver by bride of statutory rights to estate of intended husband in consideration of promise to pay lump sum on his death—No independent advice—Insufficient information as to intended husband's fortune, etc.—Inadequacy of lump sum—Transaction set aside* [ZAMET *v.* HYMAN] 933

ESTATE DUTY
Accountability—*Beneficiary absolutely entitled to settled funds subject to two successive life interests—Canadian settlement—Finance Act,* 1894 (*c.* 30), *s* 8 (4) [Re LATHAM (*decd.*)] 903
Company—*Shares—Valuation—Allowance for contingent liabilities—Balancing charge—Liability not existing at the date of death—Finance Act,* 1940 (*c.* 29), *s.* 50 (1), *s.* 55—*Finance Act,* 1894 (*c.* 30), *s.* 7 (5)—*Income Tax Act,* 1952 (*c.* 10), *s.* 292 [WINTER (EXECUTORS OF SIR ARTHUR MUNRO SUTHERLAND (*decd.*)) *v.* INLAND REVENUE COMRS.] 855
Deduction of debt—*Reimbursement—Duty leviable on death of life tenant of trust funds settled by Canadian settlement—Succeeding life tenant domiciled in England accountable but did not pay duty—Whether amount of duty a debt allowable against second life tenant's free estate—Whether there was a right to reimbursement—Finance Act,* 1894 (*c.* 30), *s.* 7 (1) (*b*), *s.* 9 (6), *s.* 20 (2) [Re LATHAM (*decd.*)] 903
Exemption—*Property which has borne duty on death of spouse—Derivative settlement—Marriage settlement followed by derivative settlement by widow of defeasible, but otherwise absolute, interests in settled estates—Estate duty paid on death of husband on settled estates comprised in marriage settlement—Death of widow—Passing of property settled by derivative settlement—Whether estate duty ascertainable on her death was payable in respect of the settled estates so as to attract exemption under Finance Act,* 1894 (*c.* 30), *s.* 5 (2) [COUTTS & CO. *v.* INLAND REVENUE COMRS.] 158
Exemption and remission—*Gift in consideration of marriage—Marriage settlement—Discretionary trusts in favour of class—Inclusion of persons not within the marriage consideration—Finance* (1909-10) *Act,* 1910 (*c.* 8), *s.* 59 (2) [RENNELL (LORD) *v.* INLAND REVENUE COMRS.] .. 1028
Incidence—*Real property—Contrary intention—Australian duty.* *See* DEATH DUTY (Incidence—*Real property*).
Passing of property—*Settled property—Derivative settlement—To what "settled property" reference should be made* [COUTTS & CO. *v.* INLAND REVENUE COMRS.] 158

EVIDENCE
Appeal—*Criminal appeal.* *See* CRIMINAL LAW (Appeal).
Criminal proceedings, in. *See* CRIMINAL LAW (Evidence; Insanity; Trial—*Summing-up*).
Divorce. *See* DIVORCE.
Fresh evidence—*New trial.* *See* COURT OF APPEAL (New trial).
Further evidence—*Power of appellate court to receive.* *See* COURT OF APPEAL.
Handwriting—*Criminal proceedings—Need for expert evidence.* *See* CRIMINAL LAW.
Possession—*Land.* *See* TRESPASS (Land—*Possession*).

PAGE

EXAMINING MAGISTRATES
See MAGISTRATES.

EXCEPTION
Clause of exception. *See* SHIPPING (Lighterage).

EXCHANGE
Stamp duty. *See* STAMP DUTY.

EXPENSES
Deduction for income tax. *See* INCOME TAX (Deduction in computing profits).

FACTORY
Building regulations. *See* BUILDING (Building regulations).
Dangerous machinery—*Duty to fence—Component on machine forming a fence preventing operator's body touching machinery—Hand tool coming into contact with machinery—Whether breach of duty to fence in that fencing not secure against hand tool—Factories Act*, 1937 (*c.* 67), *s.* 14 (1) [SPARROW *v.* FAIREY AVIATION CO., LTD.] 452
Horizontal milling machine—Machine comprising traversing table carrying block in nature of vice—Bolts to be milled affixed to block—Whether block, when moving and carrying bolts, dangerous part of machinery—Factories Act, 1937 (*c.* 67), *s.* 14 (1) [EAVES *v.* MORRIS MOTORS, LTD.] 233
Definition—*Pumping station occupied by water board—Water from springs filtered and chlorinated in filter house then put under pressure in pump house—Whether water an "article"—Whether pump house a factory—Factories Act*, 1937 (*c.* 67), *s.* 151 (1) (*b*), (6) [LONGHURST *v.* GUILDFORD GODALMING AND DISTRICT WATER BOARD] 545
Removal of dust—*Limitation of action—Pneumoconiosis. See* LIMITATION OF ACTION (Breach of statutory duty—*Accrual of cause of action*).
Safe place of employment—*Secure foot-hold—Secure "hand-hold"—Window cleaner on ladder needing to use both hands at once to hold and clean window—Factories Act*, 1937 (*c.* 67), *s.* 26 (2) [WIGLEY *v.* BRITISH VINEGARS, LTD.] 418
Statutory duty—*Breach. See* Dangerous machinery—*Duty to fence, ante.*
Causation. See STATUTORY DUTY (Breach).

FALSE IMPRISONMENT
Evidence—*Credit—Concealment. See* COURT OF APPEAL (New trial—*Misleading the court at trial*).

FATAL ACCIDENT
Damages—*Assessment—Factors—Computation of pecuniary loss a jury question—Arithmetical calculation as check by comparison—Assessment of benefits accruing from deceased's death—Fatal Accidents Act*, 1846 (*c.* 93), *s.* 2 [DANIELS *v.* JONES] .. ..
Measure of damages—Tortfeasor must take victim as he finds him—Cancer developing from pre-malignant condition [SMITH *v.* LEECH BRAIN & CO., LTD.] 1159

FENCING
Dangerous machinery. *See* FACTORY (Dangerous machinery).

FIREARMS
Unlawful possession of firearms at time of "apprehension" for offence—*Conviction of offence other than that for which arrest was made—Offence not specified in Firearms Act*, 1937, *Sch.* 3—*Whether there could be conviction of being in possession of firearms contrary to Firearms Act*, 1937 (*c.* 12), *s.* 23 (2) [R. *v.* BAKER] 703

FOREIGN JUDGMENT
See CONFLICT OF LAWS.

FOREIGN MARRIAGE
See NULLITY.

GAMES
Children's play causing injury to third person—*Liability of occupier of land on which play permitted. See* OCCUPIER (Negligence).

GHANA
See PRIVY COUNCIL.

GRIEVOUS BODILY HARM
See CRIMINAL LAW.

GUARDIAN
Foreign law, by. *See* CONFLICT OF LAWS (Foreign judgment—*Recognition—Status*).

HANDWRITING
Criminal proceedings—*Need for expert evidence. See* CRIMINAL LAW (Evidence).

HARBOUR
Quay—*Cranes—Undertakers providing cranes for public use—Stevedores using cranes—Undertakers subsequently themselves undertaking stevedoring services—Whether undertakers entitled to refuse use of cranes to public, including stevedores—Harbours, Docks, and Piers Clauses Act*, 1847 (*c.* 27), *s.* 22, *s.* 33 [GARLAND & FLEXMAN (A FIRM) *v.* WISBECH CORPN.] 342

HIGHWAY
Negligence—*Occupation of property adjoining highway—Liability of occupier for acts done on property causing injury to persons using highway. See* OCCUPIER (Negligence).

HIRE-PURCHASE
Damages for breach of contract—*Hirer's breach by not paying instalments—Goods re-sold by owners—Hirer's option to determine agreement not exercised—Measure of damages* [YEOMAN CREDIT, LTD. *v.* WARAGOWSKI] 145
Depreciation clause. *See* Penalty—*Depreciation, post.*
Penalty—*Depreciation—Agreement to pay depreciation on termination of agreement by either party—Amount of depreciation substantially greater on determination in early months—No depreciation payable, in the particular case, during last six months for which agreement would run* [PHONOGRAPHIC EQUIPMENT (1958), LTD. *v.* MUSLU] 626

HOSPITAL
Gift to. *See* CHARITY (Uncertainty).

HOUSEBREAKING
Attempt. *See* CRIMINAL LAW (Attempt).

HOUSE OF LORDS
Appeal to—*Criminal cause or matter—Jurisdiction. See* CRIMINAL LAW (Appeal).
Leave to appeal—Conditions—Power to impose conditions—Revenue appeal [RENNELL (LORD) *v.* INLAND REVENUE COMRS.] 1041
Compromise—*Infant appellant—Leave to appeal to House of Lords granted by Court of Appeal—Settlement after petition lodged—Approval by House of Lords* [FLACK *v.* WITHERS] 388

HOUSING
Insurance—*Tenant's personal and household effects—Arrangements made by housing authority for issuing group policy of insurance of its tenants' personal and household effects—Premiums collected by housing authority with weekly rent—Whether insurance scheme ultra vires the housing authority—Whether insurance was an act of general management of the housing authority's properties—Housing Act,* 1957 (*c.* 56), *s.* 111 (1) [ATTORNEY-GENERAL *v.* CRAYFORD URBAN DISTRICT COUNCIL] 1002
Notice—*Signature—Validity. See* LANDLORD AND TENANT (Small tenement—*Recovery of possession—Notice to quit—Notice of intended application for warrant for recovery of possession*).

HUSBAND AND WIFE
Maintenance—*Agreement—Post-nuptial settlement—Variation. See* VARIATION OF SETTLEMENT (MATRIMONIAL CAUSES) (Post-nuptial settlement).
Property—*Matrimonial home—Purchase by husband—Wife contributing to household expenses—Intention—Whether wife had beneficial interest in property* [ALLEN *v.* ALLEN] 385
Summary proceedings—Reference to official referee—Jurisdiction to determine issues—Married Women's Property Act, 1882 (*c.* 75), *s.* 17—*Administration of Justice Act,* 1956 (*c.* 46), *s.* 15 (1) (*a*)—*R.S.C., Ord.* 36A, *r.* 1 [Re EDWARD'S QUESTIONS] 580
Summary matrimonial jurisdiction. *See* MAGISTRATES.

INCOME TAX
Accommodation—*Provision. See* Income—*Accommodation and benefits provided to directors and others, post.*
Annual payment—*Instalments of purchase price. See* SURTAX (Annual payment—*Capital or income*).
Deduction in computing profits—*Expenses—Medical specialist in private practice—Holder of part-time appointments as consultant—Profits of office assessable under Sch. E—Expenses not deductible under Sch. E—Whether deductible as expenses of profession under Sch. D—Income Tax Act,* 1952 (*c.* 10), *s.* 122 (*Sch. D, para.* 1, *proviso*). *s.* 156 (*Sch. E, para.* 2) [MITCHELL (INSPECTOR OF TAXES) *v.* ROSS, SAME *v.* HIRTENSTEIN, SAME *v.* MARSHALL, TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY, SAME *v.* DREW] 49
"Expenses incurred wholly, exclusively and necessarily in the performance of . . . duties"—Bank manager—Subscription to club—Membership practically requisite for employment as manager—Income Tax Act, 1952 (*c.* 10), *Rules applicable to Sch. E, Sch.* 9, *r.* 7 [BROWN *v.* BULLOCK (INSPECTOR OF TAXES)] 129
Excess of rent of living accommodation provided by company over taxpayer's contribution—Residence required in London flat—Entertainment of customers there—Income Tax Act, 1952 (*c.* 10), *Sch.* 9, *Rules applicable to Sch. E, r.* 7 [MCKIE (INSPECTOR OF TAXES) *v.* WARNER] 348
Exemption—*Exempt income—Not exempt unless taxable but for exemption. See* PRIVY COUNCIL (New Zealand—*Income tax—Mutual life insurance company*).
Expenses. *See* Deduction in computing profits—*Expenses, ante.*
Income—*Accommodation and benefits provided to directors and others—Service house of mill manager—Company's payments for coal, electricity and garden—Emoluments of manager under Sch. E—Income Tax Act,* 1952 (*c.* 10), *s.* 161 (1), (3) [BUTTER (INSPECTOR OF TAXES) *v.* BENNETT] 1041
Accommodation provided for employee—Employee charged only part of rent—Whether difference income of employee—Income Tax Act, 1952 (*c.* 10), *s.* 161 (1) [MCKIE (INSPECTOR OF TAXES) *v.* WARNER] 348
Builder—Timber company possessing building powers—Purchase of houses from subsidiary building company—Object to assist managing director to re-start business—Subsequent sale at a profit—Whether investment or adventure in nature of trade—Income Tax Act, 1952 (*c.* 10), *Sch. D, Case I, s.* 123, *s.* 526 [LUCY & SUNDERLAND, LTD. *v.* HUNT (INSPECTOR OF TAXES)] 1062
Derived from any business carried on in New Zealand. See PRIVY COUNCIL (New Zealand—*Income tax—Mutual life insurance company*).
Instalments of purchase price. *See* SURTAX (Annual payment—*Capital or income*).
Profits—*Builder—Timber company possessing building powers* [LUCY & SUNDERLAND, LTD. *v.* HUNT (INSPECTOR OF TAXES)] 1062
Medical specialist—Part-time consultant at National Health Service hospital—Whether assessable under Income Tax Act, 1952 (*c.* 10), *Sch. E* [MITCHELL (INSPECTOR OF TAXES) *v.* ROSS, SAME *v.* HIRTENSTEIN, SAME *v.* MARSHALL, TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY, SAME *v.* DREW] 49
Profits tax. *See* PROFITS TAX.
Surtax. *See* SURTAX.
Timber merchant—*Subsidiary building company—Purchase of houses as investment. See* Income—*Builder, ante.*

INDICTMENT
See CRIMINAL LAW.

INDUSTRIAL HEREDITAMENT
See RATING (De-rating).

INFANT
Compromise—*Appeal to House of Lords. See* HOUSE OF LORDS (Compromise).
Education. *See* EDUCATION.
Jurisdiction—*Inherent jurisdiction—Restriction by statute* [Re BAKER (INFANTS)] 276
Maintenance—*Divorce Division of High Court—Practice—Application to High Court while magistrates' court's order existing—Copy of maintenance order of magistrates' court to be lodged* [PRACTICE DIRECTION] 1200

INJUNCTION
Divorce—*Divorced wife—Child of the dissolved marriage—Child at school in Scotland—Injunction restraining divorced wife from allowing letter sent to child's school to be handed to him—Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 45 (1) [R. *v.* R. AND I.] .. 461

INJUNCTION—*continued.* PAGE
Jurisdiction—*Territorial jurisdiction—Injunction—Injunction directed to party in England against allowing act in Scotland. See* Divorce—*Divorced wife—Child of the dissolved marriage, ante.*
Restrictive Practices Court. *See* RESTRICTIVE TRADE PRACTICES.

INQUIRY
Answer—*Negligent. See* NEGLIGENCE (Duty to take care—*Statements*).

INSANITY
Crime—*Defence. See* CRIMINAL LAW (Appeal; Insanity).
Divorce—*Defence. See* DIVORCE (Adultery).
Ground for. See DIVORCE.

INSURANCE
Local government. *See* HOUSING.

INVESTMENT CLAUSE
See TRUST AND TRUSTEE (Variation of trusts by the court).
See also WILL.

INVESTMENT COMPANY
Profits tax—*Commencement of business. See* PROFITS TAX (Chargeable accounting period—*Determination by Inland Revenue Commissioners*).

IRELAND
Marriage—*Recognition of divorce abroad. See* NULLITY (Foreign marriage).

IRREGULARITY
Rules of court—*Non-compliance. See* PRACTICE (Pleading—*Delivery—Long vacation*).

JOINT TORTFEASORS
See TORT.

JUDGE
Indication of judge's view in course of trial—*Danger of semblance of prejudging issues* [BRASSINGTON *v.* BRASSINGTON] 988
Notes. *See* COURT OF APPEAL (Judge's note).

JUDGMENT
Foreign. *See* CONFLICT OF LAWS (Foreign judgment).
Setting aside. *See* PRACTICE (Pleading—*Delivery—Long vacation*; Setting aside judgment).
Summary judgment—*Leave to defend. See* PRACTICE (Summary judgment).

JURISDICTION
Court-martial—*Civil offence. See* COURT-MARTIAL.
Divorce Divisional Court—*Application for re-hearing. See* DIVORCE (Appeal—*Divisional Court*).
Domestic tribunal—*Jurisdiction of court in relation to determinations of tribunal—Whether redress forfeited by appeal to superior authority. See* TRADE UNION (Domestic tribunal).
Foreign court. *See* CONFLICT OF LAWS (Foreign judgment).
Ouster—*Divorce—Agreement to refer to chambers. See* DIVORCE (Practice—*Custody—Chambers*).
See also PURCHASE TAX (Regulations—*Validity*).
Questions on which jurisdiction depends. *See* RENT CONTROL (Rent tribunal).
Trusts—*Variation. See* TRUST AND TRUSTEE (Variation of trusts by the court).

JURY
Criminal trial, at. *See* CRIMINAL LAW (Trial—*Jury*).

LAND
Covenant running with. *See* COVENANT (Running with land).
Limitation—*Time. See* LIMITATION OF ACTION.

LAND REGISTRATION
Limitation of action—*Leasehold. See* LIMITATION OF ACTION (Land—*Leasehold*).

LANDLORD AND TENANT
Landlord—*Identity. See* RENT CONTROL (Rent tribunal—*Jurisdiction*).
See also Lease—*Business premises—Continuation, post.*
Lease—*Business premises—Continuation—Reversionary lease granted by head lessor to person then the tenant of an intermediate landlord—Whether intermediate landlord the "landlord"—Whether interest of intermediate landlord a tenancy which would not expire within fourteen months of the grant of the "reversionary tenancy"—Landlord and Tenant Act*, 1954 (*c.* 56), *s.* 28, *s.* 44 (1) (*b*) [BOWES-LYON *v.* GREEN] 843
Contract to grant lease more than twenty-one years after date of contract—Validity—Law of Property Act, 1925 (*c.* 20), *s.* 149 (3) [WEG MOTORS, LTD. *v.* HALES] 181
Covenant—Whether option agreement not under seal a covenant. See OPTION (Renewal of lease—*Option of taking a further lease granted by agreement in writing (but not under seal) executed on same date as lease*).
New tenancy—*Business premises—Terms of new tenancy—Holding—Property to be comprised in new tenancy—Proper date for designating holding—Landlord and Tenant Act*, 1954 (*c.* 56), *s.* 32 (1) [I. & H. CAPLAN, LTD. *v.* CAPLAN] 1174
Notice to quit—*Business premises—Date incomplete—Year of termination of tenancy left blank—Validity of notice—Landlord and Tenant Act*, 1954 (*c.* 56), *s.* 25, *s.* 66 (2)—*Landlord and Tenant (Notices) Regulations*, 1957 (*S.I.* 1957 *No.* 1157), *reg.* 4 (vii) [SUNROSE, LTD. *v.* GOULD] 1142
Recovery of possession—*Rent restricted premises. See* RENT RESTRICTION (Possession).
Rent control. *See* RENT CONTROL.
Rent restriction. *See* RENT RESTRICTION.
Small tenement—*Recovery of possession—Notice to quit—Notice of intended application for warrant for recovery of possession—Notice of intended application signed by housing manager as agent of local authority—Whether latter notice validly signed—Small Tenements Recovery Act*, 1838 (*c.* 74), *s.* 1, *s.* 7—*Housing Act*, 1957 (*c* 56), *s.* 158 (2), *s.* 166 (2) [R. *v.* BERKSHIRE (FOREST) JUSTICES, *Ex parte* DALLAIRE] 1138
Tenancy—*Business premises—New tenancy. See* New tenancy—*Business premises, ante.*
Reversionary tenancy—Agreement to grant future tenancy—Landlord and Tenant Act, 1954 (*c.* 56), *s.* 28, *s.* 65 (3) [BOWES-LYON *v.* GREEN] 843

LEASE
Option. *See* OPTION (Renewal of lease).
Settled Land Act, 1925. *See* SETTLEMENT (Powers of tenant for life—*Leasing*).
See also LANDLORD AND TENANT.

LIBEL
Privilege—*Absolute privilege—Inquiry by Benchers into conduct of barrister* [LINCOLN *v.* DANIELS] 740
Qualified privilege—Communications to Bar Council—Libel alleged contained in letters of complaint against Queen's Counsel addressed to secretary of Bar Council—No complaint made to Benchers of Inn of Court—Letters not protected by absolute privilege [LINCOLN *v.* DANIELS] 740

LICENCE
Public carriers' licence. *See* ROAD TRAFFIC.

LICENSING
Road traffic. *See* ROAD TRAFFIC (Licence).

LIGHTERAGE
See SHIPPING.

LIMITATION OF ACTION
Amendment of writ—*Writ issued within period of limitation—Defective indorsement claiming damages for personal injuries—Writ a nullity—Defendant informed by plaintiff's solicitor's letter shortly after accident giving rise to claim that damages for negligent driving would be claimed—Writ issued nearly three years later—Summons to set aside service after limitation period expired—Statement of claim filed after summons heard—Whether amendment should be allowed or service of writ set aside* [PONTIN *v.* WOOD] 992
Breach of statutory duty—*Accrual of cause of action—When serious harm suffered—Pneumoconiosis—Injury caused by acts outside statutory period—Injury first discovered within statutory period—Disablement within statutory period—Limitation Act*, 1939 (*c.* 21), *s.* 2 (1) (*a*) [CARTLEDGE *v.* E. JOPLING & SONS, LTD.] 482
Burden of proof—*Tort—Burden on plaintiff* [CARTLEDGE *v.* E. JOPLING & SONS, LTD.] 482
Land—*Leasehold—Possessory title acquired against lessee—Surrender of lease—Whether freeholder entitled to possession—Registered land—Limitation Act*, 1939 (*c.* 21), *s.* 16—*Land Registration Act*, 1925 (*c.* 21), *s.* 75 (1) [ST. MARLYEBONE PROPERTY CO., LTD. *v.* FAIRWEATHER] .. 560
Negligence—*Accrual of cause of action. See* Breach of statutory duty, *ante.*
Trust—*Breach of trust—Advancement. See* TRUST AND TRUSTEE (Breach of trust—*Consent—Nature of consent*).
When time begins to run—*Breach of statutory duty. See* Breach of statutory duty, *ante.*

LIVERPOOL COURT OF PASSAGE
Judge's notes. *See* COURT OF APPEAL (Judge's note).

LOAN
Contract. *See* MONEY.

LOCAL AUTHORITY
Action—*Competence to bring in own name—Abatement of statutory nuisance—Rectification. See* PRACTICE (Parties—*Capacity—Local authority*).

LOCAL GOVERNMENT
Audit—*Surcharge—Application for relief—Circumstances to be considered by the court—Discretion of court to grant—Local Government Act*, 1933 (*c.* 51), *s.* 230 [ANNISON *v.* DISTRICT AUDITOR FOR THE METROPOLITAN BOROUGH OF ST. PANCRAS. TAYLOR *v.* SAME] 914
Election. *See* ELECTIONS.
Harbours. *See* HARBOUR.
Insurance. *See* HOUSING (Insurance).

LONDON
London lighterage clause. *See* SHIPPING (Lighterage—*Exceptions*).
Road traffic—*Waiting and loading restrictions. See* ROAD TRAFFIC.

LONG VACATION
Pleading—*Delivery. See* PRACTICE (Pleading—*Delivery*).

MACHINERY
Dangerous. *See* FACTORY (Dangerous machinery).

MAGISTRATES
Examining magistrates—*Remand—Adjournment granted at request of Crown before any evidence called—Whether magistrate has discretion to remand accused in custody or must remand on bail—Magistrates' Courts Act*, 1952 (*c.* 55), *s.* 6 (1), *s.* 105 (1) [R. *v.* GUEST, *Ex parte* METROPOLITAN POLICE COMR.] 1118
Husband and wife—*Cruelty—Persistent cruelty—Reasonable belief in husband's adultery deliberately induced in wife's mind by husband—Injury to wife's health* [WALKER *v.* WALKER] .. 14
Maintenance order—Lodging for subsequent High Court application. See DIVORCE (Maintenance—*Wife—Practice—Application to High Court while magistrates' court's order existing*).
Order—Non-cohabitation clause—Effect of, in divorce proceedings. See DIVORCE (Evidence—*Magistrates' court order on similar issue*).
Small Tenements Recovery Act, 1838. *See* LANDLORD AND TENANT (Small tenement).

MAINTENANCE
Infant. *See* INFANT.
Wife. *See* DIVORCE.

MALAYA
See PRIVY COUNCIL.

MALICIOUS PROSECUTION
Damage necessary to support action—*Costs of defence and appeal—Actual costs less lump sum costs awarded by quarter sessions—Whether sufficient to support an action* [BERRY *v.* BRITISH TRANSPORT COMMISSION] 65
Malice—*Motive—Recovery of sum of which prosecutor had been defrauded the ultimate aim—Prosecution for felony before civil action a duty imposed by law—Whether malice established* [ABBOTT *v.* REFUGE ASSURANCE CO., LTD.] 1074
Reasonable and probable cause for prosecution—*Need to take steps to obtain information—Admissible evidence only to be considered—Need for legal advice—Weight to be attributed to counsel's opinion—Subsequent stages of trial—Resisting submission of no case to answer—Contesting successful appeal against conviction* [ABBOTT *v.* REFUGE ASSURANCE CO., LTD.] 1074

PAGE

MARKETS AND FAIRS
Disturbance—*Annual "fair" or "wake"—Right to hold annual fair or wake acquired by inhabitants of parish by ancient usage—Enclosure award made pursuant to private Act of Parliament appointing certain parcels of land in parish on which inhabitants might hold fair—Declaration in award of future right of inhabitants to hold fair annually and bar against disturbing surface—Part of land acquired by defendant in ignorance of right—Annual fair or wake had not then been held within living memory—Planning permission obtained by defendant and building begun—Inhabitants of parish claimed to be entitled to preserve right to hold fair—Whether right existed or whether it had been waived and abandoned—Whether action was maintainable by plaintiffs as representatives of inhabitants of parish—Whether Attorney-General a necessary party—Whether right vested in parish council—Local Government Act*, 1894 (*c.* 73), *s.* 6 (1) (*a*) [WYLD *v.* SILVER] 1014

MARRIAGE
Foreign marriage—*Validity—Marriage in Republic of Ireland—Whether prior decree of divorce in England recognised by law of republic. See* NULLITY (Foreign marriage).
Settlement—*Estate duty—Exemption. See* ESTATE DUTY (Exemption and remission—*Gift in consideration of marriage*).

MARSHALLING
Compensation—*Proceeds of devise of land in Australia used initially to pay duties not chargeable thereon* [Re MATTHEWS'S WILL TRUSTS] 869

MASTER AND SERVANT
Duty of master—*Employment of servant—Employment only possible at some risk to health of servant—Servant wishing to engage or continue in employment—No duty on master to refuse to employ or to dismiss servant* [WITHERS *v.* PERRY CHAIN CO., LTD.] 676
Liability of master—*Causation—Presumption—Disease contracted by servant after being subjected to conditions likely to cause it—Servant not having previously suffered from the disease* [GARDINER *v.* MOTHERWELL MACHINERY AND SCRAP CO., LTD.] 831
Negligence—Limitation of action. See LIMITATION OF ACTION (Breach of statutory duty—*Accrual of cause of action*).
Remuneration—*Commission—"Advance commission"—Half commission paid in advance—Commission due only if delivery of goods made during employment—Whether half commission advanced during employment on orders of goods not delivered until after employment ended repayable* [BRONESTER, LTD. *v.* PRIDDLE] 471

MATRIMONIAL HOME
See HUSBAND AND WIFE (Property).

MEASURE OF DAMAGES
See DAMAGES.

MEMORANDUM
Moneylender's contract, of. *See* MONEYLENDER.

MENTAL HEALTH
Hospital order—*Criminal proceedings—Restriction on discharge—Inquiry as to facilities for legal custody of patient. See* CRIMINAL LAW (Practice—*Sentence*).

MERGER
Misdemeanour. *See* CRIMINAL LAW (Attempt).

MISDIRECTION
Criminal trial, in. *See* CRIMINAL LAW (Appeal).

MISPRISION OF FELONY
See CRIMINAL LAW.

MISREPRESENTATION
Statements—*Careless statements—Liability in damages. See* NEGLIGENCE (Duty to take care—*Proximity of relation—Statements*).

MONEY
Loan—*Bills purchased at discount—Post-dated cheques given as collateral security—Purchaser not a bank or discount house—Whether contract for repayment of money lent—Whether money-lending transaction* [CHOW YOONG HONG *v.* CHOONG FAH RUBBER MANUFACTORY] 1163

MONEYLENDER
Definition of moneylender—*Nature of transaction of loan distinguished. See* MONEY (Loan—*Bills purchased at discount*).
Memorandum—*Omitted terms—Reference therein to promissory note which contained the omitted words—Not permissible to look at promissory note unless copy thereof delivered or sent to borrower—Moneylenders Act*, 1927 (*c.* 21), *s.* 6 (2) [EDGWARE TRUST, LTD. *v.* LAWRENCE] 141

MORTGAGE
Charge by way of legal mortgage—*Estate of mortgagee—Whether legal term of years vested in chargee—Law of Property Act*, 1925 (*c.* 20), *s.* 87 (2) [WEG MOTORS, LTD. *v.* HALES] .. 181
Estates of mortgagor [WEG MOTORS, LTD. *v.* HALES] 181

MOTOR CYCLIST
Negligence. *See* ROAD TRAFFIC (Negligence).

MOTOR VEHICLE
Waiting and loading restrictions. *See* ROAD TRAFFIC (London).

MURDER
See CRIMINAL LAW.

NATIONAL HEALTH SERVICE
Consultant. *See* INCOME TAX (Deduction in computing profits—*Expenses—Medical specialist in private practice*).
Specialist—*Income tax—Whether holder of a public office. See* INCOME TAX (Deduction in computing profits—*Expenses—Medical specialist in private practice*).

NATURAL JUSTICE
Domestic tribunal. *See* TRADE UNION (Domestic tribunal).

NEGLIGENCE
Causation—*Presumption—Disease. See* MASTER AND SERVANT (Liability of master—*Causation*).
Child. *See* OCCUPIER.

NEGLIGENCE—*continued.*
Contributory negligence—*Accident partly due to plaintiff's breach of statutory duty. See* STATUTORY DUTY (Breach—*Causation—Breach by both employer and employee—Faults not co-extensive*).
Appeal—Judge's reasons—Need for copy of judge's notes of evidence and of his reasons [JOHNSON *v.* REA, LTD.] 816
Motor traffic. See ROAD TRAFFIC.
Damages—*Personal injury—Measure of damages—Loss of amenities of life—Loss of future earning capacity—Child aged twenty months—Mental defective as result of injury—Expense of home help and child's entering private institution in the first instance—Probability that child would spend most of his life in state institution—Total award unlikely to be used by or on behalf of child* [OLIVER *v.* ASHMAN] 323
Measure of damages—Tortfeasor takes victim as he finds him. See DAMAGES (Remoteness of damage—*Negligence—Foreseeability—Type, but not extent, of injury foreseeable*).
Separate tortfeasors—Successive torts. See DAMAGES (Measure of damages—*Separate tortfeasors*).
Dangerous conditions—*Duty of persons creating. See* DANGEROUS CONDITIONS (Creation of dangerous conditions).
Duty to take care—*Proximity of relation—Statements—Careless statements causing damage to persons or property—Statements actionable under principle in* M'Alister (or Donoghue) *v.* Stevenson—*Instructions negligently issued by architect to bricklayer resulting in bricklayer's personal injuries* [CLAYTON *v.* WOODMAN & SON (BUILDERS), LTD.] 249
Statements—References given by bank honestly but without due care—No special relationship between inquirer and bank giving rise to duty of care—Whether bank liable for negligent reference—Whether duty owed by bank to take reasonable care [HEDLEY BYRNE & CO., LTD. *v.* HELLER & PARTNERS, LTD.] 891
Employment—*Whether duty to refuse employment on ground of risk to employee's health* [WITHERS *v.* PERRY CHAIN CO., LTD.] 676
Joint tortfeasors—*Contribution. See* TORT (Joint tortfeasors).
Master—*Liability to servant. See* MASTER AND SERVANT (Duty of master).
Motor cyclist. *See* ROAD TRAFFIC.
Occupier. *See* OCCUPIER.
Remoteness of damage. *See* DAMAGES (Remoteness of damage).
Road traffic. *See* ROAD TRAFFIC.

NEW TENANCY
See LANDLORD AND TENANT.

NEW TRIAL
See COURT OF APPEAL.

NEW ZEALAND
See PRIVY COUNCIL.

NORTHERN IRELAND
Criminal law—*Insanity. See* CRIMINAL LAW (Insanity—*Time to which test by M'Naghten rules should be related*).

NOTICE TO QUIT
See LANDLORD AND TENANT.

NUISANCE
Statutory nuisance—*Action—Competence of plaintiff. See* PRACTICE (Parties—*Capacity—Local authority*).

NULLITY
Foreign marriage—*Lex loci celebrationis not providing for divorce—Husband's first marriage in Eire dissolved by English court, parties being then domiciled in England—Second marriage of husband in Republic of Ireland—Whether second marriage void—Constitution of Ireland, art.* 41, *s.* 3 (3) [BREEN (OTHERWISE SMITH) *v.* BREEN] 225

OCCUPIER
Negligence—*Children permitted to use land for play with a football—Land abutting on highway and separated only by low wall—Motor cyclist on highway injured as result of football kicked over wall onto highway by child—Whether occupier liable* [HILDER *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD.] 709

OFFICIAL REFEREE
Reference to. *See* HUSBAND AND WIFE (Property—*Summary proceedings*).

OFFICIAL SECRETS
Sentence. *See* CRIMINAL LAW (Sentence—*Consecutive sentences*).

OPTION
Renewal of lease—*Option of taking a further lease granted by agreement in writing (but not under seal), executed on same date as lease—Whether option for renewal of lease or void as infringing rule against perpetuities—Whether obligation to grant new lease ran with reversion—Whether agreement was "covenant" within Law of Property Act,* 1925 (*c.* 20), *s.* 142 (1) [WEG MOTORS, LTD. *v.* HALES] 181

ORDER XIV
See PRACTICE (Summary judgment).

PARK
Rateable occupation. *See* RATES (Rateable occupation—*Public park*).

PARLIAMENT
Election. *See* ELECTIONS.

PARTICULARS
Order for—*Whether particulars ordered. See* PRACTICE (Particulars).
Pleading to. *See* PLEADING.

PARTIES
See PRACTICE.

PARTNERSHIP
Foreign partnership—*Enforcement of foreign judgment by action in England. See* CONFLICT OF LAWS (Foreign judgment—*Enforcement*).

PAGE

PASSENGER
Liability of, in accident. *See* ROAD TRAFFIC (Negligence).

PEERAGES
Inalienability—*Inability to renounce or surrender* [Re BRISTOL SOUTH EAST PARLIAMENTARY ELECTION] 354

PENALTY
Hire-purchase agreement. *See* HIRE-PURCHASE.

PERPETUITIES
Rule against perpetuities—*Option to renew lease. See* OPTION (Renewal of lease—*Option of taking a further lease granted by agreement in writing (but not under seal), executed on same date as lease*).
Residuary bequest—Direction to realise and divide residue of estate—Legatee to be existing at time of realisation of residuary estate—No express power to postpone realisation—Whether gift referred to end of executor's year—Validity [Re PETRIE (*decd.*)] 1067

PERSON OF UNSOUND MIND
Divorce—*Ground for. See* DIVORCE (Insanity).

PERSONAL INJURIES
See DAMAGES (Measure of damages).

PETITION
Divorce. *See* DIVORCE.

PLANNING
See TOWN AND COUNTRY PLANNING.

PLEADING
Delivery. *See* PRACTICE (Pleading).
Particulars—*No obligation to plead to particulars* [CHAPPLE *v.* ELECTRICAL TRADES UNION] .. 612

PNEUMOCONIOSIS
Limitation of action. *See* LIMITATION OF ACTION (Breach of statutory duty—*Accrual of cause of action*).

POLICE
Evidence—*Concealment of reduction in rank for disciplinary offence. See* COURT OF APPEAL (New trial—*Misleading the court at trial*).

POSSESSION
Demised property, of. *See* RENT RESTRICTION.
Firearms, of—*Criminal offence. See* FIREARMS.
Land—*Evidence. See* TRESPASS (Land).
Small tenement, of. *See* LANDLORD AND TENANT (Small tenement).

POST-NUPTIAL SETTLEMENT
See VARIATION OF SETTLEMENT (MATRIMONIAL CAUSES).

POWER OF APPOINTMENT
Special power—"*Born in the lifetime of*" *the testator. See* WILL (Gift—"*Born in the lifetime of*" *the testator*).

PRACTICE
Amendment—*Limitation period expired. See* LIMITATION OF ACTION (Amendment of writ).
Writ—Nullity. See WRIT (Defect in indorsement).
Compromise—*Appeal to House of Lords. See* HOUSE OF LORDS (Compromise).
Court of Appeal. *See* COURT OF APPEAL.
Criminal court. *See* CRIMINAL LAW.
Cross examination—*Credit—Concealment of material. See* COURT OF APPEAL (New trial—*Misleading the court at trial*).
Divorce. *See* DIVORCE.
Particulars—*Pleading—Traverse of negative allegation—Not pregnant with affirmative—Whether particulars of traverse should be ordered* [CHAPPLE *v.* ELECTRICAL TRADES UNION] 612
Parties—*Adding persons as parties—Defendant—Amendment of writ to change defendant "W.J.D. & Co. (a firm)" to "W.J.D. & Co., Ltd."—Whether a correction of a mere misnomer—Whether omission of "Limited" meant that no person was sued—Amendment sought after limitation period expired* [WHITTAM *v.* W. J. DANIEL & CO., LTD.] 796
Capacity—Local authority—Proceedings for statutory nuisance instituted before authorising resolution—Ratification by resolution three days later—Validity—Public Health Act. 1936 (*c.* 49), *s.* 100 [WARWICK RURAL DISTRICT COUNCIL *v.* MILLER-MEAD, MILLER-MEAD *v.* WARWICK RURAL DISTRICT COUNCIL] 542
Charity—Whether Charity Commissioners or Attorney-General necessary parties [NEVILLE ESTATES, LTD. *v.* MADDEN] 769
Pleading—*Delivery—Long vacation—Irregularity—Statement of claim delivered in long vacation—No defence filed within time allowed—Judgment signed in default of defence—Whether statement of claim void or voidable—Whether judgment should be set aside—R.S.C., Ord.* 64, *r.* 4, *Ord.* 70, *r.* 1 [MACFOY *v.* UNITED AFRICA CO., LTD.] 1169
Reference to referee—*Matrimonial property dispute. See* HUSBAND AND WIFE (Property—*Summary proceedings*).
Service—*Setting aside service—Writ—Defective indorsement—Limitation period expired—Statement of claim delivered. See* LIMITATION OF ACTION (Amendment of writ).
Setting aside judgment—*Summary judgment—Specific performance—Purchaser's action—Appearance not entered by vendor—Judgment obtained under R.S.C., Ord.* 14A—*Judgment not carried into effect—Action commenced to have judgment set aside on ground of vendor's contractual incapacity and of undue influence—Application by purchaser to have statement of claim struck out—Whether second action appropriate procedure—Whether judgment under R.S.C., Ord.* 14A, *was a judgment by default within R.S.C., Ord.* 27, *r.* 15 [DSANE *v.* HAGAN] 380
Solicitor—*Withdrawal. See* SOLICITOR (Withdrawal).
Summary judgment—*Leave to defend—Conditional leave—Payment into court as condition of giving leave—Need for foundation for imposing such condition—R.S.C., Ord.* 14, *r.* 1 [FIELDRANK, LTD. *v.* STEIN] 681
Setting aside—Irregularity. See Pleading—*Delivery—Long vacation, ante*; Setting aside judgment, *ante*.

PREVENTIVE DETENTION
See ROAD TRAFFIC (Dangerous driving—*Sentence*).

PRIVATE COMPANY
See COMPANY.

PRIVILEGE
Libel. *See* LIBEL.

PRIVY COUNCIL
Australia—*Death duty—Incidence. See* DEATH DUTY (Incidence).
New South Wales—Death duty—Incidence. See DEATH DUTY (Incidence).
Victoria—Workmen's compensation—Injury by accident arising out of or in the course of . . . employment—Worker developing silicosis long after she left employment—Compensation not payable for silicosis at date of worker leaving employment—Later Act providing that compensation to be payable in respect of silicosis due to nature of employment "at any time" prior to disablement—Victoria Workers Compensation Act, 1951 (*No.* 5601), *s.* 12 (1) [SUNSHINE PORCELAIN POTTERIES PROPRIETARY, LTD. *v.* NASH] 203
Ceylon—*Bill of lading—Evidence of shipment of goods—Condition that weight, contents and value of bags shipped unknown* [ATTORNEY-GENERAL OF CEYLON *v.* SCINDIA STEAM NAVIGATION CO., LTD.] 684
Carriage of goods by sea—Short delivery—Bills of lading stating number of bags shipped but containing condition that weight, contents and value unknown—Mode of proof of contents and weight of missing bags by consignee—Indian Carriage of Goods by Sea Act, 1925, *Schedule, art.* III, *r.* 3, *r.* 4 [ATTORNEY-GENERAL OF CEYLON *v.* SCINDIA STEAM NAVIGATION CO., LTD.] 684
Ghana—*Trespass—Land—Possession* [WUTA-OFEI *v.* DANQUAH] 596
Malaya—*Moneylender—Loan transaction—Bills purchased at discount—Post-dated cheques maturing on same day as bills given as collateral security—Purchaser not a bank or discount house—Whether contract for the repayment of money lent—Malayan Moneylenders Ordinance,* 1951 (*No.* 42 *of* 1951), *s.* 15, *s.* 16 [CHOW YOONG HONG *v.* CHOONG FAH RUBBER MANUFACTORY] 1163
New Zealand—*Income tax—Mutual life insurance company—Assessment—Reversionary bonuses—Allotment of surplus funds for reversionary bonuses—Declared face value of maturing reversionary bonuses irrelevant—Deduction of income exempt from taxation—Income not "exempt" unless it would be subject to New Zealand taxation but for the exemption—Income from investments in Australian and English companies not therefore "exempt" from taxation and not deductible—Whether income from Australian investments held by branch in New Zealand of Australian life insurance company income "derived from" a business carried on in New Zealand—New Zealand Land and Income Tax Act,* 1954 (*No.* 67), *s.* 149 (2), *s.* 86 (1) (i), *s.* 167 (*a*) [AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMRS.] 1051
Sierra Leone—*Practice—Pleading—Delivery in long vacation—Statement of claim—Whether a nullity or irregularity* [MACFOY *v* UNITED AFRICA CO., LTD.] 1169
Trinidad and Tobago—*Murder—Provocation—Summing-up—Issue to be left to jury although defence of provocation not raised and although accused did not testify that he was provoked* [BULLARD *v.* R.] 470
West Indies—*Criminal law—Jury—Intimidation or threat—Jury told by judge to remember their oath—Direction to put aside extraneous matters, to make up their minds one way or the other and to accept reason one from the other—Whether such coercion as to invalidate jury's verdict* [SHOUKATALLIE *v.* R.] 996
Trinidad—Trade union—Domestic tribunal—Natural justice—Member charged with breach of union's rules none of which gave power of expulsion—Expulsion at adjourned hearing at which he was not present under another rule dealing with conduct prejudicial to interests of union—No charge of breach of such rule—Appeal by member against expulsion dismissed—No complaint of failure of natural justice—Whether expulsion valid—Whether member could seek redress in the courts [ANNAMUNTHODO *v.* OILFIELDS WORKERS' TRADE UNION] .. 621

PROFITS TAX
Chargeable accounting period—*Determination by Inland Revenue Commissioners—Interval between company's old and new businesses—Commencement of business as investment company—Last chargeable accounting period—Period before interval—Finance Act,* 1937 (*c.* 54), *s.* 19 (4), *s.* 20 (2) (*a*), (*b*)—*Finance Act,* 1947 (*c.* 35), *s.* 35 (1) (*c*) [E.Y.L. TRADING CO., LTD. *v.* INLAND REVENUE COMRS.] 1121
Distribution—*Distribution charge—Reconstruction—Vendor company's business sold in* 1950 *in consideration of shares in purchasing company—Subsequent sale by vendor company of shares of purchasing company—Liquidation of vendor company in* 1955—*Liability to distribution charge—Finance Act,* 1947 (*c.* 35), *s.* 30 (3), *s.* 36 (4), *s.* 43 (1) [INLAND REVENUE COMRS. *v.* J. B. HODGE & CO. (GLASGOW), LTD. (IN VOLUNTARY LIQUIDATION)] 172

PROOF
Burden of. *See* CRIMINAL LAW (Burden of proof); LIMITATION OF ACTION (Burden of proof).

PROPERTY
Husband and wife—*Dispute between. See* HUSBAND AND WIFE.

PROSECUTION
Felonious act—*Duty to prosecute before bringing civil action. See* MALICIOUS PROSECUTION (Malice—*Motive*).
Malicious. *See* MALICIOUS PROSECUTION.

PROVOCATION
See CRIMINAL LAW (Murder).

PUBLIC HEALTH
Nuisance. *See* PRACTICE (Parties—*Capacity*).

PURCHASE TAX
Demand—*Signature—Demand authorised by proper officer but signed by officer not so authorised—Customs and Excise Act,* 1952 (*c.* 44), *s.* 4 (1) [COMRS. OF CUSTOMS AND EXCISE *v.* CURE & DEELEY, LTD.] 641
Regulations—*Validity—Power of Commissioners of Customs and Excise to make regulation which "appears to them necessary" to enable them to discharge their functions—Whether commissioners sole judges of what was necessary—Ouster of court's jurisdiction—Finance* (*No.* 2) *Act,* 1940 (*c.* 48), *s.* 33—*Purchase Tax Regulations,* 1945 (*S.R. & O.* 1945 *No.* 517), *reg.* 12 [COMRS. OF CUSTOMS AND EXCISE *v.* CURE & DEELEY, LTD.] 641

PAGE

QUALIFIED PRIVILEGE
See LIBEL (Privilege—*Absolute privilege*).

QUARTER SESSIONS
Appeal to—*Abandonment of appeal—Application to withdraw notice of abandonment—No power to entertain application unless abandonment a nullity, as through mistake or fraud* [R. *v.* ESSEX QUARTER SESSIONS, *Ex parte* LARKIN] 930

QUAY
See HARBOUR.

RATES
De-rating—*Industrial hereditament—Adapting for sale—Timber—Natural drying of timber—Factory and Workshop Act*, 1901 (*c.* 22), *s.* 149 (1)—*Rating and Valuation (Apportionment) Act*, 1928 (*c.* 44), *s.* 3 (1) [BUNCOMBE (VALUATION OFFICER) *v.* BALTIC SAWMILLS CO., LTD.] 272
Purposes of user—Primary and substantial purposes—Reconditioning of parts of vehicles—Maintenance of occupier's road vehicles—Whether hereditament as a whole an industrial hereditament—Apportionment between industrial and other use—Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 3 (1), (2) (*b*), *s.* 4 [EAST YORKSHIRE MOTOR SERVICES, LTD. *v.* CLAYTON (VALUATION OFFICER)] 758
Rateable occupation—*Art gallery—Trust of gallery for enjoyment by the public in perpetuity—Gallery vested in local authority—Whether trusts allowed any potentiality of beneficial occupation by the local authority* [KINGSTON-UPON-HULL CORPN. *v.* CLAYTON (VALUATION OFFICER)] 118
Public park—Absence of formal "dedication" to the public—Acquisition for use as public walks and pleasure grounds—Powers of sale and leasing ancillary to use [BLAKE (VALUATION OFFICER) *v.* HENDON CORPN.] 601

RATIFICATION
Authority to sue. *See* PRACTICE (Parties—*Capacity—Local authority*).

REINSTATEMENT
Dismissed appeal. *See* COURT OF APPEAL (Reinstatement of dismissed appeal).

RELIGION
Charitable purpose. *See* CHARITY.

REMAND
See MAGISTRATES (Examining magistrates).

REMOTENESS OF DAMAGE
See DAMAGES.

RENT CONTROL
Rent tribunal—*Jurisdiction—Determination of question on which jurisdiction depends—Contract of tenancy—Identity of landlord—Circumstances of landlord—Furnished Houses (Rent Control) Act*, 1946 (*c.* 34), *s.* 2 (2) [R. *v.* PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL, *Ex parte* HAINES] 1047

RENT RESTRICTION
Acts—*Operation in rem. See* Sub-tenancy—*Letting—Letting to intermediate landlord outside Acts as agricultural holding let to farmer, post.*
Possession—*Sub-letting of whole of premises without consent of landlord—No evidence of there being such sub-letting at commencement of proceedings—Jurisdiction to make order for possession—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (*c.* 32), *Sch.* 1, *para.* (*d*) [FINKLE *v.* STRZELCZYK] 409
Sub-tenancy—*Letting—Letting to intermediate landlord outside Acts as agricultural holding let to farmer—Sub-tenancy of cottage on farm—Cottage occupied as private dwelling, not in connexion with farm work—Whether sub-tenant protected by Rent Restriction Acts—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (*c.* 17), *s.* 12 (2) *proviso* (iii) [CRITCHLEY *v.* CLIFFORD] 288
Possession. See Possession—*Sub-letting of whole of premises without consent of landlord, ante.*

RENT TRIBUNAL
See RENT CONTROL.

REPUDIATION
Contract. *See* CONTRACT.

RESTRICTIVE COVENANT
Successors in title—*Implication of words. See* COVENANT (Running with land—*Sale of theatre and cinema properties*).

RESTRICTIVE TRADE PRACTICES
Agreement—*New agreement—Test whether new agreement is "to the like effect" to another agreement in respect of restrictions declared to be contrary to the public interest—"Effect"—Test to be applied where court has given reasoned judgment on reference of original agreement—Restrictive Trade Practices Act*, 1956 (*c.* 68), *s.* 20 (3) [Re BLACK BOLT AND NUT ASSN. OF GREAT BRITAIN'S AGREEMENT (NO. 2)] 316
Injunction—*Restrictions declared contrary to public interest—Party enjoined—Whether trade federation should be included in order restraining the enforcing of the restrictions or making new agreement with like restrictions—Whether Federation, a registered trade union whose members were retail newsagents, was "carrying on business"—Restrictive Trade Practices Act*, 1956 (*c.* 68), *s.* 20 (3) [Re THE AGREEMENT BETWEEN THE NEWSPAPER PROPRIETORS' ASSN., LTD. AND THE NATIONAL FEDERATION OF RETAIL NEWSAGENTS, BOOKSELLERS AND STATIONERS] 428
Reference—*Newspaper supplies—London daily newspapers—Newsagents' permits—Agreement not to supply newspapers to wholesale newsagents except on terms that newspapers supplied only to retail newsagents holding permits—Permits issued by association of newspaper proprietors—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act*, 1956 (*c.* 68), *s.* 21 (1) (*b*) [Re THE AGREEMENT BETWEEN THE NEWSPAPER PROPRIETORS' ASSN., LTD. AND THE NATIONAL FEDERATION OF RETAIL NEWSAGENTS, BOOKSELLERS AND STATIONERS] 428

ROAD TRAFFIC
Dangerous driving—*Causing death by dangerous driving—Objective test—Admissibility of evidence of drink taken—Road Traffic Act*, 1960 (*c.* 16), *s.* 1 [R. *v.* MCBRIDE] 6
Sentence—Preventive detention—Circumstances which justify such a sentence—Protection of public [R. *v.* HIGGINBOTHAM] 616

ROAD TRAFFIC—*continued.*

Licence—*Public carriers' licence—Application—Contract A licence existing—Proposed substitution of A licence—Owner of goods carried under contract supporting application—Question whether proposed change in his best interests irrelevant to the grant of application* [MERCHANDISE TRANSPORT, LTD. *v.* BRITISH TRANSPORT COMMISSION, ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* SAME] 495

Application—Subsidiary company's application—Undertaking to carry only parent company's goods on outward journeys—Uneconomic competition for return loads—Parent company already having C licence—Conditional B licence appropriate—Whether relationship between subsidiary and parent company could be considered [MERCHANDISE TRANSPORT, LTD. *v.* BRITISH TRANSPORT COMMISSION, ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* SAME] 495

Transport Tribunal's appellate jurisdiction—Objection—Whether tribunal limited to objection—Precedent—Previous decisions not to inhibit tribunal examining the merits of each case [MERCHANDISE TRANSPORT, LTD. *v.* BRITISH TRANSPORT COMMISSION, ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* SAME] 495

London—*Waiting and loading restrictions—Prohibition of waiting longer than necessary to enable any person to "board" or "alight"—London Parking Zones (Waiting and Loading) (Restriction) Regulations,* 1960 (*S.I.* 1960 *No.* 594), *reg.* 4 (*a*) [CLIFFORD-TURNER *v.* WATERMAN] 974

Motor vehicle—*Waiting and loading restrictions—London. See* London, *ante.*

Negligence—*Contribution—Joint tortfeasors. See* TORT (Joint tortfeasors).

Contributory negligence—Motor cyclist not wearing crash helmet—Whether contributory negligence [HILDER *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD.] 709

Damages. See NEGLIGENCE (Damages—*Personal injury*).

Liability of passenger—Driver unknown—Driver driving as agent of passengers—Accident due to dangerous or careless driving and third persons injured [SCARSBROOK *v.* MASON] .. 767

Waiting and loading restrictions. *See* London, *ante.*

RULE AGAINST PERPETUITIES

See PERPETUITIES.

SALE

Shares—*Transfer compelled by statute—Whether sale. See* STAMP DUTY (Conveyance on sale—*Transfer of stock—Compulsory transfer under statutory provision*).

SALE OF LAND

Charity—*Consent of Charity Commissioners. See* CHARITY (Unincorporated association—*Trust for members of synagogue*).

SCAFFOLDING

See BUILDING (Building regulations).

SEA

Coast protection. *See* WATER AND WATERCOURSES (Coast protection).

SENTENCE

See CRIMINAL LAW (Practice; Sentence).

SERVANT

See MASTER AND SERVANT.

SETTLEMENT

Conflict of laws. *See* ESTATE DUTY (Deduction of debt—*Reimbursement—Duty leviable on death of life tenant of trust funds settled by Canadian settlement*).

Construction—*Beneficial trusts—"Male issue" and "male descendants"—Whether restricted to the male line of descent* [Re DU CROS' SETTLEMENT] 193

Death duty. *See* ESTATE DUTY.

Derivative settlement—*What settled property is for purposes of estate duty. See* ESTATE DUTY (Passing of property—*Settled property*).

Power—*Foreign guardianship order. See* CONFLICT OF LAWS (Foreign judgment—*Recognition*).

Powers of tenant for life—*Leasing—Settled and unsettled property comprised in one lease—Contract to grant lease in consideration of redevelopment—Whether "agreement for a lease"—Lease to take effect after twelve years—Property leased in lots—Aggregate rent exceeding one-fifth of aggregate annual values—Settled Land Act* 1925 (*c.* 18), *s.* 42 (1) (i), *s.* 44 (3) (iii), *s.* 90 (1) (iii), *s.* 117 (1) (x) [Re RYCROFT'S SETTLEMENTS] 581

Variation of settlement. *See* VARIATION OF SETTLEMENT (MATRIMONIAL CAUSES).

Variation of trusts—*Jurisdiction—Variation of Trusts Act,* 1958. *See* TRUST AND TRUSTEE (Variation of trusts by the court).

SHARE

Valuation for estate duty. *See* ESTATE DUTY (Company).

SHIPPING

Bill of lading—*Evidence of shipment of goods—Condition that weight, contents and value of bags shipped unknown* [ATTORNEY-GENERAL OF CEYLON *v.* SCINDIA STEAM NAVIGATION CO., LTD.] 684

Transfer of rights—Consignee's right to sue—Contract for sale of goods by charterers—Charter-party for carriage of goods within contract of sale—Charterers claiming for alleged shortage and contamination of goods after voyage—Whether right to sue vested in consignee (purchaser from charterers) to the exclusion of charterers—Bills of Lading Act, 1855 (*c.* 111), *s.* 1 [GARDANO & GIAMPARI *v.* GREEK PETROLEUM GEORGE MAMIDAKIS & CO.] 919

Carriage by sea—*Lighterage. See* Lighterage, *post.*

Carriage of goods by sea—*Short delivery—Bills of lading stating number of bags shipped but containing condition that weight, contents and value unknown—Mode of proof of contents and weight of missing bags by consignee—Indian Carriage of Goods by Sea Act,* 1925, *Schedule, art.* 111, *r.* 3, *r.* 4—*Carriage of Goods by Sea Act,* 1924 (*c.* 22), *Schedule, art.* 111, *r.* 3, *r.* 4 [ATTORNEY-GENERAL OF CEYLON *v.* SCINDIA STEAM NAVIGATION CO., LTD.] 684

Charterparty—*Right of suit—Transfer. See* Bill of lading—*Transfer of rights, ante.*

Lighterage—*Exceptions—London Lighterage Clause—Unseaworthiness—Exemption from liability if loss or damage occasioned by unseaworthiness of craft—Whether unseaworthiness to be construed as at commencement of service or after—Exemption excluded if unseaworthy barge supplied recklessly—Meaning of "recklessly"* [SHAWINIGAN, LTD. *v.* VOKINS & CO., LTD.] 396

Seaworthiness—*Exception. See* Lighterage, *ante.*

SHIPPING—*continued.*
Towage—*Contract—Arbitration. See* ARBITRATION (Stay of proceedings—*Protocol agreement—Contract containing arbitration clause alleged to be a nullity*).

SIERRA LEONE
See PRIVY COUNCIL.

SIGNATURE
Notice of intended application for warrant of ejectment—*Whose signature sufficient. See* LANDLORD AND TENANT (Small tenement—*Recovery of possession—Notice to quit—Notice of intended application for warrant for recovery of possession*).

SMALL TENEMENT
Recovery of possession under Small Tenements Recovery Act, 1838. *See* LANDLORD AND TENANT.

SOLDIER
Court-martial. *See* COURT-MARTIAL.

SOLICITOR
Withdrawal—*Application for order where no notice of change given—Appeal to Court of Appeal pending—Practice—R.S.C., Ord.* 7, *r.* 4 (1) [PRACTICE DIRECTION] 64

SPECIALIST
Medical—*Income tax. See* INCOME TAX (Deduction in computing profits—*Expenses*).

STAMP DUTY
Conveyance on sale—*Amalgamation of companies—Shares of brewery company acquired by purchasing company from shareholders—Liquidation of brewery company—Conveyance of brewery company's land to purchasing company—Conveyance by liquidator of brewery company on authority of shareholders—Transfers of shares by vendor shareholders not registered—No evidence whether transfers stamped—Whether conveyance attracted stamp duty as a conveyance on sale—Stamp Act,* 1891 (*c.* 39), *s.* 54, *Sch.* 1 [HENTY & CONSTABLE (BREWERS), LTD. *v.* INLAND REVENUE COMRS.] 1146
Lease—Whether a "conveyance"—Exchange of dissimilar legal estates—Whether an exchange or conveyance on sale—Stamp Act, 1891 (*c.* 39), *Sch.* 1—*Finance Act,* 1930 (*c.* 28), *s.* 42—*Finance Act,* 1938 (*c.* 46), *s.* 50 (1) (*b*) [LITTLEWOODS MAIL ORDER STORES, LTD. *v.* INLAND REVENUE COMRS.] 258
Transfer of stock—Compulsory transfer under statutory provision—Company acquiring nine-tenths of other company's stock—Transfers of dissenting shareholder's stock executed by nominee—Companies Act, 1948 (*c.* 38), *s.* 209—*Whether transfer on sale—Stamp Act,* 1891 (*c.* 39), *s.* 54, *Sch.* 1 [RIDGE NOMINEES, LTD. *v.* INLAND REVENUE COMRS.] 1108
Exchange—*Freehold estate exchanged for leasehold interest in same land—Stamp Act,* 1891 (*c.* 39), *s.* 54, *Sch.* 1 [LITTLEWOODS MAIL ORDER STORES, LTD. *v.* INLAND REVENUE COMRS.] .. 258
Guarantee. *See* "Mortgage, bond, debenture, covenant", *post.*
"Mortgage, bond, debenture, covenant"—"*Only or principal or primary security*"—*Guarantee—Deed securing a payment under an agreement not under seal for sale of stock—Additional secondary or collateral security to agreement—Stamp Act,* 1891 (*c.* 39), *Sch.* 1, *Mortgage, bond, etc.* [HENRY ANSBACHER & CO. *v.* INLAND REVENUE COMRS.] 211

STATEMENT OF CLAIM
Delivery. *See* PRACTICE (Pleading—*Delivery*).

STATEMENTS
Negligent. *See* NEGLIGENCE (Duty to take care).

STATUS
Foreign law. *See* CONFLICT OF LAWS (Foreign judgment—*Recognition*).

STATUTE
Construction—*Conjunctive or disjunctive—"Or" not construed "and"—Army Act,* 1955 (*c.* 18), *s.* 70 (2) [R. *v.* COX] 1194
Headings—Central headings—Reference to these in construing ambiguous paragraph [QUALTER, HALL & CO., LTD. *v.* BOARD OF TRADE] 389
In pari materia—"Conveyance"—Series of statutes—Whether same meaning in latter statute of series—Stamp Act, 1891 (*c.* 39), *Sch.* 1—*Finance Act,* 1938 (*c.* 46), *s.* 50 (1) (*b*) [LITTLEWOODS MAIL ORDER STORES, LTD. *v.* INLAND REVENUE COMRS.] 258
Mandatory or directory provisions—Coast protection—Works scheme providing for coast protection charges—Whether time limit within which coast protection authority to levy charges was mandatory or directory—Coast Protection Act, 1949 (*c.* 74), *s.* 7 (4) (*b*) [CULLIMORE *v.* LYME REGIS CORPN.] 1008
Crown—*Whether bound by statute—Parens patriae jurisdiction as to infants—Education Act,* 1944 (*c.* 31) [Re BAKER (INFANTS)] 276
Retrospective operation—*Workmen's compensation—Injury before amending Act passed—Disease first noticed many years later—Worker never in employment after amendment passed* [SUNSHINE PORCELAIN POTTERIES PROPRIETARY, LTD. *v.* NASH] 203

STATUTORY DUTY
Breach—*Causation—Breach by both employer and employee—Faults not co-extensive—Apportionment of responsibility—Non-compliance with building regulations—Liability for damages shared equally—Building (Safety, Health and Welfare) Regulations,* 1948 (*S.I.* 1948 *No.* 1145), *reg.* 4, *reg.* 29 (4) [MCMATH *v.* RIMMER BROS. (LIVERPOOL), LTD.] 1154
Breach of duty not contributing to injury—Plaintiff failing to show that safety apparatus, if provided, would have been used [WIGLEY *v.* BRITISH VINEGARS, LTD.] 418
Limitation of action. See LIMITATION OF ACTION (Breach of statutory duty).
See also COAL MINING; FACTORY (Dangerous machinery).

STATUTORY INSTRUMENT
Validity—*Power to make provision which "appears to them necessary" for discharging functions in relation to purchase tax. See* PURCHASE TAX (Regulations—*Validity*).

STAY OF PROCEEDINGS
Arbitration. *See* ARBITRATION.

SUMMING-UP
Criminal proceedings. *See* CRIMINAL LAW (Trial).

SUMMONS
Divorce—*Practice. See* DIVORCE (Practice).

SURCHARGE
Local government audit. *See* LOCAL GOVERNMENT (Audit).

SURTAX
Annual payment—*Capital or income—Purchase price payable by instalments—Total price exceeding current value of property sold—Price computed having regard to interest factor—Dissection of annual payment into capital and interest for tax purposes* [VESTEY *v.* INLAND REVENUE COMRS., INLAND REVENUE COMRS. *v.* VESTEY] 978
Undistributed income—*Direction and apportionment—Distribution not within reasonable time after end of accounting period—Distribution following earlier decision not to distribute—Income Tax Act*, 1952 (*c.* 10), *s.* 245 [C. H. W. (HUDDERSFIELD), LTD. *v.* INLAND REVENUE COMRS., SPENCER *v.* SAME, GARSIDE *v.* SAME] 551
Subsidiary company—Exemption—Company becoming subsidiary company towards end of accounting period—Apportionment on time basis—Shareholders ceasing to be members before end of accounting period—Dividend declared after previous decision not to declare dividend—Whether distribution within reasonable time after the accounting period—Income Tax Act, 1952 (*c.* 10), *s.* 245, *s.* 256 (4) [C. H. W. (HUDDERSFIELD) LTD. *v.* INLAND REVENUE COMRS., SPENCER *v.* SAME, GARSIDE *v.* SAME] 551

TENANT FOR LIFE
Powers. *See* SETTLEMENT (Powers of tenant for life).

THEATRE
Covenant to procure restriction on use—*Covenant on sale—Whether personal covenant or binding successors in title. See* COVENANT (Running with land—*Sale of theatre and cinema properties*).

TORT
Joint tortfeasors—*Contribution—Assessment in absence of party possibly liable for contributory negligence—Law Reform (Married Women and Tortfeasors) Act*, 1935 (*c.* 30), *s.* 6 (2) [MAXFIELD *v.* LLEWELLYN] 95
Separate tortfeasors—*Successive torts—Damages. See* DAMAGES (Measure of damages—*Separate tortfeasors*).

TOWAGE
Contract—*Arbitration. See* ARBITRATION (Stay of proceedings).

TOWN AND COUNTRY PLANNING
Building preservation order—*Special architectural or historic interest—Whether architectural or historic interest of neighbouring buildings may be taken into account—Whether effect of demolition and replacement of building subject to the order on collation of buildings of which it was one relevant—Town and Country Planning Act*, 1947 (*c.* 51), *s.* 29 (1) [IVEAGH (EARL) *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT] 98
Development—*Material change of use—Question of fact and degree* [EAST BARNET URBAN DISTRICT COUNCIL *v.* BRITISH TRANSPORT COMMISSION] 878
Enforcement notice—*Invalidity—Application for planning permission not determined within period allowed. See* Permission for development—*Notification of decision by local planning authority, post.*
Notice founded on breach of condition of grant of planning permission—Comprehensive condition applying to land other than that to which permission truly related—Land used by railway company for emergency coal stacking ground and by coal merchants as coal depot—User of land as transit depot for handling and storage of crated motor vehicles carried by rail—Whether "development"—Development permitted by General Development Orders—Permission not needed—Town and Country Planning Act, 1932 (*c.* 48), *s.* 53—*Town and Country Planning Act*, 1947 (*c.* 51), *s.* 12 (2)—*Town and Country Planning General Development Order*, 1948 (*S.I.* 1948 *No.* 958), *art.* 3 (1), *Sch.* 1, *Class* XVIII A—*Town and Country Planning General Development Order*, 1950 (*S.I.* 1950 *No.* 728), *art.* 3 (1), *Sch.* 1, *Class* XVIII A [EAST BARNET URBAN DISTRICT COUNCIL *v.* BRITISH TRANSPORT COMMISSION] .. 878
Permission for development—*Notification of decision by local planning authority—Notice of refusal not given within time laid down in General Development Order—Mandatory requirement—Notice void—Enforcement notice given before application for development permission also invalidated—Town and Country Planning Act*, 1947 (*c.* 51), *s.* 23 (3)—*Town and Country Planning General Development Order*, 1950 (*S.I.* 1950 *No.* 728), *art.* 5 (8) [EDWICK *v.* SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL] 10

TRADE
Adventure in the nature of trade—*Income tax. See* INCOME TAX (Income—*Builder*).
Restrictive practices. *See* RESTRICTIVE TRADE PRACTICES.

TRADE UNION
Domestic tribunal—*Natural justice—Adjudication on member's conduct—Appeal by member to annual conference of delegates—Whether member could thereafter seek redress in the courts* [ANNAMUNTHODO *v.* OILFIELDS WORKERS' TRADE UNION] 621
Election—*Pleading—Particulars. See* PRACTICE (Particulars).
Expulsion—*Charge—Rule under which expulsion awarded not mentioned in charges—Member expelled not present at hearing* [ANNAMUNTHODO *v.* OILFIELDS WORKERS' TRADE UNION] 621

TRANSFER
Compulsory—*Sale, as. See* STAMP DUTY (Conveyance on sale—*Transfer of stock—Compulsory transfer under statutory provision*).

TRANSPORT TRIBUNAL
Licensing—*Road traffic—Appeals. See* ROAD TRAFFIC (Licence—*Public carriers' licence*).

TRESPASS
Land—*Possession—Evidence—Inference of possession where land not used—Title temporarily vested in state—Continuance of former possession* [WUTA-OFEI *v.* DANQUAH] 596

TRIAL
Judge—*Indication of view before evidence completed. See* COURT OF APPEAL (New trial—*Apprehension of prejudgment of issues*).
See also CRIMINAL LAW.

TRIBUNAL
Decision—*Natural justice—Expulsion from trade union. See* TRADE UNION (Domestic tribunal).
Precedent—*Previous decisions of statutory tribunal as precedent—Not to inhibit examining into merits of each case in which called on to exercise statutory discretion* [MERCHANDISE TRANSPORT, LTD. *v.* BRITISH TRANSPORT COMMISSION, ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* SAME] 495

PAGE

TRINIDAD
See PRIVY COUNCIL (West Indies).

TRUST
Charitable trust. *See* CHARITY.

TRUST AND TRUSTEE
Breach of trust—*Consent—Nature of consent—Requisites to disentitle beneficiary from suing for breach—Invalid exercise of power of advancement—Whether action statute-barred—Whether trustee entitled to relief—Limitation Act*, 1939 (*c.* 21), *s.* 19 (2), *proviso—Trustee Act*, 1925 (*c.* 19), *s.* 61 [Re PAULING'S SETTLEMENT TRUSTS] 713
Charitable trust. *See* CHARITY.
Powers of trustee—*Advancement—Exercise—Validity of particular exercises of power* [Re PAULING'S SETTLEMENT TRUSTS] 713
Practice—*Service—Persons not served—Approval on behalf of respondents not served withheld* [Re CLARKE'S WILL TRUSTS] 1133
Relief—*Breach of trust. See* Breach of trust—*Consent, ante.*
Remuneration of trustee—*Investment company—Director trustees* [Re COOPER'S SETTLEMENT] 636
Uncertainty—*Investment clause. See* WILL (Investment clause—*Direction to invest in stocks, shares, and/or convertible debentures in the "blue chip" category*).
See also CHARITY (Uncertainty).
Variation of trusts by the court—*Investment—Extension of powers of investment—Discretion—Special circumstances to be shown to justify departure from scope enacted by Trustee Investments Act*, 1961—*Invalid clause in will showing testator's wish that his trustee should invest only in "blue chip" equities—Whether special circumstances established—Trustee Act*, 1925 (*c.* 19), *s.* 57—*Trustee Investments Act*, 1961 (*c.* 62), *s.* 15 [Re KOLB'S WILL TRUSTS] 811
Extension of powers of investment—Discretion—Special circumstances to be shown to justify departure from scope enacted by Trustee Investments Act, 1961—*Two-thirds of trust fund invested in investment trust company and one-third in authorised trustee investments—Approval sought for proposed arrangement giving trustees power to invest the whole trust fund in industrial equities—Remuneration of director trustees—Whether special circumstances established—Trustee Investments Act*, 1961 (*c.* 62), *s.* 15—*Variation of Trusts Act*, 1958 (*c.* 53), *s.* 1 [Re COOPER'S SETTLEMENT] 636
Discretion—Variation of Trusts Act, 1958 (*c.* 53), *s.* 1—*Trustee Investments Act*, 1961 (*c.* 62), *Sch.* 1, *Part* 4, *para.* 3 [Re CLARKE'S WILL TRUSTS] 1133
Jurisdiction—English marriage settlement to be replaced by trust abroad—Husband and wife emigrated to Canada and became domiciled there—Approval sought for proposed arrangement involving appointment of Canadian trustee in place of English trustee and resettlement of trust funds on trusts of new Canadian settlement—Variation of Trusts Act, 1958 (*c.* 53), *s.* 1 [Re SEALE'S MARRIAGE SETTLEMENT] 136

ULTRA VIRES
See HOUSING (Insurance).

UNCERTAINTY
Charitable gift. *See* CHARITY.
See also WILL (Investment clause—*Direction to invest in stocks, shares, and/or convertible debentures in the "blue chip" category*).

UNDUE INFLUENCE
See EQUITY.

UNINCORPORATED BODY
Charity. *See* CHARITY (Unincorporated association).

VARIATION OF MAINTENANCE ORDER
See DIVORCE (Maintenance—*Wife*).

VARIATION OF SETTLEMENT (MATRIMONIAL CAUSES)
Post-nuptial settlement—*Maintenance agreement made between decree nisi and decree absolute of divorce—Agreement including annuities for wife and children—Agreement by wife not to sue for permanent maintenance—Whether agreement was a post-nuptial settlement—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 25 [YOUNG *v.* YOUNG] 695

VARIATION OF TRUSTS
Court, by. *See* TRUST AND TRUSTEE (Variation of trusts by the court).

VERDICT
Special verdict. *See* CRIMINAL LAW (Appeal—*Insanity*).

VICTORIA
See PRIVY COUNCIL (Australia).

WARRANT
Ejectment—*Application for, under Small Tenements Recovery Act*, 1838 (*c.* 74). *See* LANDLORD AND TENANT (Small tenement).

WATER AND WATERCOURSES
Coast protection—*Works scheme—Coast protection charges—Time within which cost to be apportioned after the completion of the work to be specified in the scheme—Whether mandatory or directory provision—Whether determination after nearly two years was substantial compliance with time limit of six months—Coast Protection Act*, 1949 (*c.* 74), *s.* 7 (4) (*b*), (5) [CULLIMORE *v.* LYME REGIS CORPN.] 1008

WATER SUPPLY
Pumping station—*Whether a factory. See* FACTORY (Definition).

WEST INDIES
See PRIVY COUNCIL.

WIFE
Maintenance. *See* DIVORCE (Maintenance).

WILL
Charity. *See* CHARITY.
Gift—*"Born in the lifetime of" the testator—Special power of appointment—Life interest appointed to a nephew's widow during widowhood if "born in the lifetime" of the testator—En ventre sa mère at death of testator—Whether "born in the lifetime" of the testator* [Re STERN'S WILL TRUSTS] 1129

WILL—*continued.*
Investment clause—*Direction to invest in stocks, shares, and/or convertible debentures in the "blue chip" category—Uncertainty—Whether clause valid* [Re KOLB'S WILL TRUSTS] .. 811
Issue—*Male issue—Male descendants—Whether restricted to descent through males. See* SETTLEMENT (Construction—*Beneficial trusts*).
Legacy—*Burial ground—Legacy to build house on unconsecrated part of burial ground. See* BURIAL (Burial ground—*Disused*).
Remoteness—Time of ascertainment of legatee—When residue of testatrix' estate was realised—No trust for conversion—Whether time referred to was end of executors' year [Re PETRIE (*decd.*)] 1067

WINDING-UP
Company, of. *See* COMPANY.

WINDOW CLEANER
Factories Act—*Safety. See* FACTORY (Safe place of employment).

WRIT
Amendment—*Limitation of action. See* LIMITATION OF ACTION (Amendment of writ).
Nullity. See Defect in indorsement, *post.*
Parties. See PRACTICE (Parties).
Defect in indorsement—*Whether nullity—Whether curable by amendment or delivery of statement of claim* [PONTIN *v.* WOOD] 992
Service—*Setting aside. See* LIMITATION OF ACTION (Amendment of writ).

CASES NOTED

PAGE

Abrath *v.* North Eastern Ry. Co. (1883) (11 Q.B.D. 440; 52 L.J.Q.B. 620; 49 L.T. 618). *Applied in* Abbott *v.* Refuge Assurance Co., Ltd. .. 1074

Ackland & Pratten, Ltd. *v.* I.R. Comrs. ([1960] 3 All E.R. 377; [1960] 1 W.L.R. 1131). *Dictum of* CROSS, J., *approved in* I.R. Comrs. *v.* J. B. Hodge & Co. (Glasgow), Ltd. .. 172

Alexander *v.* Tredegar Iron & Coal Co., Ltd. ([1945] 2 All E.R. 275; [1945] A.C. 286; 114 L.J.K.B. 377; 173 L.T. 113). *Considered in* Cook *v.* National Coal Board .. 220

Ansbacher (Henry) & Co. *v.* I.R. Comrs. ([1960] 1 All E.R. 686; [1960] 1 W.L.R. 337). *Affirmed.* C.A. 211

Archer *v.* Catton & Co., Ltd. ([1954] 1 All E.R. 896; [1954] 1 W.L.R. 775). *Approved and applied in* Cartledge *v.* E. Jopling & Sons, Ltd. .. 482

A.-G. *v.* Dodington ([1897] 2 Q.B. 373; 66 L.J.Q.B. 684; 77 L.T. 299). *Followed in* Coutts & Co. *v.* I.R. Comrs. .. 158

A.-G. *v.* Felixstowe Gas Light Co. ([1907] 2 K.B. 984; 76 L.J.K.B. 1107; 97 L.T. 340). *Applied in* Ridge Nominees, Ltd. *v.* I.R. Comrs. .. 1108

A.-G. *v* H.R.H. Prince Ernest Augustus of Hanover ([1957] 1 All E.R. 53; [1957] A.C. 460; [1957] 2 W.L.R. 7). *Dictum of* VISCOUNT SIMONDS *applied in* Qualter, Hall & Co., Ltd. *v.* Board of Trade 389

A.-G. *v.* Jacobs Smith ([1895] 2 Q.B. 341; 64 L.J.Q.B. 605; 72 L.T. 714). *Considered in* Rennell (Lord) *v.* I.R. Comrs. .. 1028

A.-G. *v.* Mathieson ([1907] 2 Ch. 383; 76 L.J.Ch. 682; 97 L.T. 450). *Followed in* Neville Estates, Ltd. *v.* Madden .. 769

A.-G. for Colony of Hong Kong *v.* Kwok-a-Sing (1873) (L.R. 5 P.C. 179; 42 L.J.P.C. 64; 29 L.T. 114). *Distinguished in* R. *v.* Cox .. 1194

Baindail *v.* Baindail ([1946] 1 All E.R. 346; [1946] P. 129; 115 L.J.P. 68; 174 L.T. 324). *Dictum of* LORD GREENE, M.R., *applied in* Re Langley's Settlement Trusts .. 803

Baker (Infants), Re ([1961] 2 All E.R. 250; [1961] Ch. 303; [1961] 2 W.L.R. 626). *Affirmed.* C.A. 276

Baker *v.* Baker ([1953] 2 All E.R. 1199; [1954] P. 33; [1953] 3 W.L.R. 857). *Applied in* Walker *v.* Walker .. 14

Barclays Bank, Ltd. *v.* Ascott ([1961] 1 All E.R. 786; [1961] 1 W.L.R. 722). *Dictum of* BARRY, J., *approved in* Sunrose, Ltd. *v.* Gould .. 1142

Barnett *v.* Eccles Corpn. ([1900] 2 Q.B. 104). *Considered and explained in* Berry *v.* British Transport Commission .. 65

Beauchamp (Earl) *v.* Madresfield (1872) (L.R. 8 C.P. 245; 42 L.J.C.P. 32; 27 L.T. 606). *Considered and applied in* Re Bristol South East Parliamentary Election .. 354

Benham *v.* Gambling ([1941] 1 All E.R. 13; [1941] A.C. 167; 110 L.J.K.B. 53; 164 L.T. 293). *Observations of* VISCOUNT SIMON, L.C., *applied in* Oliver *v.* Ashman .. 323

Bennett *v.* Bennett ([1952] 1 All E.R. 422; [1952] 1 K.B. 262, 263). *Dictum of* DENNING, L.J., *applied in* L. *v.* L. .. 834

Beresford-Hope *v.* Sandhurst (Lady) (1889) (23 Q.B.D. 79; 58 L.J.Q.B. 316; 61 L.T. 150). *Followed in* Re Bristol South East Parliamentary Election .. 354

Bernal *v.* Bernal (1838) (7 L.J.Ch. 115). *Distinguished in* Re du Cros' Settlement .. 193

Berry *v.* British Transport Commission ([1960] 3 All E.R. 322; [1960] 3 W.L.R. 666). *Reversed on one point.* C.A. .. 65

Blunt *v.* Park Lane Hotel, Ltd. ([1942] 2 All E.R. 187; [1942] 2 K.B. 253; 111 L.J.K.B. 706; 167 L.T. 359). *Considered in* Clifford *v.* Clifford .. 231

Boaler, Re ([1914-15] All E.R. Rep. 1030; [1915] 1 K.B. 36; 83 L.J.K.B. 1637; 111 L.T. 503). *Dictum of* SCRUTTON, J., *applied in* Comrs. of Customs and Excise *v.* Cure & Deeley, Ltd. .. 641

Bolton *v.* Stone ([1951] 1 All E.R. 1086; [1951] A.C. 867). *Dictum of* LORD REID *applied in* Hilder *v.* Associated Portland Cement Manufacturers, Ltd. .. 709

Bolton (H. L.) (Engineering) Co., Ltd. *v.* Graham (T. J.) & Sons, Ltd. ([1956] 3 All E.R. 626; [1957] 1 Q.B. 168; [1956] 3 W.L.R. 809). *Dictum of* DENNING, L.J., *approved in* Bowes-Lyon *v.* Green 843

Bonnington Castings, Ltd. *v.* Wardlaw ([1956] 1 All E.R. 615; [1956] A.C. 613; [1956] 2 W.L.R. 707). *Applied in* Wigley *v.* British Vinegars, Ltd. .. 418

Bosworth and Gravesend Corpn., Re ([1905] 2 K.B. 426; 74 L.J.K.B. 810; 93 L.T. 226). *Considered in* Re Jewison's Will Trusts .. 1022

Brewster, Re ([1908] 2 Ch. 365; 77 L.J.Ch. 605; 99 L.T. 517). *Followed in* Re Matthews's Will Trusts S69

Bristow *v.* Cormican (1878) (3 App. Cas. 657). *Dictum of* LORD HATHERLEY *applied in* Wuta-Ofei *v.* Danquah .. 596

Brown *v.* Bullock ([1961] 1 All E.R. 206; [1961] 1 W.L.R. 53). *Affirmed.* C.A. .. 129

Brown *v.* Notley (1848) (18 L.J.Ex. 40; 12 L.T.O.S. 223). *Dictum of* PARKE, B., *disapproved in* Wuta-Ofei *v.* Danquah .. 596

Bullard *v.* R. ([1957] A.C. 635; [1957] 3 W.L.R. 656). *Considered in* R. *v.* Porritt .. 463

Bullock *v.* G. John Power (Agencies), Ltd. ([1956] 1 All E.R. 498; [1956] 1 W.L.R. 171). *Applied in* Eaves *v.* Morris Motors, Ltd. .. 233

Bullock-Webster, Re ([1936] Ch. 1; 105 L.J.Ch. 291; 153 L.T. 448). *Distinguished in* Re Latham (*decd.*) .. 903

Burnell *v.* Downham Market U.D.C. ([1952] 1 All E.R. 601; [1952] 2 Q.B. 55). *Considered in* Kingston-upon-Hull Corpn. *v.* Clayton .. 118

Caldow *v.* Pixell (1877) (2 C.P.D. 566; 46 L.J.Q.B. 543; 36 L.T. 470). *Dicta of* DENMAN, J., *applied in* Cullimore *v.* Lyme Regis Corpn. .. 1008

Canada & Dominion Sugar Co., Ltd. *v.* Canadian National (West Indies) Steamships, Ltd. ([1947] A.C. 46; [1947] L.J.R. 385). *Considered in* A.-G. of Ceylon *v.* Scindia Steam Navigation Co., Ltd. 684

Candler *v.* Crane, Christmas & Co. ([1951] 1 All E.R. 426; [1951] 2 K.B. 164). *Considered in* Clayton *v.* Woodman & Son (Builders) Ltd. .. 249

—— *Applied in* Hedley Byrne & Co., Ltd. *v.* Heller & Partners, Ltd. .. 891

—— ([1951] 1 All E.R. 440; [1951] 2 K.B. 191). *Dictum of* ASQUITH, L.J., *applied in* Hedley Byrne & Co., Ltd. *v.* Heller & Partners, Ltd. .. 891

Carltona, Ltd. *v.* Works Comrs. ([1943] 2 All E.R. 564). *Dictum of* LORD GREENE, M.R., *applied in* Comrs. of Customs and Excise *v.* Cure & Deeley, Ltd. .. 641

Cavanagh *v.* Ulster Weaving Co., Ltd. ([1959] 2 All E.R. 751, 752; [1960] A.C. 166, 167; [1959] 3 W.L.R. 274). *Dictum of* LORD SOMERVELL OF HARROW *applied in* Hilder *v.* Associated Portland Cement Manufacturers, Ltd. .. 709

Chillingworth *v.* Chambers ([1896] 1 Ch. 699; 65 L.J.Ch. 347; 74 L.T. 37). *Observations of* LINDLEY, L.J., *considered in* Re Pauling's Settlement Trusts .. 713

Clayton *v.* Kingston-upon-Hull Corpn. ([1960] 3 All E.R. 840; [1961] 1 Q.B. 345; [1961] 2 W.L.R. 1). *Affirmed.* H.L. .. 118

Clayton *v.* Woodman & Son (Builders), Ltd. (post, p. 249; [1961] 3 W.L.R. 987). *Distinguished in* Hedley Byrne & Co., Ltd. *v.* Heller & Partners, Ltd. .. 891

Clayton Newbury, Ltd. *v.* Findlay ([1953] 2 All E.R. 826; [1953] 1 W.L.R. 1194). *Considered in* Bronester, Ltd. *v.* Priddle .. 471

Close *v.* Steel Co. of Wales, Ltd. ([1961] 2 All E.R. 953; [1961] 3 W.L.R. 319). *Applied in* Eaves *v.* Morris Motors, Ltd. .. 233

—— *Applied in* Sparrow *v.* Fairey Aviation Co., Ltd. .. 452

PAGE

Cobb *v.* Cobb ([1955] 2 All E.R. 696; [1955] 1 W.L.R. 781). *Considered in* Allen *v.* Allen 385
Collison, Re (1879) (12 Ch.D. 834; 48 L.J.Ch. 720; 41 L.T. 175). *Applied in* Re Petrie (*decd.*) .. 1067
Cornish *v.* Brook Green Laundry, Ltd. ([1959] 1 All E.R. 373; [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215). *Applied in* Bowes-Lyon *v.* Green 843
Cowley (Earl) *v.* Cowley (Countess) ([1901] A.C. 450; 70 L.J.P. 83; 85 L.T. 254). *Considered in* Re Bristol South East Parliamentary Election 354
Cox *v.* Cutler & Sons, Ltd. and Hampton Court Gas Co. ([1948] 2 All E.R. 667; [1949] L.J.R. 297). *Dictum of* SCOTT, L.J. *followed in* Longhurst *v.* Guildford Godalming and District Water Board .. 545
Davies *v.* Elsby Brothers, Ltd. ([1960] 3 All E.R. 672; [1961] 1 W.L.R. 170). *Distinguished in* Whittam *v.* W. J. Daniel & Co., Ltd. 796
Davies *v.* Swan Motor Co. (Swansea), Ltd. ([1949] 1 All E.R. 632; [1949] 2 K.B. 326). *Dicta of* DENNING, L.J., *applied in* McMath *v.* Rimmer Bros. (Liverpool), Ltd. 1154
Den of Airlie S.S. Co., Ltd. *v.* Mitsui & Co., Ltd. and British Oil & Cake Mills, Ltd. (1912) (106 L.T. 451). *Applied in* Gardano & Giampari *v.* Greek Petroleum George Mamidakis & Co. 919
Director of Public Prosecutions *v.* Smith ([1960] 3 All E.R. 172; [1961] A.C. 335; [1960] 3 W.L.R. 560). *Dictum of* VISCOUNT KILMUIR, L.C., *applied in* R. *v.* Metharam 200
Duffy, Re ([1948] 2 All E.R. 756; [1949] Ch. 28; [1949] L.J.R. 133). *Considered in* Winter *v.* I.R. Comrs. 855
—— ([1948] 2 All E.R. 760; [1949] Ch. 36, 37; [1949] L.J.R. 137). *Dictum of* LORD GREENE, M.R., *disapproved in* Winter *v.* I.R. Comrs. 855
Duke's Court Estates, Ltd. *v.* Associated British Engineering, Ltd. ([1948] 2 All E.R. 137; [1948] Ch. 458; [1948] L.J.R. 1892). *Followed in* Chapple *v.* Electrical Trades Union 612
Dulieu *v.* White & Sons ([1901] 2 K.B. 679; 70 L.J.K.B. 842; 85 L.T. 130). *Principle stated by* KENNEDY, J., *applied in* Smith *v.* Leech Brain & Co., Ltd. 1159
Dunlop Pneumatic Tyre Co., Ltd. *v.* New Garage & Motor Co., Ltd. ([1914-15] All E.R. Rep. 742; [1915] A.C. 86; 83 L.J.K.B. 1576; 111 L.T. 863). *Dictum of* LORD DUNEDIN *applied in* Phonographic Equipment (1958), Ltd. *v.* Muslu 626
Dunne *v.* Byrne ([1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394). *Considered in* Re Smith's Will Trusts 824
Eaves *v.* Morris Motors, Ltd. ([1960] 3 All E.R. 656; [1961] 1 W.L.R. 511). *Reversed.* C.A. 233
Elliot *v.* Joicey ([1935] All E.R. Rep. 589; [1935] A.C. 233; 104 L.J.Ch. 122; sub nom. Re Joicey, Joicey *v.* Elliot, 152 L.T. 404). *Principle stated by* LORD RUSSELL OF KILLOWEN *explained and applied in* Re Stern's Will Trusts 1129
Emanuel *v.* Symon ([1908] 1 K.B. 309; 77 L.J.K.B. 184; 98 L.T. 308). *Dictum of* BUCKLEY, L.J., *considered in* Blohn *v.* Desser 1
Evans *v.* Benyon (1887) (37 Ch.D. 329; 58 L.T. 700). *Considered in* Re Pauling's Settlement Trusts .. 713
Farnell's Settled Estates, Re (1886) (33 Ch.D. 599). *Distinguished in* Re Rycroft's Settlements .. 581
Felstead *v.* R. ([1914-15] All E.R. Rep. 41; [1914] A.C. 534; 83 L.J.K.B. 1132; 111 L.T. 218). *Followed in* R. *v.* Duke 737
Fendoch Investment Trust Co. *v.* Inland Revenue Comrs., Alporteno Investment Trust Co. *v.* Inland Revenue Comrs. ([1943] 2 All E.R. 413; 169 L.T. 203; *affd.* H.L., [1945] 2 All E.R. 140; sub nom. Alporteno Investment Trust Co. *v.* Inland Revenue Comrs., Fendoch Investment Trust Co. *v.* Inland Revenue Comrs., 114 L.J.K.B. 291; 173 L.T. 35). *Applied in* C. H. W. (Huddersfield), Ltd. *v.* I.R. Comrs. 551
Foley (Lady) *v.* Fletcher (1858) (28 L.J.Ex. 100; 33 L.T.O.S. 11). *Dicta of* POLLOCK, C.B., *and* BRAMWELL, B., *not followed in* Vestey *v.* I.R. Comrs. 978
Foster (John) & Sons, Ltd. *v.* I.R. Comrs. ([1894] 1 Q.B. 516; 63 L.J.Q.B. 173; 69 L.T. 817). *Applied in* Ridge Nominees, Ltd. *v.* I.R. Comrs. 1108
Francis Jackson Developments, Ltd. *v.* Hall ([1951] 2 All E.R. 74; [1951] 2 K.B. 488). *Distinguished in* R. *v.* Paddington and St. Marylebone Rent Tribunal, *Ex parte* Haines 1047
Fribance *v.* Fribance ([1957] 1 All E.R. 357; [1957] 1 W.L.R. 384). *Considered in* Allen *v.* Allen .. 385
Fry *v.* Salisbury House Estate, Ltd. ([1930] All E.R. Rep. 538; [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77). *Applied in* Mitchell *v.* Ross 49
Furness Ry. Co. *v.* I.R. Comrs. (1864) (33 L.J Ex. 173; 10 L.T. 161). *Applied in* Ridge Nominees, Ltd. *v.* I.R. Comrs. 1108
Gas Light & Coke Co. *v.* Towse (1887) (35 Ch.D. 519; 56 L.J.Ch. 889; 56 L.T. 602). *Applied in* Re Rycroft's Settlements 581
Gilmour *v.* Coats ([1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034). *Applied in* Neville Estates, Ltd. *v.* Madden 769
Ginty *v.* Belmont Building Supplies, Ltd. ([1959] 1 All E.R. 423, 424). *Principle approved in* McMath *v.* Rimmer Bros. (Liverpool), Ltd. 1154
Great Western Ry. Co. *v.* I.R. Comrs. ([1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86). *Applied in* Ridge Nominees, Ltd. *v.* I.R. Comrs. 1108
Green *v.* Bowes-Lyon ([1961] 1 All E.R. 13; [1961] 1 W.L.R. 503). *Affirmed.* H.L. 843
Hankey *v.* Clavering ([1942] 2 All E.R. 311; [1942] 2 K.B. 326; 111 L.J.K.B. 711; 167 L.T. 193). *Distinguished in* Sunrose, Ltd. *v.* Gould 1142
Hare *v.* Putney Overseers (1881) (7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339). *Considered in* Kingston-upon-Hull Corpn. *v.* Clayton 118
Harpur's Will Trusts, Re ([1960] 3 All E.R. 237; [1960] 3 W.L.R. 607). *Affirmed.* C.A. 588
Harris *v.* Bright's Asphalt Contractors, Ltd. ([1953] 1 All E.R. 395; [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341). *Approved in* Oliver *v.* Ashman 323
Hawken (S.A.), Ltd., Re ([1950] 2 All E.R. 413). *Dictum of* WYNN-PARRY, J., *applied in* Re Davis Investments (East Ham), Ltd. 926
Hayfield *v.* Hayfield ([1957] 1 All E.R. 601; [1957] 1 W.L.R. 477). *Dictum of* SACHS, J., *applied in* Young *v.* Young (No. 2) 793
Henty & Constable (Brewers), Ltd. *v.* I.R. Comrs. ([1961] 2 All E.R. 372; [1961] 1 W.L.R. 1018). *Affirmed.* C.A. 1146
Herniman *v.* Smith ([1938] 1 All E.R. 8; [1938] A.C. 316; 107 L.J.K.B. 230). *Test approved, applied in* Abbott *v.* Refuge Assurance Co., Ltd. 1074
Heyman *v.* Darwins, Ltd. ([1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306). *Considered in* The Tradesman 661
Hill *v.* Baxter ([1958] 1 All E.R. 196; [1958] 1 Q.B. 284; [1958] 2 W.L.R. 81). *Dicta of* DEVLIN, J., *followed in* Bratty *v.* A.-G. for Northern Ireland 523
Hill *v.* Luton Corpn. ([1951] 1 All E.R. 1028; [1951] 2 K.B. 387). *Considered and distinguished in* Pontin *v.* Wood 992
Hip Foong Hong *v.* Neotia & Co. ([1918] A.C. 894; 87 L.J.P.C. 145; 119 L.T. 590). *Dictum of* LORD Buckmaster *applied in* Meek *v.* Fleming 148
Hoare *v.* Grazebrook, M. & W., Ltd. ([1957] 1 All E.R. 470; [1957] 1 W.L.R. 638). *Disapproved by* WILLMER, L.J., *in* Eaves *v.* Morris Motors, Ltd. 240
Hoare *v.* Green (Robert), Ltd. ([1907] 2 K.B. 315; 76 L.J.K.B. 730; 96 L.T. 724). *Considered in* Longhurst *v.* Guildford Godalming and District Water Board 545
Hogarth Shipping Co., Ltd. *v.* Blyth, Greene, Jourdain & Co., Ltd. ([1917] 2 K.B. 534; 86 L.J.K.B. 1426; 117 L.T. 290). *Applied in* A.-G. of Ceylon *v.* Scindia Steam Navigation Co., Ltd. 684

PAGE

Hogarth Shipping Co., Ltd. *v.* Blyth, Greene, Jourdain & Co., Ltd. ([1917] 2 K.B. 542). *Dictum of* LUSH, J., *applied in* A.-G. of Ceylon *v.* Scindia Steam Navigation Co., Ltd. 684
Hughes *v.* Bank of New Zealand ([1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463). *Distinguished in* Mitchell *v.* Ross 49
Hyde *v.* Pimley ([1952] 2 All E.R. 104; [1952] 2 Q.B. 511). *Dictum of* SIR RAYMOND EVERSHED, M.R., *explained in* Finkle *v.* Strzelczyk 409
Inglis *v.* Robertson & Baxter ([1898] A.C. 630; 67 L.J.P.C. 114; 79 L.T. 227). *Dictum of* LORD HERSCHELL *applied in* Qualter, Hall & Co., Ltd. *v.* Board of Trade 389
Inland Revenue Comrs. *v.* Baddeley ([1955] 1 All E.R. 525; [1955] A.C. 572; [1955] 2 W.L.R. 552). *Distinguished in* Neville Estates, Ltd. *v.* Madden 769
Inland Revenue Comrs. *v.* Hodge (J.B.) & Co. (Glasgow), Ltd. (post, p. 172; [1961] 1 W.L.R. 1216). *Distinguished in* E. Y. L. Trading Co., Ltd. *v.* I.R. Comrs. 1121
Inland Revenue Comrs *v.* Priestley ([1901] A.C. 208; 70 L.J.P.C. 41; 84 L.T. 700). *Followed in* Coutts & Co. *v.* I.R. Comrs. 158
Inland Revenue Comrs. *v.* Ramsay ([1935] All E.R. Rep. 854; 154 L.T. 147). *Dictum of* ROMER, L.J., *not followed in* Vestey *v.* I.R. Comrs. 978
Inland Revenue Comrs. *v.* Wesleyan and General Assurance Society ([1946] 2 All E.R. 751; 176 L.T. 85). *Dictum of* LORD GREENE, M.R., *not followed in* Vestey *v.* I.R. Comrs. 978
Johnson *v.* Crook (1879) (12 Ch.D. 644; 48 L.J.Ch. 779; 41 L.T. 401). *Dictum of* SIR GEORGE JESSEL, M.R., *applied in* Re Petrie (*decd.*) 1067
Johnson *v.* J. Stone & Co. (Charlton), Ltd. ([1961] 1 All E.R. 869; [1961] 1 W.L.R. 849). *Overruled in* Sparrow *v.* Fairey Aviation Co., Ltd. 452
Jones *v.* I.R. Comrs. ([1895] 1 Q.B. 484; 64 L.J.Q.B. 84; 71 L.T. 763). *Applied in* Henry Ansbacher & Co. *v.* I.R. Comrs. 211
Kara *v.* Kara and Holman ([1948] 2 All E.R. 17; [1948] P. 289). *Dicta of* LORD GREENE, M.R., *applied in* Turner *v.* Turner 944
Kirkness *v.* John Hudson & Co., Ltd. ([1955] 2 All E.R. 345; [1955] A.C. 696; [1955] 2 W.L.R. 1135). *Considered in* Ridge Nominees, Ltd. *v.* I.R. Comrs. 1108
L. *v.* L. (post. p. 20; [1961] 3 W.L.R. 544). *Reversed.* C.A. 834
Ladd *v.* Marshall ([1954] 3 All E.R. 748; [1954] 1 W.L.R. 1491). *Dictum of* DENNING, L.J., *applied in* Crook *v.* Derbyshire 786
Lambeth Overseers *v.* London County Council ([1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795). *Explained and distinguished in* Kingston-upon-Hull Corpn. *v.* Clayton 118
—— *Followed in* Blake *v.* Hendon Corpn. 601
Lamont (James) & Co., Ltd. *v.* Hyland, Ltd. (No. 1) ([1950] 1 All E.R. 341; [1950] 1 K.B. 585). *Considered and distinguished in* National Benzole Co., Ltd. *v.* Gooch 1097
Langley's Settlement Trusts, Re ([1961] 1 All E.R. 78; [1961] 1 W.L.R. 41). *Affirmed.* C.A. 803
Le Lievre *v.* Gould ([1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626). *Considered in* Clayton *v.* Woodman & Son (Builders), Ltd. 249
—— *Applied in* Hedley Byrne & Co., Ltd. *v.* Heller & Partners, Ltd. 891
Leahy *v.* A.-G. of New South Wales ([1959] 2 All E.R. 300; [1959] A.C. 457; [1959] 2 W.L.R. 722). *Applied in* Neville Estates, Ltd. *v.* Madden 769
Lewis *v.* Lewis ([1958] 1 All E.R. 859; [1958] P. 193; [1958] 2 W.L.R. 747). *Considered in* Clifford *v.* Clifford 231
Liddiard, Re (1880) (14 Ch.D. 310; 49 L.J.Ch. 373; 42 L.T. 621). *Considered in* Re Seale's Marriage Settlement 136
Lilley *v.* Roney (1892) (61 L.J.Q.B. 727). *Distinguished in* Lincoln *v.* Daniels 740
Lincoln *v.* Daniels ([1960] 3 All E.R. 205; [1960] 1 W.L.R. 852). *Affirmed.* C.A. 740
Littlewoods Mail Order Stores, Ltd. *v.* I.R. Comrs. ([1961] 1 All E.R. 195; [1961] Ch. 210; [1961] 2 W.L.R. 25). *Affirmed.* C.A. 258
London & North Eastern Ry. Co. *v.* British Trawlers' Federation, Ltd. ([1934] All E.R. Rep. 589; [1934] A.C. 301; 103 L.J.K.B. 320; sub nom. British Trawlers' Federation *v.* London & North Eastern Ry. Co., 150 L.T. 467). *Dictum of* LORD MACMILLAN *followed in* Garland & Flexman (a firm) *v.* Wisbech Corpn. 342
London County Council *v.* Greenwich Corpn. ([1928] All E.R. Rep. 724; [1929] 1 Ch. 305; 98 L.J.Ch. 49; 140 L.T. 456). *Considered in* Re Jewison's Will Trusts 1022
Longhurst *v.* Guildford Godalming and District Water Board ([1960] 3 All E.R. 664; [1961] 1 Q.B. 408; [1960] 3 W.L.R. 1059). *Affirmed.* H.L. 545
Lort-Williams *v.* Lort-Williams ([1951] 2 All E.R. 245; [1951] P. 403). *Dictum of* DENNING, L.J., *applied in* Young *v.* Young 695
Lywood *v.* Warwick (1860) (30 L.J.Ch. 507). *Followed in* Re Du Cros' Settlement 193
M. (an infant) Re ([1961] 1 All E.R. 788; [1961] Ch. 328; [1961] 2 W.L.R. 350). *Applied in* Re Baker (infants). 276
M'Alister *v.* Stevenson ([1932] All E.R. Rep. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281). *Applied in* Clayton *v.* Woodman & Son (Builders), Ltd. 249
McNeill, Re ([1957] 3 All E.R. 508; [1958] Ch. 259; [1957] 3 W.L.R. 1007). *Applied in* Re Latham (*decd.*) 903
Mancini *v.* Director of Public Prosecutions ([1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353). *Applied in* Bratty *v.* A.-G. for Northern Ireland 523
Married Women's Property Act, 1882, Re, Re Humphery and Humphery ([1917] 2 K.B. 72; 86 L.J.K.B. 775; 117 L.T. 7). *Not followed in* Re Edward's Questions 580
Marshall *v.* Nottingham City Corpn. ([1960] 1 All E.R. 665; [1960] 1 W.L.R. 717). *Dictum of* GLYN-JONES, J., *applied in* East Barnet U.D.C. *v.* British Transport Commission 878
Meering *v.* Grahame-White Aviation Co., Ltd. (1919) (122 L.T. 44). *Applied in* Abbott *v.* Refuge Assurance Co., Ltd. 1074
Melvill *v.* Melvill ([1930] All E.R. Rep. 79; [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206). *Distinguished in* Young *v.* Young 695
Midland Bank Executor and Trustee Co., Ltd. *v.* Inland Revenue Comrs. ([1959] 1 All E.R. 180; [1959] Ch. 277; [1959] 2 W.L.R. 77). *Considered in* Coutts & Co. *v.* I.R. Comrs. 158
Mills *v.* Mills ([1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272). *Not followed in* L. *v.* L. 20
—— *Followed in* L. *v.* L. 834
Mills Conduit Investments, Ltd. *v.* Tattersall ([1940] 1 All E.R. 283; 162 L.T. 382). *Dictum of* DU PARCQ, L.J., *applied in* Edgware Trust, Ltd. *v.* Lawrence 141
Mitchell *v.* Ross ([1960] 2 All E.R. 218; [1960] Ch. 498; [1960] 2 W.L.R. 766). *Reversed.* H.L. .. 49
Moore (Percy G.), Ltd. *v.* Stretch ([1951] 1 All E.R. 228). *Distinguished in* Critchley *v.* Clifford .. 288
Mounsdon *v.* Weymouth and Melcombe Regis Corpn. ([1960] 1 All E.R. 538; [1960] 1 Q.B. 645; [1960] 2 W.L.R. 484). *Applied in* East Barnet U.D.C. *v.* British Transport Commission 878
Mountain (Alexander) & Co. *v.* Rumere, Ltd. ([1948] 2 All E.R. 484; [1948] 2 K.B. 441). *Dictum of* COHEN, L.J., *applied in* Whittam *v.* W. J. Daniel & Co., Ltd. 796
Muller *v.* Trafford ([1901] 1 Ch. 54; 70 L.J.Ch. 72). *Considered in* Weg Motors, Ltd. *v.* Hales 181
New Chinese Antimony Co., Ltd. *v.* Ocean S.S. Co., Ltd. ([1917] 2 K.B. 664; 86 L.J.K.B. 1417; 117 L.T. 297). *Distinguished in* A.-G. of Ceylon v. Scindia Steam Navigation Co., Ltd. 684
Nicholls *v.* Austin (Leyton), Ltd. ([1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5). *Applied in* Sparrow *v.* Fairey Aviation Co., Ltd. 452

PAGE

Nicholls *v.* Austin (Leyton), Ltd. ([1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5). *Applied in* Eaves *v.* Morris Motors, Ltd. .. 233
Nicoll *v.* Austin (1935) (19 Tax Cas. 531). *Considered in* Butter *v.* Bennett .. 1041
Nocton *v.* Lord Ashburton ([1914-15] All E.R. Rep. 45; [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641). *Considered in* Hedley Byrne & Co., Ltd. *v.* Heller & Partners, Ltd. .. 891
Norfolk (Earldom) Case ([1907] A.C. 10; 76 L.J.P.C. 9; 95 L.T. 682). *Followed in* Re Bristol South East Parliamentary Election .. 354
North Riding of Yorkshire County Valuation Committee *v.* Redcar Corpn. ([1942] 2 All E.R. 589; [1943] K.B. 114; 112 L.J.K.B. 97; 168 L.T. 81). *Distinguished in* Blake *v.* Hendon Corpn. .. 601
Nouvion *v.* Freeman (1889) (15 App. Cas. 1; 59 L.J.Ch. 337; 62 L.T. 189). *Applied in* Blohn *v.* Desser 1
Oak Property Co., Ltd. *v.* Chapman ([1947] 2 All E.R. 1; [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364). *Considered in* Finkle *v.* Strzelczyk .. 409
Olds Discount Co., Ltd. *v.* John Playfair, Ltd. ([1938] 3 All E.R. 275; 159 L.T. 332). *Applied in* Chow Yoong Hong *v.* Choong Fah Rubber Manufactory .. 1163
Oliver *v.* Ashman ([1960] 3 All E.R. 677; [1961] 1 Q.B. 337; [1960] 3 W.L.R. 924). *Affirmed for reasons partly different.* C.A. .. 323
Overseas Tankship (U.K.), Ltd. *v.* Morts Dock & Engineering Co., Ltd. (The Wagon Mound) ([1961] 1 All E.R. 404; [1961] A.C. 388; [1961] 2 W.L.R. 126). *Considered in* Smith *v.* Leech Brain & Co., Ltd. .. 1159
Pachner *v.* Parker (formerly Pachner) ([1960] 1 All E.R. 159; [1960] 1 W.L.R. 486). *Applied in* L. *v.* L. .. 20
Palmer *v.* Palmer ([1954] 3 All E.R. 494; [1955] P. 4; [1954] 3 W.L.R. 756). *Applied in* S. *v.* S. .. 133
Parsons *v.* Barclay & Co., Ltd. (1910) (103 L.T. 199). *Dictum of* COZENS-HARDY, M.R., *followed in* Hedley Byrne & Co., Ltd. *v.* Heller & Partners, Ltd. .. 891
Pinson *v.* Lloyds & National Provincial Foreign Bank, Ltd. ([1941] 2 All E.R. 636; [1941] 2 K.B. 72; 110 L.J.K.B. 657; 165 L.T. 360). *Applied in* Chapple *v.* Electrical Trades Union .. 612
—— ([1941] 2 All E.R. 644; [1951] 2 K.B. 84; 110 L.J.K.B. 663; 165 L.T. 364). *Dictum of* STABLE, J., *applied in* Chapple *v.* Electrical Trades Union .. 612
Point of Ayr Collieries, Ltd. *v.* Lloyd-George ([1943] 2 All E.R. 547). *Dictum of* LORD GREENE, M.R., *applied in* Comrs. of Customs and Excise *v.* Cure & Deeley, Ltd. .. 641
Polemis and Furness, Withy & Co., Ltd., Re ([1921] All E.R. Rep. 40; [1921] 3 K.B. 560; sub nom., Polemis *v.* Furness, Withy & Co., 90 L.J.K.B. 1353; 126 L.T. 154). *Treated as not binding in* Smith *v.* Leech Brain & Co., Ltd. .. 1159
Ponsford and Newport District School Board, Re ([1894] 1 Ch. 454; 63 L.J.Ch. 278; sub nom. Ponsford *v.* Newport District School Board, 70 L.T. 502). *Considered in* Re Jewison's Will Trusts .. 1022
Pope *v.* D. Murphy & Son, Ltd. ([1960] 2 All E.R. 873; [1960] 2 W.L.R. 861). *Overruled in* Oliver *v.* Ashman .. 323
Potteries Electric Traction Co., Ltd. *v.* Bailey ([1930] All E.R. Rep. 63; [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410). *Applied in* East Yorkshire Motor Services, Ltd. *v.* Clayton .. 758
Praed *v.* Graham (1889) (24 Q.B.D. 55; 59 L.J.Q.B. 230). *Dictum of* LORD ESHER, M.R., *applied in* Meek *v.* Fleming .. 148
Pratt *v.* Pratt ([1939] 3 All E.R. 438; [1939] A.C. 420; 108 L.J.P. 98; 161 L.T. 50). *Dictum of* LORD MACMILLAN *adopted by* LORD ROMER *in* COHEN *v.* COHEN ([1940] 2 All E.R. 335; [1940] A.C. 638; 109 L.J.P. 56; 163 L.T. 184). *Explained in* Brewer *v.* Brewer .. 957
Prince *v.* Prince ([1950] 2 All E.R. 375; [1951] P. 71) *Followed in* Turner *v.* Turner .. 944
Prout *v.* Hunter ([1924] All E.R. Rep. 53; [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193). *Applied in* Critchley *v.* Clifford .. 288
Pyx Granite Co., Ltd. *v.* Ministry of Housing and Local Government ([1959] 3 All E.R. 6; [1960] A.C. 268; [1959] 3 W.L.R. 357). *Dictum of* VISCOUNT SIMONDS *applied in* Comrs. of Customs and Excise *v.* Cure & Deeley, Ltd. .. 641
Qualter, Hall & Co., Ltd. *v.* Board of Trade ([1961] 1 All E.R. 210; [1961] Ch. 121; [1961] 2 W.L.R. 63). *Affirmed in part.* C.A. .. 389
Quartz Hill Gold Mining Co. *v.* Eyre (1883) (11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.T. 249). *Considered in* Berry *v.* British Transport Commission .. 65
R. *v.* Caddy ([1959] 3 All E.R. 138 n.; [1959] 1 W.L.R. 868). *Applied in* R. *v.* Essex Quarter Sessions, *Ex parte* Larkin .. 930
R. *v.* Cook ([1959] 2 All E.R. 97; [1959] 2 Q.B. 340; [1959] 2 W.L.R. 616). *Applied in* R. *v.* Flynn .. 58
R. *v.* County Licensing (Stage Plays) Committee of Flint C.C., *Ex parte* Barrett ([1957] 1 All E.R. 122; [1957] 1 Q.B. 367, 368; [1957] 2 W.L.R. 103). *Dictum of* JENKINS, L.J., *adopted in* Merchandise Transport, Ltd. *v.* British Transport Commission .. 495
R. *v.* Day ([1940] 1 All E.R. 403; 162 L.T. 408). *Ruling of* CROOM-JOHNSON, J., *approved in* R. *v.* Tilley .. 406
R. *v.* Ellis ([1910] 2 K.B. 746; 79 L.J.K.B. 841; 102 L.T. 922). *Dicta applied in* R. *v.* Jones .. 668
R. *v.* Hopper ([1914-15] All E.R. Rep. 914; [1915] 2 K.B. 431; 84 L.J.K.B. 1371; 113 L.T. 381). *Followed in* R. *v.* Porritt .. 463
R. *v.* Martin ([1956] 2 All E.R. 86; [1956] 2 Q.B. 272; [1956] 2 W.L.R. 975). *Considered in* R. *v.* Cox 1194
R. *v.* Moore ([1957] 2 All E.R. 703 n.; [1957] 1 W.L.R 841). *Applied in* R. *v.* Essex Quarter Sessions, *Ex parte* Larkin .. 930
R. *v.* Naylor ([1961] 2 All E.R. 932; [1961] 3 W.L.R. 898). *Considered in* R. *v.* Cox .. 1194
R. *v.* Rice and Wilton (1866) (L.R. 1 C.C.R. 21; 35 L.J.M.C. 93; 13 L.T. 678). *Followed in* R. *v.* Quinn .. 88
R. *v.* Rickard (1918) (88 L.J.K.B. 720; 119 L.T. 192). *Observations of* SALTER, J., *applied in* R. *v.* Tilley .. 406
R. *v.* Smith ([1961] 2 All E.R. 743; [1961] 1 W.L.R. 1046). *Considered in* R. *v.* Higginbotham .. 616
R. *v.* Taylor ([1915] 2 K.B. 712, 713; 84 L.J.K.B. 1672; 113 L.T. 513). *Dictum of* LORD READING, C.J., *applied in* R. *v.* Duke .. 737
Raby *v.* Ridehalgh (1855) (24 L.J.Ch. 528; 25 L.T.O.S. 19). *Applied in* Re Pauling's Settlement Trusts .. 713
Ravenga *v.* Mackintosh (1824) (2 L.J.O.S.K.B. 137). *Considered in* Abbott *v.* Refuge Assurance Co., Ltd. .. 1074
Reading Trust, Ltd. *v.* Spero ([1929] All E.R. Rep. 411; [1930] 1 K.B. 507, 508; 99 L.J.K.B. 192; 142 L.T. 365). *Dicta of* GREER, L.J., *considered in* Edgware Trust, Ltd. *v.* Lawrence .. 141
Reed *v.* Cattermole ([1937] 1 All E.R. 541; [1937] 1 K.B. 613; 106 L.J.K.B. 407; 156 L.T. 389). *Considered in* Butter *v.* Bennett .. 1041
Rhondda's (Viscountess) Case ([1922] 2 A.C. 362; 92 L.J.P.C. 89; 128 L.T. 160). *Dictum of* VISCOUNT BIRKENHEAD, L.C., *followed in* Re Bristol South East Parliamentary Election .. 354
—— ([1922] 2 A.C. 393; 92 L.J.P.C. 104; 128 L.T. 171). *Dictum of* LORD WRENBURY *applied and followed in* Re Bristol South East Parliamentary Election .. 354
Ridge Nominees, Ltd. *v.* I.R. Comrs. ([1961] 2 All E.R. 354; [1961] 3 W.L.R. 393). *Reversed.* C.A. .. 1108
Rivoli Hats, Ltd. *v.* Gooch ([1953] 2 All E.R. 823; [1953] 1 W.L.R. 1190). *Considered in* Bronester, Ltd. *v.* Priddle .. 471
Roberts *v.* Dorman Long & Co., Ltd. ([1953] 2 All E.R. 432; [1953] 1 W.L.R. 946). *Dictum of* LORD GODDARD, C.J., *stated to have been overruled in* Wigley *v.* British Vinegars, Ltd. .. 418

PAGE

Rogers *v.* Arnott ([1960] 2 All E.R. 417; [1960] 2 Q.B. 244; [1960] 3 W.L.R. 73). *Distinguished in* R. *v.* Males 705
Rose *v.* Ford ([1937] 3 All E.R. 380, 381; [1937] A.C. 861; 106 L.J.K.B. 592; 157 L.T. 183). *Observations of* LORD ROCHE *applied in* Oliver *v.* Ashman 323
Royal Aquarium and Summer and Winter Garden Society, Ltd. *v.* Parkinson ([1892] 1 Q.B. 447; 61 L.J.Q.B. 414; 66 L.T. 517). *Dictum of* FRY, L.J., *not followed in* Lincoln *v.* Daniels 740
Rudler *v.* Franks ([1947] K.B. 530; [1947] L.J.R. 658; 176 L.T. 326). *Distinguished in* Critchley *v.* Clifford 288
Russell *v.* Russell ([1956] 1 All E.R. 470; [1956] P. 295; [1956] 2 W.L.R. 551). *Dictum of* JENKINS, L.J., *applied in* L. *v.* L. 834
St. John, Hampstead, Re ([1939] P. 281; 160 L.T. 641). *Considered in* Re Jewison's Will Trusts .. 1022
Samuel, Re ([1945] 2 All E.R. 319; [1945] Ch. 364; 114 L.J.Ch. 337; 173 L.T. 278). *Considered and distinguished in* National Benzole Co., Ltd. *v.* Gooch 1097
Secretary of State in Council of India *v.* Scoble ([1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1). *Applied in* Vestey *v.* I.R. Comrs. 978
Selot's Trust, Re ([1902] 1 Ch. 488; 71 L.J.Ch. 192). *Followed in* Re Langley's Settlement Trusts 803
Shaw *v.* Director of Public Prosecutions ([1961] 2 All E.R. 452; [1961] 2 W.L.R. 917). *Dictum of* VISCOUNT SIMONDS *applied in* R. *v.* Quinn 88
—— ([1961] 2 All E.R. 468; [1961] 2 W.L.R. 940). *Dictum of* LORD HODSON *applied in* R. *v.* Quinn 88
Sheffield Corpn. *v.* Tranter ([1957] 2 All E.R. 583; [1957] 1 W.L.R. 843). *Followed in* Blake *v.* Hendon Corpn. 601
Shelley *v.* New South Wales Institution for the Deaf and Dumb and the Blind ([1919] A.C. 650). *Followed in* Re Matthews's Will Trusts 869
Smith *v.* Selwyn ([1914] 3 K.B. 98; 83 L.J.K.B. 1339; 111 L.T. 195). *Applied in* Abbott *v.* Refuge Assurance Co., Ltd. 1074
Smith & Co. *v.* Bedouin Steam Navigation Co. ([1896] A.C. 70; 65 L.J.P.C. 8). *Applied in* A.-G. of Ceylon *v.* Scindia Steam Navigation Co., Ltd. 684
Society for Training Teachers of the Deaf and Whittle's Contract, Re ([1907] 2 Ch. 486; 76 L.J.Ch. 656; 97 L.T. 538). *Not followed in* Neville Estates, Ltd. *v.* Madden 769
Somerset, Re ([1894] 1 Ch. 265; 63 L.J.Ch. 46; 69 L.T. 747). *Observations of* LINDLEY, L.J., *considered in* Re Pauling's Settlement Trusts 713
Sothern-Smith *v.* Clancy ([1941] 1 All E.R. 116; [1941] 1 K.B. 283; 110 L.J.K.B. 191; 164 L.T. 211). *Dictum of* SIR WILFRID GREENE, M.R., *applied in* Vestey *v.* I.R. Comrs. 978
Sparrow *v.* Fairey Aviation Co., Ltd. ([1961] 1 All E.R. 216; [1961] 1 W.L.R. 844). *Affirmed.* C.A. 452
Spiller *v.* Turner ([1897] 1 Ch. 911; 66 L.J.Ch. 435; 76 L.T. 622). *Applied in* Re Latham (*decd.*) .. 903
Spira *v.* Spira ([1939] 3 All E.R. 924). *Considered in* Dsane *v.* Hagan 380
Sutherland (*decd.*), Re ([1960] 3 All E.R. 270; [1960] Ch. 611; [1960] 3 W.L.R. 491). *Reversed.* H.L. 855
Swan *v.* Swan ([1953] 2 All E.R. 854; [1953] P. 258; [1953] 3 W.L.R. 591). *Applied in* S. *v.* S. 133
Taylor *v.* Twinberrow ([1930] All E.R. Rep. 342; [1930] 2 K.B. 16; 99 L.J.K.B. 313; 142 L.T. 648). *Considered in* St. Marylebone Property Co., Ltd. *v.* Fairweather 560
Tennant *v.* Smith ([1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327). *Considered in* Butter *v.* Bennett 1041
Thellusson *v.* Lord Rendlesham (1859) (28 L.J.Ch. 948; sub nom. Thellusson *v.* Robarts, 33 L.T.O.S. 379). *Distinguished in* Re du Cros' Settlement 193
Thorogood *v.* Van Den Berghs & Jurgens, Ltd. ([1951] 1 All E.R. 682; sub nom. Thurogood *v.* Van Den Berghs & Jurgens, Ltd., [1951] 2 K.B. 537). *Applied in* Longhurst *v.* Guildford Godalming and District Water Board 545
Tichborne *v.* Weir (1892) (67 L.T. 735). *Applied in* St. Marylebone Property Co., Ltd. *v.* Fairweather 560
Tickler *v.* Tickler ([1943] 1 All E.R. 59). *Dictum of* SCOTT, L.J., *applied in* Brewer *v.* Brewer .. 957
Tillmanns & Co. *v.* S.S. Knutsford, Ltd. ([1908] 2 K.B. 385; 77 L.J.K.B. 778; sub nom. S.S. Knutsford, Ltd. *v.* Tillmanns & Co., 99 L.T. 399). *Applied in* Re Latham (*decd.*) 903
Tolson *v.* Sheard (1877) (5 Ch.D. 19; 46 L.J.Ch. 815; 36 L.T. 756). *Applied in* Re Rycroft's Settlements 581
Victoria Insurance Co., Ltd. *v.* Junction North Broken Hill Mine ([1925] A.C. 354). *Considered in* Sunshine Porcelain Potteries Pty., Ltd. *v.* Nash 203
Villar *v.* Gilbey ([1907] A.C. 139; 76 L.J.Ch. 339; 96 L.T. 511). *Considered in* Re Stern's Will Trusts 1129
Walker *v.* Bletchley Flettons, Ltd. ([1937] 1 All E.R. 175). *Dictum of* DU PARCQ, J., *applied in* Eaves *v.* Morris Motors, Ltd. 233
—— *Test formulated by* DU PARCQ, J., *applied in* Wigley *v.* British Vinegars, Ltd. 418
Walter *v.* Yalden ([1902] 2 K.B. 304; 71 L.J.K.B. 693; 87 L.T. 97). *Overruled in* St. Marylebone Property Co., Ltd. *v.* Fairweather 560
Watson *v.* M'Ewan ([1905] A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489). *Considered in* Lincoln *v.* Daniels 740
Weg Motors, Ltd. *v.* Hales ([1960] 3 All E.R. 762; [1961] Ch. 176; [1960] 3 W.L.R. 964). *Affirmed.* C.A. 181
Weldon *v.* Neal (1887) (19 Q.B.D. 395; 56 L.J.Q.B. 621). *Dictum of* LORD ESHER, M.R., *considered in* Pontin *v.* Wood 992
Wells-King *v.* Wells-King ([1955] 1 All E.R. 585; [1955] 1 W.L.R. 309). *Followed in* Turner *v.* Turner 944
White, Re ([1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187). *Distinguished in* Re Smith's Will Trusts 824
Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement (No. 2), Re ([1961] 2 All E.R. 9; L.R. 2 R.P. 239; [1961] 1 W.L.R. 617). *Dictum not followed in* Re Newspaper Proprietors' Assocn., Ltd. and National Federation of Retail Newsagents, Booksellers and Stationers' Agreement 428
Wiffen *v.* Bailey and Romford Urban Council ([1914-15] All E.R. Rep. 974; [1915] 1 K.B. 610; 84 L.J.K.B. 694; 112 L.T. 278). *Dictum of* PHILLIMORE, L.J., *considered and explained in* Berry *v.* British Transport Commission 65
Wilkins, Re (1881) (18 Ch.D. 634; 50 L.J.Ch. 774; 45 L.T. 244). *Applied in* Re Petrie (*decd.*) .. 1067
Williams *v.* Bayley (1866) (L.R. 1 H.L. 220; 35 L.J.Ch. 726; 14 L.T. 807). *Dictum of* LORD WESTBURY *disapproved in* Sykes *v.* Director of Public Prosecutions 33
Wood *v.* Wood ([1891] P. 276; 60 L.J.P. 68; 64 L.T. 589). *Observations of* LINDLEY, L.J., *applied in* KIRKE *v.* KIRKE 1059
Woodall *v.* Clifton ([1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257). *Followed in* Weg Motors, Ltd. *v.* Hales 181
Woods *v.* Martins Bank, Ltd. ([1958] 3 All E.R. 166; [1959] 1 Q.B. 55; [1958] 1 W.L.R. 1018). *Distinguished in* Hedley Byrne & Co., Ltd. *v.* Heller & Partners, Ltd. 891
Woolmington *v.* Director of Public Prosecutions ([1935] All E.R. Rep. 1; [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232). *Applied in* Bratty *v.* A.-G. for Northern Ireland 523
Worms *v.* De Valdor (1880) (49 L.J.Ch. 261; 41 L.T. 791). *Followed in* Re Langley's Settlement Trusts 803
Yenidje Tobacco Co., Ltd., Re ([1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530). *Considered in* Re Davis Investments (East Ham), Ltd. 926
Young *v.* Young ([1961] 2 All E.R. 843; [1961] 1 W.L.R. 955). *Reversed.* C.A. 695

STATUTES, ETC., NOTED

PAGE

Administration of Justice Act, 1956 (*c.* 46), *s.* 15 (1) (*a*) .. 580
Administration of Justice Act, 1960 (*c.* 65), *s.* 1 (2) .. 299
Arbitration Act, 1950 (*c.* 27), *s.* 4 .. 661
Army Act, 1955 (*c.* 18), *s.* 70 (2) .. 1194
Bills of Lading Act, 1855 (*c.* 111), *s.* 1 .. 919
Carriage of Goods by Sea Act, 1924 (*c.* 22), *Schedule, art. III, r.* 3, *r.* 4 .. 684
Charitable Trusts Act, 1853 (*c.* 137), *s.* 62 .. 769
Charitable Trusts (Validation) Act, 1954 (*c.* 58), *s.* 1 (1) .. 588
Coast Protection Act, 1949 (*c.* 74), *s.* 7 (4) (*b*), (5) .. 1008
Companies Act, 1948 (*c.* 38)—
s. 129 (4) .. 389
s. 209 .. 1108
s. 222 (*f*) .. 926
Sch. 7, *para.* 7 (1), *para.* 9 .. 389
Criminal Appeal Act, 1907 (*c.* 23)—
s. 3 .. 737
s. 4 (1) .. 969
s. 9 .. 633
Criminal Evidence Act, 1898 (*c.* 36)—
s. 1, *proviso* (*f*) (i) .. 668
(ii) .. 58
Criminal Procedure Act, 1851 (*c.* 100), *s.* 12 .. 705
Criminal Procedure Act, 1865 (*c.* 18), *s.* 8 .. 406
Customs and Excise Act, 1952 (*c.* 44), *s.* 4 (1) .. 641
Disused Burial Grounds Act, 1884 (*c.* 72), *ss.* 2, 3 .. 1022
Divorce (Insanity and Desertion) Act, 1958 (*c.* 54), *s.* 1 (3) .. 1105
Education Act, 1944 (*c.* 31), *ss.* 36, 37, 40 (2) .. 276
Factories Act, 1937 (*c.* 67)—
s. 14 (1) .. 233, 452
s. 26 (2) .. 418
s. 151 (1) (*b*), (6) .. 545
Factory and Workshop Act, 1901 (*c.* 22), *s.* 149 (1) .. 272
Fatal Accidents Act, 1846 (*c.* 93), *s.* 2 .. 24
Finance Act, 1894 (*c.* 38)—
s. 5 (2) .. 158
s. 7 (1) (*b*) .. 903
(5) .. 855
ss. 8 (4), 9 (6), 20 (2) .. 903
Finance (1909-10) Act, 1910 (*c.* 8), *s.* 59 (2) .. 1028
Finance Act, 1930 (*c.* 28), *s.* 42 .. 258
Finance Act, 1937 (*c.* 54), *ss.* 19 (4), 20 (2) (*a*) (*b*) .. 1121
Finance Act, 1938 (*c.* 46), *s.* 50 (1) (*b*) .. 258
Finance Act, 1940 (*c.* 29), *ss.* 50 (1), 55 .. 855
Finance (No. 2) Act, 1940 (*c.* 48), *s.* 33 .. 641
Finance Act, 1947 (*c.* 35)—
s. 30 (3) .. 172
s. 35 (1) (*c*) .. 1121
ss. 36 (4), 43 (1) .. 172
Firearms Act, 1937 (*c.* 12), *s.* 23 (2) .. 703
Furnished Houses (Rent Control) Act, 1946 (*c.* 34), *s.* 2 (2) .. 1047
Harbours, Docks, and Piers Clauses Act, 1847 (*c.* 27), *ss.* 22, 33 .. 342
Homicide Act, 1957 (*c.* 11), *s.* 3 .. 463
Housing Act, 1957 (*c.* 56)—
s. 111 (1) .. 1002
ss. 158 (2), 166 (2) .. 1138
Income Tax Act, 1952 (*c.* 10)—
s. 122, *Sch. D, para.* 1, *proviso* .. 49
s. 123, *Sch. D, Case I* .. 1062
s. 156, *Sch. E, para.* 2 .. 49
s. 161 (1) .. 348, 1041
(3) .. 348
ss. 245, 256 (4) .. 551
s. 292 .. 855
s. 526 .. 1062
Sch. 9, *Rules applicable to Sch. E, r.* 7 .. 129, 348
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (2), *proviso* (iii) 288
Land Registration Act, 1925 (*c.* 21), *s.* 75 (1) .. 560
Land Transfer Act, 1897 (*c.* 65), *s.* 4 (1) .. 869
Landlord and Tenant Act, 1954 (*c.* 56)—
s. 25 .. 1142
s. 28 .. 843
s. 32 (1) .. 1174
s. 44 (1) (*b*) .. 843
s. 66 (2) .. 1142
Law of Property Act, 1925 (*c.* 20)—
s. 79 .. 83
ss. 87 (2), 142 (1) .. 181
Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 6 (2) .. 95
Law Reform (Miscellaneous Provisions) Act, 1949 (*c.* 100), *s.* 9 .. 276
Limitation Act, 1939 (*c.* 21)—
s. 2 (1) (*a*) .. 482
s. 16 .. 560
s. 19 (2) *proviso* .. 713
Local Government Act, 1894 (*c.* 73), *s.* 6 (1) (*a*) .. 1014
Local Government Act, 1933 (*c.* 51)—
s. 230 .. 914
Sch. 3, *Part* 2, *para.* 3 .. 446
Magistrates' Courts Act, 1952 (*c.* 55), *ss.* 6 (1), 105 (1) .. 1118
Married Women's Property Act, 1882 (*c.* 75), *s.* 17 .. 580

PAGE

Matrimonial Causes Act, 1950 (*c.* 25)—
s. 1 (1) (*d*) .. 1105
s. 7 (2) .. 944
s. 19 (2) .. 20, 834
(3) .. 834, 1059
s. 25 .. 695
s. 28 (1) .. 793
(3) .. 1059
s. 32 (3) .. 231
Matrimonial Causes (Property and Maintenance) Act, 1958 (*c.* 35), *s.* 1 (1) .. 20, 834
Mental Health Act 1959 (*c.* 72), *ss.* 60, 65 .. 616
Mines and Quarries Act, 1954 (*c.* 70), *s.* 34 (1) (*b*) .. 220
Moneylenders Act, 1927 (*c.* 21), *s.* 6 (2) .. 141
Offences against the Person Act, 1861 (*c.* 100), *s.* 18 .. 200
Official Secrets Act, 1911 (*c.* 28), *s.* 1 (1) (*c*) .. 125
Official Secrets Act, 1920 (*c.* 75), *s.* 8 (1) .. 125
Open Spaces Act, 1887 (*c.* 32), *s.* 4 .. 1022
Open Spaces Act, 1906 (*c.* 25), *s.* 20 .. 1022
Public Health Act, 1936 (*c.* 49), *s.* 100 .. 542
Rating and Valuation (Apportionment) Act, 1928 (*c.* 44)—
s. 3 (1) .. 272, 758
(2) (*b*), *s.* 4 .. 758
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *Sch.* 1, *para.* (*d*) .. 409
Restrictive Trade Practices Act, 1956 (*c.* 68)—
s. 20 (3) .. 316, 428
s. 21 (1) (*b*) .. 428
Road Traffic Act, 1960 (*c.* 16)—
ss. 1, 2 .. 6
s. 3 (1) .. 1194
s. 6 .. 6
Small Tenements Recovery Act, 1838 (*c.* 74), *ss.* 1, 7 .. 1138
Stamp Act, 1891 (*c.* 39)—
s. 54 .. 258, 1108, 1146
Sch. 1 .. 211, 258, 1108, 1146
Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 45 (1) .. 461
Town and Country Planning Act, 1932 (*c.* 48), *s.* 53 .. 878
Town and Country Planning Act, 1947 (*c.* 51)—
s. 12 (2) .. 878
s. 23 (3) .. 10
s. 29 (1) .. 98
Trial of Lunatics Act, 1883 (*c.* 38), *s.* 2 (1) .. 737
Trustee Act, 1925 (*c.* 19)—
s. 57 .. 811
s. 61 .. 713
Trustee Investments Act, 1961 (*c.* 62)—
s. 15 .. 636, 811
Sch. 1, *Part* 4, *para.* 3 .. 1133
Variation of Trusts Act, 1958 (*c.* 53), *s.* 1 .. 136, 636, 1133

COMMONWEALTH AND DEPENDENCIES

Indian Carriage of Goods by Sea Act, 1925, *Schedule*, *art.* III, *r.* 3, *r.* 4 .. 684
Malayan Moneylenders Ordinance, 1951 (*No.* 42 of 1951), *ss.* 15, 16 .. 1163
New Zealand Land and Income Tax Act, 1954 (*No.* 67), *ss.* 149 (2), 86 (1) (i), 167 (*a*) .. 1051
Victoria Workers Compensation Act, 1951 (*No.* 5601), *s.* 12 (1) .. 203

RULES

Judges' Rules, *r.* 3 .. 972
Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619)—
r. 3 (3) .. 247
proviso (ii) .. 20
r. 4 (4) .. 247
r. 36 (1) .. 944
R.S.C.—
Ord. 7, *r.* 4 (1) .. 64
Ord. 14, *r.* 1 .. 681
Ord. 14A .. 380
Ord. 27, *r.* 15 .. 380
Ord. 36A, *r.* 1 .. 580
Ord. 64, *r.* 4, *Ord.* 70, *r.* 1 .. 1169

REGULATIONS

Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145)—
reg. 3 (2) .. 108
reg. 4 .. 1154
regs. 5, 7 (1), (4), 8 (1), 12 (2), 24 (1) .. 108
reg. 29 .. 1154
Landlord and Tenant (Notices) Regulations, 1957 (*S.I.* 1957 *No.* 1157), *reg.* 4 (vii) .. 1142
London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960 (*S.I.* 1960 *No.* 594), *reg.* 4 (*a*) .. 974
Purchase Tax Regulations, 1945 (*S.R. & O.* 1945 *No.* 517), *reg.* 12 .. 641

ORDERS

Town and Country Planning General Development Order, 1948 (*S.I.* 1948 *No.* 958), *art.* 3 (1), *Sch.* 1, *Class* XVIII A .. 878
Town and Country Planning General Development Order (*S.I.* 1950 *No.* 728)—
art. 3 (1) .. 878
art. 5 (8) .. 10
Sch. 1, *Class* XVIII A .. 878

MISCELLANEOUS

Constitution of Ireland, *art.* 41, *s.* 3 (3) .. 225

WORDS AND PHRASES

	PAGE
Advance commission	471
Agreement for a lease [*Settled Land Act*, 1925, *s.* 117 (1) (*x*)]	581
Alight (" *for so long as may be necessary for the purpose of enabling any person to . . . alight from the vehicle* ")	974
And [*not substituted for* " *or* " *in penal enactment*]	1194
Appears to them necessary	641
Apprehension [*Firearms Act*, 1937, *s.* 23 (2)]	703
Article	545
At any time [*retrospective operation of statute*]	203
Blue chip [*investments*]	811
Board (" *for so long as may be necessary for the purpose of enabling any person to board . . . the vehicle* ")	974
Born in the lifetime of	1129
Contingent liability	855
Conveyance [*Stamp Duty—Whether lease or exchange a conveyance*]	258
Covenant [*within s.* 142 (1) *of Law of Property Act*, 1925]	181
Debts	869
Dedication	601
Derived from (" *income derived from any business carried on in New Zealand* ")	1051
Descendants—See " *Male descendants* ".	
Development	878
Effect—See " *To the like effect* ".	
Error of the court at the hearing	449
Exempt (" *income exempt from taxation* ")	1051
Expenses incident to the execution of the preceding trusts	869
Expenses incurred wholly, exclusively and necessarily in the performance of . . . duties—See " *Wholly, exclusively and necessarily* ".	
Fair	1019
First class [*investments*]	811
Future tenancy [*Landlord and Tenant Act*, 1954, *s.* 28]	843
Gangway	108
General management [*Housing Act*, 1947, *s.* 111 (1)]	1002
Hand-hold [*Factories Act*, 1937, *s.* 26 (2)]	418
Hospital	824
Interruption	1105
Issue—See " *Male issue* ".	
Landlord [*Landlord and Tenant Act*, 1954, *s.* 44 (1)]	843
Lease—See " *Agreement for a lease* ".	
Liability—See " *Contingent liability* ".	
Like effect—See " *To the like effect* ".	
Lord of Parliament	354
Male descendants	193
Male issue	193
Management—See " *General management* ".	
Mixed charity	769
Mortgage, bond, debenture, covenant	211
Necessary—See " *Appears to them necessary* ".	
Obstruction [*Mines and Quarries Act*, 1954, *s.* 34 (1) (*b*)]	220
Or (" *and* " *not substituted for* " *or* " *in penal enactment*]	1194
Parliament—See " *Lord of Parliament* ".	
Post-nuptial settlement [*Matrimonial Causes Act*, 1950, *s.* 25]	695
Procure	83
Realised—See " *When the residue of my estate is realised* ".	
Residue—See " *When the residue of my estate is realised* ".	
Reversionary tenancy [*Landlord and Tenant Act*, 1954, *s.* 65 (3)]	843
Safely be done	108
Sale [*whether compulsory acquisition was a sale*]	1108
Security [*Stamp Act*, 1891, *Sch.*—" *Mortgage, bond, etc.*"]	211
Settled Land Act, 1925 (*c.* 18) *ss.* 42 (1) (i), 44 (3) (iii), 90 (1) (iii), 117 (1) (x)	581
Show—See " *Tending to show* ".	
Tenancy—See " *Future tenancy* ", " *Reversionary tenancy* ".	
Tending to show [*Criminal Evidence Act*, 1898, *s.* 1 *proviso* (*f*)]	668
Testamentary expenses	869
Time—See " *at any time* ".	
To the like effect [*Restrictive Trade Practices Act*, 1956, *s.* 20 (3) (*b*)]	316
Wake	1019
When the residue of my estate is realised	1067
Wholly, exclusively and necessarily	129, 348
Wholly maintained by voluntary contributions	769

CORRIGENDA

[1961] 2 All E.R.

p. 652 INLAND REVENUE COMRS. *v.* R. WOOLF & CO., LTD. Counsel: for " *J. M. Price* " read " *J. R. B. Price* ".

p. 896 MORRISON ROSE & PARTNERS *v.* HILLMAN. Solicitors: for " *Howard, Kennedy & Co.*" read " *Joelson & Co.*"

[1961] 3 All E.R.

p. 381 DSANE *v.* HAGAN. Counsel for the plaintiff: for " *J. Maurice Price* " read "*A. Leolin Price.*"

p. 408 R. *v.* TILLEY. Solicitors: for " *Linsley-Thomas & Co.*" read " *Peters & Peters* ".

p. 681 FIELDRANK, LTD. *v.* STEIN. Counsel: for " *M. P. Solomon* " read " *Peter Solomon* ".

p. 736 Re PAULING'S SETTLEMENT TRUSTS. Solicitors: read " *Bird & Bird* (for the plaintiffs); *Charles Russell & Co.* (for the trustees, the bank) " instead of as printed.

p. 796 WHITTAM *v.* W. J. DANIEL & CO., LTD. Line D. 5: for " W. G." read " W. J."

p. 815 Re KOLB'S WILL TRUSTS. Solicitors: for " *D. H. Kramer & Co.*" read "*A. Kramer & Co.*"

p. 941 ZAMET *v.* HYMAN. Line H. 5: for " council " read " counsel ".

p. 969 R. *v.* JOHNSON. Line B. 4: for " thereby assumes " read " does not thereby assume ".

p. 991 BRASSINGTON *v.* BRASSINGTON. Solicitors for the respondent husband: for " *F. W. P. Lupton* " read " *Vizard, Oldham, Crowder & Cash*, agents for *Chamberlain, Johnson & Parke*, Llandudno ".

THE
ALL ENGLAND
LAW REPORTS
INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

BLOHN *v.* DESSER AND OTHERS.

[QUEEN'S BENCH DIVISION (Diplock, J.), April 20, 21, May 1, 2, 3, 1961.]

Conflict of Laws—Foreign judgment—Enforcement—Action in England—Whether foreign judgment against partnership a final and conclusive judgment on which to found action against individual partner.

Conflict of Laws—Foreign judgment—Jurisdiction of foreign court—Partnership abroad—Sleeping partner in United Kingdom—Action in personam against debtor not resident in foreign country but carrying on business there through partnership.

The defendant, who at all times resided in England, was a partner in a firm carrying on business in Vienna at a place of business there, and, though the defendant took no part in and received no income from the business, her name appeared on the commercial register in Vienna as a partner. On July 15, 1957, the plaintiff, an Austrian national resident in Vienna, obtained judgment against the firm, but not against the defendant personally, in the Commercial Court of Vienna on a bill of exchange accepted by another partner, D., in the name and on behalf of the firm. D., who was the defendant's brother, at all times was resident in Vienna and was the sole managing partner of the firm. In Austrian law a partnership was not a separate legal entity and a successful action against a partnership firm did not impose personal liability on individual partners, and to obtain execution against the personal assets of a partner a further action had to be brought against the individual partner himself. In such an action the partner was estopped by the doctrine of res judicata from raising defences which could have been raised by the firm in the original action but was entitled to raise defences personal to himself or arising from matters subsequent to the judgment against the firm. In an action by the plaintiff in the English courts brought on the Austrian judgment,

Held: (i) the court of a foreign country had jurisdiction to entertain an action in personam against a debtor who did not reside physically in the country, but who, at the time of the action, was carrying on business through an agent resident in the country, where the transaction was effected by the agent at his place of business; the Austrian court had, therefore, jurisdiction to entertain the action against the defendant on the bill of exchange, the jurisdiction resting on implied agreement of the defendant by conduct to submit to the jurisdiction of the Austrian court in respect of the transaction.

Dictum of BUCKLEY, L.J., in *Emanuel* v. *Symon* ([1908] 1 K.B. at p. 309) considered.

(ii) the judgment of the Austrian court was not, however, enforceable in the English court against the defendant personally, because (a) it conferred no right against her personal assets, as distinct from the partnership assets, and (b) it was not a final and conclusive foreign judgment such as was

requisite for the purpose of being so enforced, since, on the evidence of Austrian law, the defendant might have raised defences that were not concluded by the judgment against the partnership, and the fact that the defendant had not relied on any of these defences in the English action on the judgment did not render that judgment enforceable therein.

Nouvion v. *Freeman* ((1889), 15 App. Cas. 1) applied.

[As to foreign judgments in personam as causes of action, and the conditions essential to the enforcement of a foreign judgment, see 7 HALSBURY'S LAWS (3rd Edn.) 140-143, paras. 249-252 and 144-147, paras. 256-260; and for cases on the subject, see 11 Digest (Repl.) 502-524, *1204-1368*.]

Cases referred to:

Emanuel v. *Symon*, [1908] 1 K.B. 302; 77 L.J.K.B. 180; 98 L.T. 304; 11 Digest (Repl.) 503, *1211*.

Littauer Glove Corpn. v. *F. W. Millington (1920), Ltd.*, (1928), 44 T.L.R. 746; 9 Digest (Repl.) 33, *29*.

Nouvion v. *Freeman*, (1889), 15 App. Cas. 1; 59 L.J.Ch. 337; 62 L.T. 189; 11 Digest (Repl.) 513, *1282*.

Action.

The plaintiff, an Austrian national resident in Vienna, sued three members of a partnership firm established under Austrian law and carrying on business in Vienna under the name Salvator Malzkaffee Gesellschaft Deri & Co. Two of the defendants resided outside the jurisdiction of the court and the first defendant, Mrs. Margarete Desser, who had resided in England for many years, was the only defendant served with the writ and to enter an appearance to the action. She took no part in, and received no income from, the firm in Vienna, but her name remained on the commercial register in Vienna as a partner in the firm and in Austrian law she remained a partner. The plaintiff's claim arose out of transactions in Austria between the plaintiff and one Franz Diamant, the first defendant's brother, who was the sole managing partner of the firm and at all times was resident in Austria. The plaintiff claimed against the first defendant: (i) £1,003 as a judgment debt on a judgment obtained by the plaintiff against the partnership firm in the Commercial Court of Vienna on July 15, 1957, on a bill of exchange, dated Nov. 3, 1956, payable on Feb. 2, 1957, and accepted by Franz Diamant in the name and on behalf of the firm; (ii) alternatively seventy thousand Austrian schillings on the bill of exchange itself; and (iii) in the further alternative, the sterling equivalent of seventy thousand schillings on an account stated.

The claim under head (i), with which alone this report is concerned, was contested on the ground that the Austrian judgment did not create a cause of action against the first defendant in the English courts since (inter alia) the Commercial Court of Vienna did not have jurisdiction over the first defendant and the judgment of that court was not final and conclusive as against her. The relevant findings of Austrian law are set out in the judgment.

Paul Sieghart for the plaintiff.

Leonard Caplan, Q.C., and *H. Lester* for the first defendant.

DIPLOCK, J., having held on the facts found by him that the plaintiff's claim based on the bill of exchange and the account stated failed, continued: There remains to be dealt with the plaintiff's claim on the Austrian judgment. In Austrian law the individual partners of a partnership firm are potentially liable for the debts of the partnership, and the partnership does not possess a separate personality. A creditor seeking to recover judgment in the Austrian courts in respect of a partnership debt can either sue the partnership firm in the firm's name, as the plaintiff did in the present case, or can sue the individual partners in their own names, or may take both these steps simultaneously. If, as in the present case, the partners are not sued individually, but an action is brought against a partnership firm in the partnership name, execution can

A be obtained only against the partnership assets, and not against the assets of the individual partners. In order to render the individual partners personally liable so as to obtain execution against their personal assets, it is necessary to bring a further action against the individual partner sought to be rendered liable. In Austrian law there is no doctrine of merger of the original debt in the judgment; the action against individual partners is accordingly brought B on the original debt. But the doctrine of estoppel by res judicata applies, and the individual partner cannot raise any defence which could have been raised on behalf of the partnership in the original action against the partnership firm. He can, however, raise other defences, either personal to himself such as that he was not a partner at the material time, or defences arising out of matters subsequent to the judgment such as that the debt has been satisfied in whole or C in part since the judgment.

The expert witnesses in Austrian law were not agreed whether an individual person could raise as a defence the fact that the judgment against the partnership firm had been obtained by fraud, or whether, if he desired to allege this, he had to bring separate proceedings to have the judgment against the partnership firm set aside. Faced with the invidious task of choosing between rival D experts, I prefer the view that separate proceedings to set the judgment aside are required, if it is desired to resist the claim on the ground that the judgment was obtained by fraud.

That is the background of Austrian law against which I have to consider whether the plaintiff can establish a cause of action based, not on the bill of exchange itself or the account stated, but based on the Austrian judgment E against the partnership firm. The first defendant says that this judgment does not create a cause of action against her in the English courts for three reasons: (i) that it was obtained by fraud; (ii) that the Commercial Court of Vienna by which judgment was pronounced had no jurisdiction to give judgment; and (iii) that the judgment was not a final and conclusive judgment against her, in the sense in which that expression is used in the English courts. [HIS LORD-F SHIP, having stated that he was not prepared to hold that the judgment of the Commercial Court of Vienna had been obtained by fraud, continued:] The second ground on which the first defendant relies, namely, that the Commercial Court of Vienna had no jurisdiction to pronounce judgment against her, raises a point of law on which there is no direct authority. The first defendant was at no relevant time resident or present in Austria. She was, however, a sleeping G partner in the Austrian firm which carried on business in Vienna at a place of business there, and whose managing partner, Mr. Diamant, was resident in Vienna. The Austrian firm, as I have said, had no separate legal personality in Austrian law.

The position is, therefore, that the first defendant at all material times carried on business in Vienna, not in person, but through an agent resident in Vienna. H Does this render her amenable to the jurisdiction of the Austrian courts in respect of a business transaction effected on her behalf in Vienna by that agent, if the action is brought at a time when the business is still being carried on? This is a question which is devoid of authority, no doubt because in the modern world business is generally conducted by corporations, that is to say, fictitious persons who can only be resident through an agent. In the case of a corporation, I therefore, the relevant problem tends to be whether the corporation, through its agent, is resident in the foreign country: see, for example, *Littauer Glove Corpn.* v. *F. W. Millington (1920), Ltd.* (1). A natural person, however, can only be resident in person.

I cannot, therefore, escape reaching a decision on the question of principle: Has a court of a foreign country jurisdiction in an action in personam against a debtor who does not reside physically in the country but who, at the time of

(1) (1928), 44 T.L.R. 746.

the action, carries on business at a place in that country through an agent resident in that country, where the action is brought in respect of a transaction effected by that agent at his place of business?

In *Emanuel* v. *Symon* (2) BUCKLEY, L.J., enumerated the five cases in which an English court would enforce a foreign judgment. His enumeration was as follows:

> "(1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained."

There may be some doubt whether today it would be held that the jurisdiction exists in the first category of cases, but the other four cases have never been questioned. It is also, I think, clear law that the contract referred to in the fifth case, to submit to the forum in which the judgment was obtained, may be express or implied.

It seems to me that, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made—that is to say, the public—to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent.

While I do not accept that comity is the basis on which English courts recognise and enforce foreign judgments, for there are many instances in which English courts exercise jurisdiction in personam over non-resident foreigners, where they do not recognise a similar jurisdiction in a foreign court, it is to be observed that the English courts under R.S.C., Ord. 48A, r. 1, do purport to exercise jurisdiction over non-resident foreign partners of partnership firms carrying on business at a place of business in England. I hold, therefore, in the absence of any binding authority on me, that the Commercial Court of Vienna had jurisdiction to entertain an action against the first defendant on the bill of exchange.

This, however, does not conclude the matter. The plaintiff did not obtain a judgment against the first defendant personally, but only a judgment against the firm. The judgment is no doubt final and conclusive against the firm and can be executed against the partnership assets. But in Austrian law of itself it creates no personal liability against the first defendant and gives no right of execution against her personal assets. In order to render her personally liable in Austrian law a further action must be brought against her in Austria, and a further judgment against her personally must be obtained. This is not merely a procedure for obtaining execution of an existing judgment for in the action against her, although she would be estopped by res judicata from raising any defence which could have been raised in the action against the partnership, she could raise other defences personal to herself, such as that she was not a partner at the relevant time, or defences arising after the original judgment, such as payment of the debt in whole or in part.

In my opinion, the judgment against the partnership firm is not enforceable against the first defendant in England on the alternative grounds either (a) that it is not a judgment against her personally, or (b) that if it is, it is not a final and conclusive judgment.

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(2) [1908] 1 K.B. at p. 309.

A What is a final and conclusive judgment in English law so as to entitle a judgment creditor to sue on it in the English courts? LORD HERSCHELL in *Nouvion* v. *Freeman* (3) said this:

> "My Lords, I think that in order to establish that such a judgment has been pronounced [that is to say, a final and conclusive judgment of a foreign court] it must be shown that in the court by which it was pronounced it B conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest C being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt."

D LORD BRAMWELL put the matter more succinctly in his speech where he said (4):

> "There is an essential difference, therefore, between the case where a court of competent jurisdiction has entertained all the controversies between the parties which they could and chose to raise, and come to a conclusion, which is to be presumed to be accurate, and this case where there is no ground for saying that all possible controversies between the parties have E been decided."

The judgment of the Austrian court against the partnership firm does not, in my view, enable the plaintiff to say as against the first defendant that all possible controversies between the parties have been decided by the judgment against the partnership firm, because on the evidence of Austrian law there are defences which would be available to her which are not concluded by the judgment F that the partnership firm is liable. It is irrelevant that the first defendant has not sought, in the present action on the judgment to raise the only kinds of defences which would have been available to her had she been sued personally in Austria after the judgment against the partnership firm had been given. The question is not whether she could have successfully defended an action in Austria, but whether the judgment against the partnership firm on which she G is sued in England falls within the category of a final and conclusive judgment against her—a category of judgment which alone the English courts will enforce.

Interesting questions might have arisen had the plaintiff, instead of suing on the judgment, sought to rely on it as an estoppel by res judicata by way of reply to the defence to the cause of action on the bill of exchange that it was accepted without authority, but this has not been pleaded and fortunately I H need not consider it.

I hold, therefore, that the plaintiff cannot recover against the first defendant on the judgment, and the action accordingly fails.

Judgment for the first defendant.

Solicitors: *J. F. Beer & Co.* (for the plaintiff); *Cecil Altman & Co.* (for the first defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(3) (1889), 15 App. Cas. at p. 9.

(4) (1889), 15 App. Cas. at p. 15.

R. *v.* McBRIDE.

A

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Slade, Ashworth, Paull and Salmon, JJ.), June 9, 23, 1961.]

Road Traffic—Dangerous driving—Causing death by dangerous driving—Objective test—Admissibility of evidence of drink taken—Road Traffic Act, 1960 (8 *&* 9 *Eliz.* 2 *c.* 16), *s.* 1.

B

Criminal Law—Indictment—Joinder of counts—Dangerous driving—Causing death by dangerous driving—Drunk in charge—Road Traffic Act, 1960 (8 *&* 9 *Eliz.* 2 *c.* 16), *s.* 1, *s.* 2, *s.* 6.

On the trial of an accused on a charge of causing death by dangerous driving (the proper test of which is an objective, not subjective, test), laid under s. 1 of the Road Traffic Act, 1960*, evidence that the accused driver was at the time adversely affected by drink is of probative value and admissible, and its admissibility is not limited to rebuttal of such a defence as that the accused was not in control of the vehicle through no fault of his own; such evidence must tend to show either that the amount of drink taken was such as adversely to affect a driver or that the driver (the accused) was in fact adversely affected, but the court has an overriding discretion to exclude such evidence where its prejudicial effect outweighs its probative value.

C

D

In the opinion of the Court of Criminal Appeal, but without giving any general direction, an indictment containing a charge under s. 1 of the Road Traffic Act, 1960 (causing death by reckless or dangerous driving), should not also include a charge under s. 6† (driving or being in charge of a motor vehicle when under the influence of drink or drugs); but a charge under s. 6 may be coupled with a charge under s. 2 (reckless or dangerous driving).

E

Appeal dismissed.

[As to causing death by dangerous driving, see 10 HALSBURY'S LAWS (3rd Edn.) 740, para. 1422 and Supplement; 33 HALSBURY'S LAWS (3rd Edn.) 622, para. 1047.

F

For the Road Traffic Act, 1960, s. 1, see 40 HALSBURY'S STATUTES (2nd Edn.) 711.]

Cases referred to:

Harris v. *Public Prosecutions Director*, [1952] 1 All E.R. 1044; [1952] A.C. 694; 116 J.P. 248; 36 Cr. App. Rep. 39; 14 Digest (Repl.) 423, *4118*.

G

Hill v. *Baxter*, [1958] 1 All E.R. 193; [1958] 1 Q.B. 277; 122 J.P. 134; 42 Cr. App. Rep. 51; [1958] 2 W.L.R. 76; 3rd Digest Supp.

Noor Mohamed v. *R.*, [1949] 1 All E.R. 365; [1949] A.C. 182; 14 Digest (Repl.) 421, *4097*.

Appeal.

H

This was an appeal by James McBride against his conviction on Mar. 30, 1961, at the Central Criminal Court before JUDGE BLOCK and a jury of causing death by dangerous driving contrary to s. 1 of the Road Traffic Act, 1960. He was sentenced to six months' imprisonment and disqualified from holding a driving licence for ten years.

I

* Section 1, so far as material, reads: "(1) A person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be liable on conviction on indictment to imprisonment for a term not exceeding five years."

† Section 6, so far as material, reads: "(1) A person who, when driving or attempting to drive a motor vehicle on a road or other public place, is unfit to drive through drink or drugs shall be liable—(a) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both a fine and such imprisonment . . ."

A The appellant had been indicted solely on s. 1 of the Act of 1960, and, at the magistrates' court, the prosecution had sought to adduce evidence that the appellant had "drink taken" and the magistrates had ruled that such evidence was inadmissible. His Honour on Mar. 8, 1961, heard argument whether evidence relating to the amount of alcohol the appellant was said to have consumed should be admitted or not, and ruled that such evidence should be admitted B because it was desirable that the jury should have before them the whole picture in making the objective test whether or not the driving was dangerous. The case was then adjourned to Mar. 27, 1961, when, after His Honour had affirmed his ruling on Mar. 8, 1961, the jury was sworn and the trial proceeded. In his summing-up he referred to this ruling as follows—

C "Some criticism has been levelled at the admission in this case of the evidence for the prosecution that, to put it no higher, at this stage [viz., when the accident occurred] McBride had 'drink taken', but I think it is right that you should know the circumstances. When you first sat on this case on Monday morning you recollect that I asked you to go out for a few minutes. During that time Mr. Hudson submitted to me that the evidence D as to drink should be excluded as being irrelevant and prejudicial. I ruled against him, because I felt that it was part of the circumstances of this case, and I was fortified in my decision by a decision which is briefly reported before Elwes, J. [i.e., *R.* v. *Richardson*] on circuit, where, as I see it, the circumstances were more or less the same as in this case. The short report in this case says that the defendant was charged with causing the E death of a person by dangerous driving. The prosecution sought to lead evidence that the defendant had been to certain public houses and had taken drink before the accident. The defendant was not charged with the offence of driving under the influence of drink, and the submission was made to Elwes, J., and he decided that such evidence was always admissible quite irrespective of whether there was a charge of driving under the in- F fluence of drink. Where the evidence disclosed that the car was being driven in a certain manner such evidence was undoubtedly relevant to the charge of dangerous driving. With that authority behind me and considering, as I did and do, that it is all part of the history of the offence which you have to investigate I thought it proper that you should hear it, and it is in those circumstances in which you have heard this quite considerable G evidence on the subject. But, as I say, it is incidental to your main duty, which is to decide whether in this case the driving was dangerous, a purely objective test. The reason for it is not necessary for your decision."

His Honour then summarised the evidence and at the end of his summing-up said:

H "In no sense are you trying this man for driving under the influence of drink to such an extent he had not proper control of the car. In so far as that matter is concerned, putting it at its lowest, you may think that it has nothing to do with this accident at all. Putting it at its highest, you may think that it explains the whole incident . . ."

I The jury, after retiring for about an hour, returned a verdict of guilty. After sentence, His Honour granted a certificate that the case was fit for appeal against conviction on the ground that the question whether, although the appellant was indicted solely on s. 1 of the Act of 1960, evidence was admissible that the appellant had taken intoxicating drink was a question of law of public importance. On May 9, 1961, the Court of Criminal Appeal (Lord Parker, C.J., Ashworth and Lawton, JJ.) adjourned the case for hearing before a Full Court of five judges and granted the appellant bail. On June 9, 1961, the court dismissed the appeal stating that it would give its reasons in writing at a later

date. The facts are set out in the judgment of the court. The cases enumerated below were cited in argument in addition to those in the judgment*. A

W. M. F. Hudson for the appellant.

R. D. L. Du Cann for the Crown.

Cur. adv. vult.

B

June 23. **ASHWORTH, J.**, read the following judgment of the court: The appellant was convicted at the Central Criminal Court on an indictment charging him under s. 1 of the Road Traffic Act, 1960, with causing death by dangerous driving. He has appealed to this court in pursuance of a certificate granted by the learned trial judge, the point in issue being whether evidence was rightly admitted to the effect that before the collision which resulted in the death of the deceased the appellant had " drink taken ". As this matter has been the subject of conflicting judicial rulings, a court of five judges was constituted for hearing the appeal. C

The charge arose out of a collision in Edgware Road, London, between a van driven by the appellant and a motor car coming towards him. It was alleged against the appellant that, when he was overtaking a trolley-bus at a time when it was unsafe to do so, he drove on the wrong side of the road in the face of approaching traffic. Evidence as to the appellant's condition and as to the drink which he had consumed was such as might have justified a charge under s. 6 of the Road Traffic Act, 1960, (1), although no such charge was in fact preferred. Objection to such evidence had been successfully taken before the committing justices, but notice of additional evidence had been duly served on the appellant's solicitors, and no question arose of their having been taken by surprise. At the trial, after hearing argument from both sides, the learned judge decided that the evidence was admissible in law and that in the exercise of his discretion he ought to admit it. D E

Before this court, counsel for the appellant contended in the first place that evidence as to drink taken by a person accused only of dangerous driving is inadmissible in law as being irrelevant. In his submission such evidence may explain why a person drove dangerously but is irrelevant to the preliminary question whether he did so in fact, which must be considered objectively and not subjectively in relation to the particular driver. F

This court does not propose in any way to qualify the principle, which must now be regarded as well established, that in cases of dangerous driving the proper G

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* I.e., *H.M. Advocate* v. *Tully*, 1935 S.C. (J.) 8;
Procurator-Fiscal of Dundee v. *Davidson*, [1938] 54 Sh. Ct. Rep. 119;
R. v. *Ward*, [1954] Crim. L.R. 940;
Burrell v. *Hunter*, [1956] Sc. L.T. (Sh. Ct.) 75;
R. v. *Fisher*, [1960] Crim. L.R. 135;
R. v. *Richardson*, [1960] Crim. L.R. 135, before ELWES, J., at Leeds Assizes (summarised at p. 7, letters E and F, ante); H
R. v. *Norrington*, [1960] Crim. L.R. 432;
R. v. *Spurge*, [1961] 2 All E.R. 688;
In *R.* v. *Fisher*, supra, the commissioner (N. J. SKELHORN, Q.C.) at Leeds Assizes, where an accused was tried on a charge of causing death by dangerous driving, admitted evidence to the effect that the accused had spent practically the whole day—it being a bank holiday which extended the hours of opening—in various public houses and shortly before setting off on the journey in the course of which the offence was alleged to have been committed, a girl whom he had offered to take as a passenger in his car had refused because she thought he was drunk. The commissioner admitted the evidence because the accused's alleged condition was relevant to the particular facts that, when driving round a slight bend, the near side of the front wheel of the car driven by the accused hit against the kerb and the car then went at an angle up the road for about a hundred yards before colliding with a stationary vehicle on the accused's wrong side of the road. On those facts it appeared material to inquire why the accused's car had hit the kerb and why, having done so, it was not possible to control it for so long a distance. I

(1) The relevant part of s. 6 is set out in footnote†, p. 6, ante.

A test for the tribunal to apply is what is generally known as the objective test. Juries are frequently invited to consider the matter from the point of view of an imaginary person who could see what happened and thus make up his mind whether in all the circumstances the accused was driving dangerously. In the majority of cases no doubt this approach to the problem is both convenient and correct, but cases may arise in which a bystander, however observant, would B not be aware of all the circumstances relevant to the issue whether the accused was driving dangerously. For example, he would be unaware of the condition of the driver in regard to sleepiness or the effect of drink. Dangerous driving may occur without a collision or, indeed, without any indication from the speed or movement of the vehicle that the driving of it was in the circumstances dangerous: see *Hill* v. *Baxter* (2).

C In the opinion of this court, if a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect is of probative value and is admissible in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver had had drink is not of itself relevant: in order D to render evidence as to the drink taken by the driver admissible, such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected. Secondly, there remains in the court an overriding discretion to exclude such evidence if in the opinion of the court its prejudicial effect outweighs its probative value. It is impossible to lay down any general rule as to the way in which E this discretion should be exercised, as each case must be considered in the light of its own particular facts, but in the opinion of this court, if such evidence is to be introduced, it should at least appear of substantial weight. In the present case the evidence as to the appellant's condition in regard to drink was clearly of substantial weight and, in the opinion of this court, the learned judge rightly exercised his discretion in admitting it.

F It was also contended for the appellant that evidence as to drink taken by a driver could only be adduced by the prosecution by way of rebuttal of a defence suggesting that through no fault of his own the driver was not in control of the vehicle when it was said to have been driven dangerously. In support of this contention reference was made to *Noor Mohamed* v. *R.* (3), and *Harris* v. *Public Prosecutions Director* (4), but the problem considered in those cases was altogether G different from that involved in the present case. In those cases the question was whether evidence of similar events which occurred on other occasions was admissible in support of the main charge: in the present case the matters covered by the disputed evidence formed part of the story involved in the main charge itself. In the opinion of this court there is no foundation for the contention that the admissibility of this type of evidence is limited in the way suggested. H

In the course of the argument before this court a request was made by counsel for the prosecution that some guidance should be given on the question whether a charge under s. 6 of the Act of 1960 should be preferred in addition to a charge of dangerous driving, assuming that there is evidence to justify such additional charge. Without wishing to give any general direction this court is of the I following opinion: (a) an indictment containing a charge under s. 1 of the Act (causing death by dangerous driving) should not include a charge under s. 6. This view is in accordance with the practice under which an indictment charging manslaughter has not included a count alleging driving under the influence of drink; (b) a charge under s. 6 may properly be coupled with a charge of dangerous

(2) [1958] 1 All E.R. 193; [1958] 1 Q.B. 277.
(3) [1949] 1 All E.R. 365; [1949] A.C. 182.
(4) [1952] 1 All E.R. 1044; [1952] A.C. 694.

driving under s. 2 if the evidence regarding the influence of drink on the driver is such as to justify it. A

As was indicated at the conclusion of the argument, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown). B

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

EDWICK *v.* SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL AND ANOTHER. C

[QUEEN'S BENCH DIVISION (Salmon, J.), June 26, 1961.]

Town and Country Planning—Permission for development—Notification of decision by local planning authority—Notice of refusal not given within time laid down in General Development Order—Mandatory requirement—Notice void—Enforcement notice given before application for development permission also invalidated—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 23 (3)—*Town and Country Planning General Development Order,* 1950 (*S.I.* 1950 *No.* 728), *art.* 5 (8). D

Prior to Aug. 16, 1957, the plaintiff had been using land which he owned for the display and sale of motor cars without planning permission. On that date the local planning authority served an enforcement notice on the plaintiff requiring him to discontinue the user. On Sept. 10, 1957, the plaintiff applied for permission to continue the use of the land for the display and sale of motor cars* and, accordingly, under s. 23 (3) (a) of the Town and Country Planning Act, 1947, the enforcement notice became ineffective until the final determination of the application. The local planning authority took no steps regarding the plaintiff's application until, more than two years later, by notice dated Jan. 7, 1960, they purported to refuse the application. The plaintiff claimed that the notice of Jan. 7 was void as it was not given within the period allowed by art. 5 (8)† of the Town and Country Planning General Development Order, 1950, and that, accordingly, the enforcement notice was of no effect. E F G

Held: the words of art. 5 (8) of the General Development Order of 1950 were mandatory, not merely directory, and as the local planning authority had failed to notify the plaintiff of their decision within the period allowed by art. 5 (8), the notice of refusal dated Jan. 7, 1960, was void and, therefore, the enforcement notice was no longer valid. H

[For the Town and Country Planning Act, 1947, s. 23 (3), see 25 HALSBURY'S STATUTES (2nd Edn.) 525.

For the Town and Country Planning General Development Order, 1950, art. 5 (8), see 21 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 92.]

Case referred to:

East Riding County Council v. *Park Estate (Bridlington), Ltd.*, [1956] 2 All E.R. 669; [1957] A.C. 223; 120 J.P. 380; [1956] 3 W.L.R. 312; 3rd Digest Supp. I

Action.

This was an action by Frederick Arthur Edwick claiming declarations and an

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* By s. 18 (1) of the Town and Country Planning Act, 1947, an application to continue any use of land is an application for "permission to develop land" within s. 14 (3).

† The relevant terms of art. 5 (8) are set out at p. 12, letter B, post.

A injunction against the Sunbury-on-Thames Urban District Council and the Middlesex County Council. At all material times the plaintiff was the owner of land known as 383, Staines Road West, Ashford Common, in the urban district of Sunbury-on-Thames, in the county of Middlesex. The first defendants were Sunbury-on-Thames Urban District Council and the second defendants were Middlesex County Council who were the local planning authority. For some time B prior to Aug. 16, 1957, the plaintiff had been using the land for purposes for which planning permission had not been given, namely, for the display and sale of second-hand cars. On Aug. 16, 1957, the first defendants, on behalf of the second defendants, served an enforcement notice on the plaintiff to discontinue this user of the land. On Sept. 10, 1957, the plaintiff applied for planning permission to use the land for the display and sale of second-hand cars, but he heard nothing C further about the application until by notice dated Jan. 7, 1960, viz., more than two years after the application had been made, the first defendants, on behalf of the second defendants, purported to refuse the application. By para. 6 of the statement of claim the plaintiff contended that the notice of Jan. 7, 1960, was void and of no effect and that by virtue of the Town and Country Planning Act, 1947, the enforcement notice of Aug. 16, 1957, was also of no effect. Accordingly, D the plaintiff claimed in addition to an injunction restraining the defendants from doing any acts pursuant to the enforcement notice, declarations that the enforcement notice was of no effect and that the notice refusing permission was void and of no effect. By order dated Feb. 22, 1961, it was ordered that the point of law raised by the plaintiff in para. 6 of his statement of claim should be tried without further pleadings and set down for trial within seven days. The E relevant statutory provisions are set out in the judgment.

R. M. Bingham, Q.C., and *G. B. H. Currie* for the plaintiff.
J. R. Willis, Q.C., and *G. J. Ponsonby* for the defendants.

SALMON, J., stated the facts and continued: It is necessary to refer to certain sections of the Town and Country Planning Act, 1947, which is the Act F applicable to this case. Section 23 provides for the service of an enforcement notice. Section 23 (3) is as follows:

> "Subject to the provisions of the next following subsection, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein: Provided that—(a) if within the period aforesaid an application is made to G the local planning authority under this Part of this Act for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land, to which the enforcement notice relates, the notice shall be of no effect pending the final determination of that application, and if such permission as aforesaid is granted on that application, the notice shall not take effect . . ."

H Section 14 (3), so far as it is material, provides as follows:

> "Provision may be made by a development order for regulating the manner in which applications for permission to develop land are to be dealt with by local planning authorities, and in particular . . . (d) for requiring the local planning authority to give to any applicant for permission, within I such time as may be prescribed by the order, such notice as may be so prescribed as to the manner in which his application has been dealt with . . ."

Section 18 (1) makes it plain that the words in s. 14 (3) "permission to develop land" include permission "for the continuance of any use of land instituted before" the date of the application. The material words of s. 18 (1) are as follows:

> "The power to grant permission to develop land under this Part of this Act shall include power to grant permission . . . for the continuance of any

use of land instituted before [the date of the application] (whether without permission granted under this Part of this Act or in accordance with permission so granted for a limited period only) . . ." A

The development order which regulates the manner in which local planning authorities are to deal with applications for permission to develop land is the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728). The relevant article is art. 5, paras. (8) and (9). They read as follows: B

" (8) The period within which the local planning authority shall give notice to an applicant of their decision or determination or of the reference of an application to the minister shall be the following period from the date of receipt of the application, namely . . . (b) in the case of an application for permission for development affecting trunk roads or for any approval in connexion therewith, three months, and (c) in any other case, two months, or such extended period as may at any time be agreed upon in writing between the applicant and the local planning authority." C

It is doubtful whether para. (8) (b) or (c) apply in this case, but it matters not, because the notification of the decision was made a great deal longer than three months after the application was made. Then art. 5 (9) reads: D

" Every such notice shall be in writing and (a) in the case of an application for planning permission or approval, where the local planning authority decide to grant such permission or approval subject to conditions or to refuse it, they shall state their reasons in writing, and send with the decision a notification in the terms (or substantially in the terms) set out in Part 2 of Sch. 2 hereto." E

Now art. 5, by the words which I have recited, appears to require that the application made by the owner of the land shall be dealt with within a certain period, and that the notification of the decision by the planning authority shall be in writing and shall state its reasons.

This case really turns on whether the words in art. 5, to which I have referred, are mandatory or directory only. This is a point of some general importance, and one which is quite free from authority. It is not a particularly easy point to decide. In my judgment, the language of art. 5, paras. (8) and (9), strongly suggests that the intention is that the words shall be mandatory rather than directory. Counsel for the defendants relies in his argument to the contrary particularly on the words " or such extended period as may at any time be agreed upon in writing between the applicant and the local planning authority ". He says that, assuming that this is a case to which para. 8 (c) applies, that is to say, a case in which the notification shall be within two months, the fact that that period may be extended " at any time " means that the parties may agree, whether within the two months or later than the two months, that the period shall be extended. Assuming, without deciding it, that he is right in that contention, it still seems to me not to be conclusive of the matter. If the words are mandatory, and the notice has to be given within the two months, there is no reason why provision should not be made that the applicant can, if he likes, where he has a right to have the notification within the two months, agree with the local planning authority thereafter that he will not insist on his rights but that the period may be extended. F G H

I am impressed by the argument put forward on behalf of the plaintiff, that, unless those words are mandatory, it would mean that the local planning authority could delay for as long as they liked, and in five, or it may be ten, years after the land had been continued to be used in the way which it was used before the service of the enforcement notice, the local planning authority could suddenly publish their decision and enforce an enforcement notice, which, in fact, had been a dead letter for some five or ten years. It is said that it is unlikely that any local planning authority would behave so unreasonably, and that may well be so. I

A But I have to consider whether, when Parliament and the minister were considering this matter, it was intended to give any local planning authority such exceptional latitude. It seems to me that the scheme of the Town and Country Planning Act, 1947, and of the Town and Country Planning General Development Order, 1950, is to lay down, as is stated in s. 14 (3) of the Act, the manner in which these applications are to be dealt with. They are to be dealt with expeditiously, B that is within thirty months or three months or two months, according to whether they come within the provisions of art. 5 (8), paras. (a), (b) or (c). They are to be dealt with in writing, and reasons are to be given. I cannot, for my part, believe that any such language as is used in the General Development Order of 1950 is directory only. In my judgment, it is mandatory.

I have been referred to a passage in the speech of VISCOUNT SIMONDS in *East* C *Riding County Council* v. *Park Estate* (*Bridlington*), *Ltd.* (1), where he said:

> "It was in the first place contended that the Act of 1947 was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities. This, as a general proposition, commands assent and not the less because disregard of an enforcement notice is an offence involving sufficiently serious penal consequences."

D I do not think it inconsonant with the general scheme of the Act and the order that there should be laid down, as in my view there are, stringent terms on which a local planning authority is to deal with applications made to it.

Counsel for the defendants has argued that, even if a local planning authority were to be dilatory and fail, without any good reason, to deal with an application, and fail to obtain the consent of the applicant to a delay, yet the applicant E would suffer no inconvenience by reason of the provisions of s. 16 of the Act of 1947. I do not think that I need read s. 16 of the Act. It seems to me that this provides, amongst other things, that, if the local planning authority failed to deal with an application within the time specified in the order, that is to say, within two months in this case, or three months, as the case may be, then, within twenty-eight days of the expiration of the period within which the application F should have been dealt with, the applicant has a right to go to the minister (2). The applicant can treat the failure of the local planning authority to deal with his application as a refusal, and appeal to the minister, but he has to do that within twenty-eight days. Section 16 confers on the applicant a certain right which he can exercise if he desires to do so. There are a number of cases of which one can think where it would be in his interest to exercise that right; for example, G if he had not done anything with his land, and the application to the local planning authority was for permission to do something, and it would not be wise to start doing it until he had received permission, he no doubt would invoke the provisions of s. 16 so as to reach a decision; or he might extend the time of the local planning authority. But in a case such as the present, where the applicant has been using his land, and, according to the provision of the Act (3), a H failure by the local planning authority to deal with his application to continue using the land as it had been used in the past makes the enforcement notice which has been served ineffective, I cannot conceive why an applicant should wish to invoke s. 16. Moreover, as I say, it might be that the applicant would say at the end of the two months' period "Well, I am prepared to wait. I shall no doubt be hearing from the ministry". Then twenty-eight days would go by, and I perhaps a further few weeks, and he would write and nothing would happen. He would then have lost his rights (4) under s. 16, and, because of the dilatoriness—

(1) [1956] 2 All E.R. at p. 672; [1957] A.C. at p. 233.

(2) Section 16 (1) of the Town and Country Planning Act, 1947, provides: "Where application is made under [Part III of the Act of 1947] to a local planning authority for permission to develop land . . . and that permission . . . is refused by that authority . . . then if the applicant is aggrieved by their decision he may by notice served within the time, not being less than twenty-eight days from the receipt of notification of their decision . . . appeal to the minister." (3) See s. 23 (3) (a) of the Act of 1947.

(4) See art. 11 (1) (a) of the Order of 1950.

I am not saying that in this case there was any dilatoriness, I am considering the construction of the section and the order, which have general application—in the case to which I have referred he would have lost his rights for ever.

I do not think that to construe those words of the order as being mandatory is any great hardship to the local planning authority. Another enforcement notice could always be served, and it does, to my mind, protect a land owner from what would be, or might be, a grave injustice in some cases; that is to say, that nothing would happen for two months, and longer, and the applicant would assume perhaps, as I think he is entitled to under the statute, that the enforcement notice was of no effect. He would look at the order and would see that the local planning authority cannot apparently, according to the words of the order, deal with the application unless it deals with it within the time prescribed, and he would order his affairs accordingly. Then, at the end of a very long period, he might find that he was in contravention of the enforcement notice.

For those reasons I have come to the conclusion that the words in the General Development Order, 1950, are mandatory. It does not, of course, follow from what I have been saying that all the provisions in art. 5 are mandatory. It may be that some of the provisions in other paragraphs of art. 5 are directory. One would have to look at each paragraph by itself and the language used in order to decide whether the words were mandatory or directory only.

In my judgment, for the reasons which I have indicated, the language in para. (8) of art. 5 is mandatory, and I accordingly decide that the notice of Jan. 7, 1960, is void, and accordingly the enforcement notice is void also.

Declarations accordingly.

Solicitors: *I. A. Landy, Laufer & Co.* (for the plaintiff); *Kenneth Goodacre* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

WALKER *v.* WALKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Lloyd-Jones, J.), June 5, 6, 1961.]

Magistrates — Husband and wife — Cruelty — Persistent cruelty — Reasonable belief in husband's adultery deliberately induced in wife's mind by husband— Injury to wife's health.

A husband who carries on deliberately such a course of conduct as induces in his wife a reasonable belief that he is carrying on an adulterous association and thereby causes injury to her health, is guilty of persistent cruelty towards her.

The husband was known to be associating with a widow who lived in the house next door (which he owned) and he deliberately induced in his wife the belief that he was committing adultery with this widow. The wife was unable to prove that adultery had been committed. Nevertheless the husband's conduct caused injury to the wife's mental health. Although the wife occupied a separate bedroom from the husband, she had not set up a separate household so as to found a charge of constructive desertion against him. On appeal against a separation order made by a magistrates' court on the ground that the husband had been guilty of persistent cruelty,

Held: the separation order was rightly made since the husband's conduct amounted to persistent cruelty.

Baker v. *Baker* ([1953] 2 All E.R. 1199) applied.

Appeal dismissed.

[As to a reasonable belief in adultery constituting constructive desertion, see

A 12 HALSBURY'S LAWS (3rd Edn.) 247, para. 461, note (b); and as to the relationship of cruelty to desertion as regards matrimonial causes, see ibid., pp. 249, 250, para. 464.

As to cruelty as a matrimonial offence, see 12 HALSBURY'S LAWS (3rd Edn.) 269, 270, paras. 514-516; and as to persistent cruelty for the purposes of the summary matrimonial jurisdiction, see ibid., pp. 481, 482, para. 1076; and for B cases on the subject, see 27 DIGEST (Repl.) 351, *2906* and Supplements.]

Cases referred to:

Allen v. *Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest (Repl.) 84, *633*.

Baker v. *Baker*, [1953] 2 All E.R. 1199; [1954] P. 33; 117 J.P. 556; [1953] 3 W.L.R. 857; 3rd Digest Supp.

C *Everitt* v. *Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 27 Digest (Repl.) 348, *2881*.

Glenister v. *Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, *3040*.

Hopes v. *Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 27 Digest (Repl.) 340, *2818*.

D *West* v. *West*, [1954] 2 All E.R. 505; [1954] P. 444; [1954] 3 W.L.R. 163; 3rd Digest Supp.

Appeal.

The husband appealed against a separation order made by the Rugeley justices on Mar. 8, 1961, on the wife's application under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, and on her complaints that the husband E had been guilty of persistent cruelty towards her, that he had committed adultery, that he had deserted her, and that he had been guilty of wilful neglect to provide reasonable maintenance for her. The justices found that the husband had been guilty of persistent cruelty but dismissed the other complaints; and they made a separation order in the wife's favour and ordered the husband to pay her maintenance at the rate of £5 a week.

F The husband now appealed against the finding of persistent cruelty.

R. I. Gray for the husband.

F. P. Shier for the wife.

LORD MERRIMAN, P.: The sole question is whether the finding of persistent cruelty is justified. Before I discuss the interesting question whether G it is or is not justified I must deal shortly with the other issues. Wilful neglect disappeared very early in the hearing when it was made apparent that the husband was providing a regular sum of money for the wife. I need say no more about that. Desertion, which was alleged to be of a constructive character, can, as is not really disputed, subsist with persistent cruelty. Indeed, it is a commonplace to say that very often the facts of the case are such that either a finding of constructive H desertion or a finding of cruelty would be equally appropriate, but that is not so in this case for one simple reason.

I do not propose to go through all the details of the matter but suffice it to say that although the parties were living in a state of considerable unease, to put it mildly, at the time that the wife's complaint was made in February, 1961, and were still living in that state of unease at the time of the hearing on Mar. 8, I there was no evidence which would satisfy, in my opinion, the test in *Hopes* v. *Hopes* (1) that they were living as two separate households, though under the same roof. As far as I can judge, it was not seriously attempted to prove that they were and if it had been, the answer, I think, would have been simple. It was common ground that in substance up to the date of her various complaints in February, the wife was still so far keeping one household with her husband that, although sexual intercourse had ceased, and they were no longer sleeping

(1) [1948] 2 All E.R. 920; [1949] P. 227.

in the same bedroom, she was, in fact, cooking his meals. That, I think, on the authorities would itself have been sufficient to dispose of the charge of desertion because on those facts it would not be right to hold that there was that necessary ingredient in any charge of desertion, constructive or otherwise, namely, a state of de facto separation.

There remains then only the charge of adultery. On that the magistrates said that, having regard to the heavy burden of proof in cases of adultery, they did not think that the wife could succeed on this charge.

That brings me to what is the real point in the present case. I am paraphrasing the magistrates' findings because this aspect of the case was not disputed in the course of the very clear argument which counsel for the husband has addressed to us. In substance they said that while they were not able to find that adultery had been proved, they were plainly of opinion that the husband had so conducted himself as to induce the belief, reasonable in the wife's mind, that he had been and was committing adultery with a woman who was living in the next-door house, a house which happened to be owned by the husband as was the matrimonial home itself. Moreover, having said that they did not think that the wife could succeed on the charge of adultery, they said:

> "We can well understand her suspicion and resentment, inflamed as it must be in a small well-knit community by local gossip"

and they said that although they had not the benefit of medical evidence

> "it was obvious that the wife was in a highly overwrought nervous state and although this may be partly explained by her age, we have no doubt that it has been largely caused by her husband's persistent course of conduct and we are quite satisfied that the husband knew that his conduct was causing his wife distress and pain and that if he persisted in his course of conduct her mental and physical health would suffer and the marriage would break up. For these reasons we are satisfied that the husband has treated his wife with persistent cruelty and shall make an order accordingly."

This raises then in plain form the question, not without importance, whether the deliberate inducement by the husband of the belief that he is carrying on an adulterous association with the woman next door can in law amount to persistent cruelty, providing, of course, that in addition to that particular form of ill-treatment there is added the element of danger to health—mental health in this case, as is found, or at least a reasonable apprehension of such a danger.

I think that this point, in final analysis, is a very simple one and can be dealt with quite shortly. The principle laid down in *Glenister* v. *Glenister* (2) about the legal effect of the inducing of the belief in the adultery of one spouse in the mind of the other spouse by the conduct of the wrong-doing spouse, has been accepted in the Court of Appeal in at least three cases; namely in *Everitt* v. *Everitt* (3), in *Allen* v. *Allen* (4) and, finally, to mention only one other, in *West* v. *West* (5). The principle is perfectly well established but, hitherto, I think it is fair to say that up to a certain point it has always been used as a shield against, to quote one simple example, a charge of desertion. It has been applied, however, as the law has developed, to resist a charge of wilful neglect to maintain for the same reasons as it was applied to desertion. Finally there is the decision in *Baker* v. *Baker* (6). In that case it was held by this court, myself and PEARCE, J., that if a husband deliberately induces in his wife (7)

> ". . . the belief that he is carrying on an adulterous association, and, in consequence, his wife leaves the matrimonial home, he can be held to have

(2) [1945] 1 All E.R. 513; [1945] P. 30.
(3) [1949] 1 All E.R. 908; [1949] P. 374.
(4) [1951] 1 All E.R. 724.
(5) [1954] 2 All E.R. 505; [1954] P. 444.
(6) [1953] 2 All E.R. 1199; [1954] P. 33.
(7) [1953] 2 All E.R. at p. 1200; [1954] P. at p. 36.

A expelled her, and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery."

If that is true of constructive desertion, I am unable to understand why it should not be equally true, on the same facts, of persistent cruelty. If the ill-treatment consisting of deliberately inducing belief in an adulterous association is, in B appropriate circumstances, held sufficient to justify the allegation that the wife has positively been expelled from the home, I can see no reason why the same conduct should not also be held to constitute the offence of persistent cruelty. It is a commonplace, of course, to say that persistent cruelty and constructive desertion frequently depend on the same set of facts. They are not necessarily the same thing and, as I have already pointed out, in the present case they C cannot be the same thing because the facts here lack the necessary element of separation of the spouses which would be necessary in order to justify a finding of constructive desertion.

I could cite other passages in the magistrates' very clearly reasoned statement of their findings which would dot the " i's " and cross the " t's "; for example, I have not the slightest doubt in my own mind that this is a case in which the D husband has deliberately gone out of his way to try to persuade his wife that the association was adulterous. (I am assuming for the moment in his favour that there never has been adultery, in fact, and am accepting the magistrates' finding that adultery is not proved to their satisfaction.) That, to my mind, is as clear as anything could possibly be. I will only give one instance of it. I bear in mind that this was a happy couple until this association began some time in E 1959. There came a time in August, 1960, when this association was going on and was being flaunted by the husband in the face of the wife, causing her, as I am satisfied that it did, very great distress, and the husband went away for two days. The wife said that, on Aug. 19, 1960, she went away and returned on Aug. 21 and that when she came back she told him, on Aug. 22, that the gossip was that he had been away with this woman on Aug. 20. Then, if any time, was F the time to say that it was utterly untrue, he had been to Aston Villa and then on to Walsall for another purpose and that he had never had the woman with him at all; that it was a complete myth. He said that before the magistrates, who did not believe him, but to the wife he said in effect " Nothing will induce me to my dying day to tell you where we went ". I emphasise the word " we ". Nothing could be more conclusive of a deliberate intention to distress the wife G by pretending or asserting, albeit asserting falsely, if it were false, that he had taken this woman away for an adulterous week-end. In my opinion, if that incident stood alone it would be sufficient. But it plainly does not stand alone because there is this constant flaunting of the association with this woman in the wife's face. The wife or the son, in spite of the denial of the husband and the woman named, on two occasions caught them in compromising circumstances H and the whole thing was being conducted, in my opinion, in a way most calculated to injure the wife's feelings and ultimately her health. This was a wife, I repeat, with whom until 1959, at any rate, there had been complete happiness and the raising of a family of two sons, both of whom were by this time grown up.

It has been argued that adultery itself, let alone a reasonable belief in adultery, cannot amount to persistent cruelty unless, it is said, there is some substantial I degree of misconduct on top of, or outside, the actual impropriety of the association. Those are very fine resounding words but, in my opinion, they fit the present case exactly because when an association with the woman who lives in the next house, which is owned by the husband, is being carried on and flaunted in the face of the wife, and with the deliberate pretence, at any rate, that he has taken the woman away for a particular week-end and so forth, I should say that that is undoubtedly a substantial degree of misconduct on top of the impropriety of the association itself. In other words, I think that there is ample evidence of ill-treatment—grave conjugal unkindness—in connexion

with this association which, coupled with the undoubted results on the wife's mental health as found by the magistrates, satisfies the legal description of cruelty, and of persistent cruelty in the present case, which necessitates proof not only of the ill-treatment but of the resulting injury, actual or apprehended.

In my opinion, in the final analysis, this is a perfectly plain case of persistent cruelty. I think that the magistrates were entirely right and that this appeal should fail.

LLOYD-JONES, J.: I agree so entirely with what LORD MERRIMAN, P., has said that I have grave doubts whether I should, or need, add anything at all. But the point is one of interest and perhaps I ought just to add a few words to associate myself, positively rather than formally, with my Lord's judgment.

Counsel for the husband conceded that if the wife had seen fit to separate from her husband because of his conduct, as I think he agreed that she was entitled to do by reason of that conduct, she would have been able to establish a case of constructive desertion. As LORD MERRIMAN, P., has pointed out, it was not competent to her on the given facts of the present case to rely on that ground and the question, therefore, does resolve itself into whether or not the conduct of which the husband was guilty in the present case, and which would have amounted to constructive desertion in a different set of circumstances, also amounts to cruelty.

I agree entirely that his conduct on the evidence falls absolutely within the language used by LORD MERRIMAN, P., in *Baker* v. *Baker* (8). In the present case, the husband, as far back as October, 1959, had made it plain to his wife and, indeed, to his two grown-up sons, that the widow neighbour, to whom he had already paid some attention, had come to occupy a very important part in his life. When there was a question of going for a holiday to Blackpool in 1959 he, on learning that the neighbour was not going, refused to consider going himself. He said that he would not go and when he was prevailed on ultimately by his wife and by his sons to go, he behaved in a fashion which is only consistent with that of a man whose affections were deeply engaged in respect of this woman next door, because, according to the wife, and it was not in issue, he said that he wished he was dead and cried. That was the outcome of an attempt to persuade him that he ought to go to Blackpool with his wife whether the neighbour was ready to go or not. Then at later stages thereafter until December, 1960, there were instances when he was seen going next door, and that is not in question. The justices found that he frequently went next door, although he himself sought to say that he went some half-dozen times only, but he was plainly not believed. Not only did he go next door but he was seen in compromising circumstances. It was admitted that he had kissed this woman; his own son saw him do so and his wife saw him do so, and his wife saw him with this woman on his knee on one occasion.

LORD MERRIMAN, P., has already referred to the incident in 1960 when the wife was away for some days and on her return, far from giving her any reassurance that local gossip had no foundation to it, the husband quite deliberately engendered in her mind the belief that he had been away with the woman next door. That led to the fact that the wife felt that she could no longer share his bed with him and she went to another bed and another room. The husband, far from trying to remedy that state of affairs, maintained for a period of many months an obdurate and sulky silence, not only in relation to his wife but plainly also in relation to both his sons, and nothing could apparently induce him in any way to allay his wife's fears and suspicions. In my judgment, it is clear that she was the sort of woman who would have welcomed any kind of comfort that he could have given her and he gave her none. So matters went on until she was driven into an excessive course of conduct which against the background

(8) [1953] 2 All E.R. at p. 1200; [1954] P. at p. 36.

A of her marriage, which had been admittedly happy up until October, 1959, or thereabouts, would have been until then unthinkable in her relations with her husband. Her own admission is that she was driven to striking him, not only with a blow of the hand but also with some coat-hangers. She also admitted that she had on one occasion threatened in her distraction to kill him. The husband went so far as to say that she, in fact, actually threatened him with a B knife, although that was not accepted, but it all points to the fact of a very distracted woman and, in my judgment, she was driven into that state of distraction by her husband's positive conduct, for I am unable to accept the idea that going next door over and over again was purely negative in character. When the wife knew and made known her feelings about his visits next door it is, in my view, quite erroneous to describe his visits next door as merely C negative conduct. Then she was driven into an attack on the woman next door which led to that woman's departure to some other part of the village.

It has been argued by counsel for the husband that, whatever the position may have been with the woman next door up to Christmas time when she left, though he does not concede that there had been any conduct that could be cruelty even up to that point, that for about six weeks to two months afterwards D the wife is unable to establish that there had been any continued association between the husband and the woman next door. I tried to point out in the course of the argument, and I would like to repeat, that in my view as the husband admittedly did nothing to reassure her, or to allay her suspicions during that six weeks or two months, that, in one sense, might have been more difficult to bear because the wife was no longer in a position even to observe whether E or not he was going to the woman next door for she was no longer there but somewhere else. She had not the slightest encouragement from the husband positively to believe that the association had been discontinued and, indeed, actually at the hearing the husband said two things that indicated that he would not, even if he had not been seeing this woman, have given her any assurance of any kind but would still have tormented his wife with the possibility F that at any time he would associate again or continue to associate with this woman. The first piece of evidence is, as it reads in my note of the evidence: "I told wife that I am not keeping away from [the widow] for her" and the other is, as I think, presumably in answer to some question or suggestion from the justices: "I will not give any promise after the way she has treated me", and that means: "I will not give any promise not to see this other woman".

G In those circumstances I think that there was a course of conduct which amounted to cruelty, up to the time when the woman next door left. I see no reason to deny the wife her remedy in this case because she was not in a position in the last six weeks before she brought her summons to establish that she had seen them, in fact, associating together. In my judgment it makes no difference and, indeed, it is as I suggested, although I only throw it out as a suggestion, H possible that these six weeks might have been in one sense even more difficult to bear because of the unallayed suspicion which remained naturally in her mind. I agree with LORD MERRIMAN, P., that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Gardner, Railton & Co.*, Rugeley (for the husband); *Gregory, Rowcliffe & Co.*, agents for *Pickering & Pickering*, Stafford (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

L. *v.* L.

A

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), June 27, 1961.]

Divorce—Maintenance—Wife—Dismissal in 1958 *by consent of wife's claims for maintenance and secured provision contained in petition—Lump sum accepted by wife in full satisfaction of all present and future rights to maintenance for herself—Subsequent application by wife in* 1961 *for maintenance and secured provision—Leave required to make application—Matrimonial Causes Act,* 1950 (14 *Geo.* 6 *c.* 25), *s.* 19 (2), (3) (*as amended*) *—Matrimonial Causes* (*Property and Maintenance*) *Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 35), *s.* 1 (1)—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3), *proviso* (ii).

B

C

The parties were married in 1930 and in 1938 the husband left the wife. In 1953, the husband entered into a deed of covenant to pay maintenance to the wife during their joint lives or for a period of seven years, whichever should be the shorter period. In March, 1955, the wife filed a petition for divorce in which she prayed for maintenance and a secured provision. The wife was granted a decree which was made absolute in June, 1955, but no order for maintenance was made in her favour. In 1958 the husband and wife agreed to commute the payments under the deed by a lump sum payment of £660 (being the amount payable for the remaining portion of the seven-year term) on condition that the deed be cancelled and that the wife's prayer for maintenance contained in her petition be dismissed. The husband accordingly paid £660 and on Feb. 13, 1958, an order was made by consent dismissing the wife's application for maintenance and secured provision as contained in her petition, she "having accepted the said sum in full satisfaction of all present and future rights to maintenance for herself." At that date, the Matrimonial Causes Act, 1950, s. 19 (2) and (3), provided that an order for maintenance and secured provision could be made "on" the making of a decree but after Jan. 1, 1959, the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 (1), gave the court power to make such orders at any time after the making of a decree. In March, 1961, the wife applied for maintenance and a secured provision.

D

E

F

Held: by virtue of s. 1 (1) of the Act of 1958, the wife was no longer precluded from applying for maintenance and a secured provision, but since the prayer in her petition had been dismissed by the order of Feb. 13, 1958, she required the leave of a judge pursuant to the Matrimonial Causes Rules, 1957, r. 3 (3), proviso (ii), to make the present application; that leave would be given and the matter would be referred to the registrar on the question whether any, and if so what, order should be made in the wife's favour.

G

Mills v. *Mills* ([1940] 2 All E.R. 254) not followed in view of Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1.

Pachner v. *Parker* (*formerly Pachner*) ([1960] 1 All E.R. 159) applied.

H

[**Editorial Note.** The Matrimonial Causes (Property and Maintenance) Act, 1958, was brought into operation on Jan. 1, 1959, by the Matrimonial Causes (Property and Maintenance) Act (Commencement) Order, 1958 (S.I. 1958 No. 2080).

As to the effect of a previous consent order on an application for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 439, para. 985, note (g); and for a case on the subject, see 27 DIGEST (Repl.) 615, *5759*.

I

For the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 441.

For the Matrimonial Causes Act, 1950, s. 19, see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

For the Matrimonial Causes Rules, 1957, r. 3 (3), see 10 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 218.]

A Cases referred to:

Mills v. *Mills*, [1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272; 27 Digest (Repl.) 615, *5759*.

Pachner v. *Parker* (*formerly Pachner*), [1960] 1 All E.R. 159; [1960] 1 W.L.R. 486.

Adjourned Summons.

B The wife issued a summons applying for maintenance and a secured provision. On Mar. 29, 1961, the application came before Mr. Registrar KINSLEY, who referred the matter to the judge. The facts appear in the judgment.

J. B. Mortimer for the wife.

A. C. H. de Piro for the husband.

C *Cur. adv. vult.*

June 27. **MARSHALL, J.,** read the following judgment: The parties were married on July 23, 1930, and there is one child now twenty-five years of age. They lived together until 1938 when the husband left, never to return to the wife. On Oct. 31, 1953, the husband entered into a deed of covenant to pay to the wife during their joint lives or for a period of seven years (whichever should be D the shorter period) on the first of each month £40 for the first twelve months and thereafter £20 per month. On Mar. 4, 1955, the wife filed a petition for divorce on the ground of her husband's desertion in the prayer of which she asked, inter alia, for maintenance and for a secured provision. On May 13, 1955, a decree nisi was granted which was made absolute on June 27, 1955. It will be seen that at this time the deed of covenant was still current and no order E was made as to maintenance or secured provision.

From the correspondence exhibited to an affidavit dated Mar. 28, 1961, sworn by the husband's solicitors, it is clear that by the end of 1957 the wife, who was in some financial difficulties, was desirous of leaving England for good, and was asking that she be paid the amount that would fall due under the deed of covenant if it ran the full period of seven years. The husband was only prepared to do F this on certain conditions, to which the wife ultimately agreed in letters passing between solicitors dated Feb. 3, 1958, and Feb. 7, 1958. Although the wife contends that she did not fully understand the implications of the agreement, having read the correspondence, I am satisfied that she was independently advised by a solicitor at the time and that the terms of the agreement having been explained to her she readily consented to be bound by them. Her main G wish at that time was to secure a substantial sum of money wherewith to meet some (if not all) of her financial obligations in this country and to pay for her passage to Israel in which country she hoped permanently to settle.

By this agreement the husband agreed to commute the payments under the deed of covenant by a lump-sum payment of £660 (the amount due under the unexpired portion of the deed of covenant) on the following conditions: H (i) That the deed of covenant be cancelled. (ii) That the wife's application for maintenance contained in her petition dated Mar. 4, 1955, be dismissed on receipt of the sum of £660. (iii) That the wife should make no further attempt to get in touch with the husband after the completion of the transaction. (iv) That the wife should make no attempt to find out the husband's whereabouts through his then solicitor. On Feb. 15, 1958, the wife, in the presence of her I solicitor, signed (i) a deed of revocation of the deed dated Oct. 31, 1953; (ii) a written undertaking to comply with conditions (iii) and (iv) of the agreement.

The sum of £660 having been paid to the wife a summons in agreed terms was issued and came before Mr. Registrar KINSLEY on Feb. 13, 1958, who by consent made the following order:

> "The [husband] having paid to the [wife] the sum of £660 and the [wife] having accepted the said sum in full satisfaction of all present and future rights to maintenance for herself, it is ordered that the [wife's] application

for maintenance and secured provision as contained in the prayer of the petition herein be and the same is hereby dismissed. [Wife's] costs."

I have seen the file of the original proceedings and have seen the consent summons dated Feb. 10, 1958. It was taken out by the husband's solicitors and a consent to an order in its terms was signed by the wife's solicitors.

The terms of the summons make it clear that the sum of £660 had been accepted " in full satisfaction " of all present and future rights to maintenance for herself. Although I am far from satisfied that the terms of the agreement which I have already set out made clear that the sum of £660 was anything more than a commuting of the payments due for the unexpired portion of the seven-year period covered by the then current deed of covenant, the consent by the wife's solicitors to an order, in the terms of the summons, which clearly provides for the " satisfaction of all present and future rights to maintenance for herself " must now be taken to have been consented to by the wife.

From the indorsement on the summons it is clear that only the husband's solicitors appeared before the registrar. On the summons thus consented to on the wife's behalf the registrar was clearly justified in making the order that he did. I am not satisfied that the full terms of the original agreement contained in the correspondence were ever called to his attention and it appears reasonably clear that his order was based solely on the terms set out in the consent summons. Whilst this is an unfortunate aspect of the case, I am satisfied that the solicitors acting for each party believed that the order thus obtained from the learned registrar fell within the decision in *Mills* v. *Mills* (1) and on the law as it then stood it was intended by them that the order should put an end to any right to future maintenance for the wife.

There never had been any order of the court for maintenance, and the fact that the wife's application for maintenance, contained in her petition, was dismissed, in my judgment brought to the husband the same protection against future claims for maintenance by the wife, which the decision in *Mills* v. *Mills* (1) gave to the husband in that case. As the wife could only thereafter proceed by way of a new application, the court's jurisdiction, which permitted only the making of an order for maintenance " on any decree for divorce ", could not be exercised in her favour. Counsel for the wife, no longer relying on the Maintenance Agreements Act, 1957, has argued that having regard to the terms of s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, the decision in *Mills* v. *Mills* (1) no longer prevents the wife, who is now back in this country, and in receipt of national assistance, from bringing proceedings for maintenance. Section 1 (1) reads as follows:

> " Any power of the court, under the enactments mentioned in the next following subsection, to make an order on a decree for divorce, nullity of marriage or judicial separation shall (subject as mentioned in sub-s. (3) of this section) be exercisable either on pronouncing such a decree or at any time thereafter."

The words " at any time thereafter " are important. Section 1 (2) reads:

> " The said enactments are the following provisions of the Matrimonial Causes Act, 1950 (in this Act referred to as ' the Act of 1950 '), that is to say, —(a) sub-ss. (2) and (3) of s. 19 (whereby, on a decree for divorce or nullity of marriage, the court may order the husband to make a secured provision for the wife or to pay her a monthly or weekly sum), and those subsections as extended by sub-s. (4) of that section (whereby the like provision or payments may be ordered for a husband where a petition for divorce is presented by his wife on the ground of his insanity) . . ."

The only other relevant subsection to which I need refer is sub-s. (3) (a), which

(1) [1940] 2 All E.R. 254; [1940] P. 124.

A is as follows:

> " any reference in sub-s. (1) of this section to a decree shall be construed as a reference to a decree nisi, and the reference to any time after a decree shall be construed as a reference to any such time whether before or after the decree has been made absolute."

B By these provisions the power of the court to make an order for maintenance under s. 19 of the Matrimonial Causes Act, 1950, is no longer confined to the period " on " making a decree. It is now exercisable " at any time thereafter."

In the circumstances the law on which the decision in *Mills* v. *Mills* (2) was based no longer stands and I have come to the conclusion that counsel for the wife is right and that the wife is no longer precluded by that decision from C bringing a claim for maintenance. Indeed, I am satisfied that the policy of the Matrimonial Causes (Property and Maintenance) Act, 1958, was intended to cover just this type of case and having regard to the differences which I have already pointed out, between the agreement between the wife and the husband, as set out in the exhibited correspondence, and the summons on which by consent the order of Mr. Registrar KINSLEY dated Feb. 13, 1958, was based, I am all D the more happy that the law now permits a new inquiry on the question of maintenance taking into account past agreements and the conduct of both parties.

Since there is now no application for maintenance in the petition, it having been dismissed by the order of Feb. 13, 1958, and as any new application by the wife on the authority of *Pachner* v. *Parker* (*formerly Pachner*) (3) must be made E in accordance with the Matrimonial Causes Rules, 1957, as amended, I think that it is necessary for the wife to obtain under r. 3 (3) the leave of a judge to file a new claim for maintenance. This leave I give. The case will be returned to the registrar to consider, in the light of the facts, what order, if any, should be made in respect of the wife's maintenance. The costs of the hearing before the registrar on Mar. 29, 1961, and before me to be the wife's.

Order accordingly.

Solicitors: *Benson, Mazure & Co.* (for the wife); *Gamlen, Bowerman & Forward* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(2) [1940] 2 All E.R. 254; [1940] P. 124.

(3) [1960] 1 All E.R. 159.

DANIELS *v.* JONES.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), June 14, 15, 16, 19, 1961.]

Fatal Accident—Damages—Assessment—Factors—Computation of pecuniary loss a jury question—Arithmetical calculation as check by comparison—Assessment of benefits accruing from deceased's death—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93), *s.* 2.

In the assessment of damages under the Fatal Accidents Act, 1846, s. 2, the court necessarily undertakes arithmetical calculations, and various methods of reaching a correct estimate may be adopted. But such calculations do not provide a substitute for common sense and an arithmetical calculation which shows that a well-knit family lost nothing by the death of the father, who was the breadwinner earning a high income and who himself lived frugally while providing generously for his family, must be rejected as repugnant to common sense.

The assessment of damages under the Fatal Accidents Act, 1846, including assessment of dependency, benefit to the widow from the deceased's estate, and estimate of the deceased's future income after tax paid, considered.

Appeal dismissed.

[As to basis of assessment of damages under the Fatal Accidents Acts, see 28 HALSBURY'S LAWS (3rd Edn.) 100, para. 110; and for cases on the subject, see 36 DIGEST (Repl.) 221-224, *1176-1194.*

For the Fatal Accidents Act, 1846, s. 2, see 17 HALSBURY'S STATUTES (2nd Edn.) 5.]

Appeal.

This was an appeal by the defendant from a judgment of WINN, J., given on July 13, 1960, at a trial of an action without a jury awarding the plaintiff the sum of £14,890 2s. damages and dismissing the counterclaim. The plaintiff, the widow and executrix of Joseph Lionel Daniels, deceased, brought the action under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, on behalf of the estate of the deceased, and on behalf of herself and the children of the marriage. The deceased was killed in a collision of his Jaguar motor car with another Jaguar motor car coming from the opposite direction; the collision was alleged to be due to the negligence of the defendant. In his defence and counterclaim the defendant, who was himself injured in the collision, alleged that the accident was due solely to the negligence of the deceased, alternatively that the deceased contributed to it by his negligence and counterclaimed damages. The defendant now appealed to the Court of Appeal on the question of liability and of quantum. The case is not reported on the question of liability.

Stephen Chapman, Q.C., and *M. D. Van Oss* for the defendant.
John Thompson, Q.C., and *R. C. Hutton* for the plaintiff.

June 19. The following judgments were read.

HOLROYD PEARCE, L.J.: The second question in this appeal is whether the learned judge was right in his assessment of the amount of damages under the Fatal Accidents Acts, 1846 to 1908. The defendant argues that he has awarded too large a sum of damages, since his assessment of the dependency was too high and that of the widow's inheritance too low.

The widow was fifty-four at the time of the death of her husband. The deceased was fifty years eleven months old. He was the chairman and managing director of a private company, T. H. & J. Daniels, Ltd., with subsidiary companies. The company was formed in 1904. It carried on business as hydraulic engineers and had interests in other fields of engineering. The judge described it thus:

A "The parent company was concerned with engineering and, more particularly, hydraulic engineering, and, as a speciality, the manufacture of hydraulically operated machinery for use in manufacturing articles, but there were steam plant interests and other interests. It was a very well-spread, diversified and varied industry; . . . I have had the advantage of seeing five sets of accounts of the company. I do not think it is necessary B to go into any detail about the contents and effect of those accounts; it will suffice, I feel, for me to say that the general impression, a clear impression free from doubt, on my mind is that year by year the company was progressing, developing, prospering and had a very solid basis for future success and security."

C Thus, the company was successful and well managed; and the deceased had a large income from his salary, director's fees and dividends.

There were five children, of whom two were grown up and had married. There is a girl who was thirteen. Her school fees are paid out of dividends on shares given by her father. There are also two boys who were fifteen and eighteen respectively. They both contribute to their keep from dividends on shares D given by their father.

The judge considered all the evidence and worked out the complicated considerations in this case in a masterly and lucid analysis. Its effect may be summarised thus. He found that the net earnings of the deceased for three years preceding the accident were £3,400, £2,900 and £3,750. Therefore he took the average earnings as £3,300 net. His forecast of the future prospects E was that there would be a £200 per annum increase in net earnings running over thirteen years. He said:

"I have had to do the best I can to assess what probably would have been the change of trend in Mr. Daniels' income over the years to come. It seems to me that the fairest way, the best way, to arrive at that is to suppose that over the period of thirteen years which, as I shall indicate later, I have F taken for the purpose of capitalising the annual loss, that income would have increased at the average rate year by year, sometimes more sometimes less, of the equivalent of £200 a year net of tax, and I have therefore regarded the deceased's net income for the period of thirteen years as beginning at £3,300 and rising to £6,100. I have chosen to take the average to the fourteen year period, it will be appreciated. Thirteen years at £200 being G £2,600—£3,300 to £5,900 and one more year to £6,100 so as to get a smoothing out of the range. I deliberately mention specific figures in this particular judgment because it may be that one or other party would desire to have this difficult case further considered in another court."

Thus, over thirteen years the average net income would be £4,600. That figure is said to be too high. He assessed dependency at two-thirds of the total net H income. Two-thirds is said to be too high, and half is suggested. The judge justified that assessment by the following passages.

"He was clearly a good father, concerned properly but not extravagantly or excessively to provide for his children. In 1955 he gave over £20,000 of shares to his wife and children. It is germane to this part of my assess- I ment of the material matters that I should say that here, judging the late Mr. Daniels as a person, partly from my judgment of his widow as a person, as well as from the evidence of what he did in relation to his property. The late Mr. Daniels probably devoted, on the average, and would have continued to devote on the average, something of the order of two-thirds of his net income after taxation to the group of persons comprised in his family, using the other one-third of his net income to a very considerable extent for charitable purposes though partly, of course, on necessary clothing and other things that he might wish, within his simple scope of requirements, to

have for himself in the way of books, pictures, furniture and all such things, and, of course, some expenditure on his private use of his motor car. As his income increased, and I shall have occasion to make it clear that in my judgment it would have increased materially as the years went on but for his untimely death, I think, and proceed upon the footing that the proportion would not greatly have changed in that respect, the proportion of his net income which he would have devoted to his family on the one hand and to all other purposes on the other. The closest calculation that I was able to make produced a figure of 20/33rds, but I think 22/33rds or 2/3rds is probably as near a figure as one can arrive at for this purpose . . . I consider that two-thirds of that amount or thereabouts should be regarded as attributable to expenditure on the family, and, again stressing that I am dealing in round figures, I treat the dependency as £3,000 a year. I ought perhaps to say, so that the matter is on record, that in the three years before the deceased's death the actual expenditure for household purposes averaged just under £2,000 and may be regarded as £2,000 a year. On the other hand, it is right to suppose that the tendency would have been to spend rather more than less upon the family than two-thirds of the available net income, and although I have taken two-thirds I think it is on the plus side of two-thirds, and the product of two-thirds is something that should be influenced in my own mind, which I should allow to be influenced, upwards rather than downwards to an incalculable extent. He might, more probably than not, have made further gifts."

To assess the present value of £3,000 for thirteen years at four per cent., he proceeded on the basis of a multiplier of about 9.9, being the figure for finding the present value of an annuity for thirteen years. He estimated the total at £33,000. He said:

"Taking that £3,000 a year for a period of thirteen years as an equivalent capital value today at four per cent., and I deliberately take rather a low percentage, the multiplier appropriate is the factor of 9.9, that is to say if one takes thirteen or fourteen years, and again I deliberately retain liberty to go between the two and to allow myself to be affected by looking at the one and at the other when expressing the annual return or the annual benefit to the family. Thus one is dealing with the equivalent of approximately £33,000 as an immediate capital sum."

It is argued that the resulting figure should arithmetically be £29,700 and not £33,000. Therefore a question arises whether the judge made an arithmetical mistake or a deliberate adjustment. If the former, it falls to be corrected under the judge's concluding paragraph where he says:

"The result of those calculations and subject to arithmetical errors, which I am ready to accept have probably occurred, is £33,000 less the set-off of £18,200, namely £14,800."

The learned judge then concluded:

"I therefore take that £33,000 into my calculation. That is the debit side of this balance which has to be struck in these fatal accident cases between the monetary loss, deprivation, incurred by the family group as a result of the death, and the benefits in terms of money which have come to those same persons by reason of the death."

He then dealt with the value of the assets. He started with a round figure of £23,000, derived from the probate figures, and went through some complicated adjustments. That figure of £23,000 contains the value of ordinary shares in T. H. & J. Daniels, Ltd., which were admittedly undervalued. Of those shares 10,400 were the property of the deceased at the time of his death, and six thousand came to his estate on the death of his mother after the accident, viz., in December,

A 1959. The judge had to value those shares correctly to find the true value of the estate. The task was complicated by the fact that a year after the accident there was an issue of one bonus share for every ordinary share held and that the latter block of shares had been valued on an expectancy only. He valued the shares before the bonus issue at 30s. each, which led him to add to the value of the estate £2,600 in respect of the ordinary shares held by the deceased (plus B £250 in respect of preference shares) and £5,000 in respect of the shares received after the death of his mother. By those additions he increased the value of the estate to £30,750.

That being a gross sum, the judge had to work out the proper amount of death duty attributable to it. He assessed and deducted death duties in the sum of £10,000. After that deduction he found the net value of the estate which the C plaintiff received through the death to be £20,750. But the judge found that the plaintiff already had an expectancy in the husband's assets the value of which was 12½ per cent. That percentage of £20,750 is £2,650, which fell to be deducted from the benefit which the plaintiff received by the death of the deceased. That leaves a net benefit of £18,200. The judge explained it in these words:

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> "There is a further consideration which I feel cannot be overlooked and that is that the £20,750 that I have mentioned is the valuation that I put on the assets that came to Mrs. Daniels as a result of the death of her husband. She has had those assets sooner than she could ever have had them if he had lived to the end of his natural life. However, she had before his death a chance of surviving him and inheriting those assets. In my judgment, she E had such a chance because although she was three years older than her husband, her expectancy of life is, on the accepted tables of the Registrar General, just about the same, and she would not be exposed, as he would be, to all the strain, and, indeed, hazards of strenuous business life involving a good deal of travel by road, rail and perhaps air. I feel that this chance would be overvalued if I put it at twenty per cent., and think it would be F right to regard her as having had already the equivalent of a 12½ per cent. interest in those same assets before the death of her husband. I therefore subtract from £20,750 that 12½ per cent. and arrive at the figure of £18,200."

In the result, the dependency was £33,000, from which had to be deducted the value she received from the estate of £18,200, leaving a balance of £14,800, for G which (together with £90 funeral expenses) the learned judge gave judgment.

The defendant raised the following contentions. On the question of dependency he put forward three points. First, the deceased would never have attained a net income of £6,100 per annum in view of the weight of taxation and therefore the average of £4,600 per annum net is too high. Secondly, the dependency should be half and not two-thirds. Thirdly, the apparent error H of £33,000 for £29,700 should produce a reduction in the judgment of £3,300 from £14,890 to £11,590. On the question of the value of the estate, the defendant contends that the value of the shares should be 40s. each, or some other figure higher than 30s. That would require corresponding adjustments in the judge's estimate of both the shares owned at death by the deceased and the shares which came to his estate twenty months later on his mother's death.

I If counsel for the defendant is right on all his contentions it is shown that the widow has lost nothing by her husband's death. If that be so, it is a strange result in this case. This was plainly a very happy marriage and the husband was a high-earning, frugal man who saved and provided very generously for his family. It is difficult to believe that the widow had sustained no loss when she found herself in possession of his capital of £40,000 (to take counsel for the defendant's figure) less upwards of £10,000 death duties, and when his high earnings were no longer available for the family. If counsel's arguments are correct and if arithmetically the conclusion must be that there is no loss in this

case, arithmetic has failed to provide the answer which common sense demands. It must be remembered that this is a question of fact expressly left to the jury by s. 2 of the Fatal Accidents Act, 1846. That section provides that

> "... the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought ..."

Since the question is one of actual material loss, some arithmetical calculations are necessarily involved in an assessment of the injury. But they do not provide a substitute for common sense. Much of the calculation must be in the realms of hypothesis, and in that region arithmetic is a good servant, but a bad master.

The learned judge expressly said:

> "I have made numerous calculations and checks for myself in order to arrive at what is bound, I think, in such a case to be a general effect of my assessments upon the different bases and indeed varying assumptions and estimates."

He appreciated throughout that his was but one way of arriving at a correct estimate of the loss. The slightly different approach put forward by PEARSON, L.J., during argument based more directly on the loss of earning capacity to the family was an equally valid approach.

This was an unusually well-knit family, as the evidence shows and the judgment accepts. Inferences and hypotheses in such a case are different from those where the deceased is not so wholehearted and successful a provider for his family. Each case must depend on its facts. On the facts of this case I would not myself accept that the whole of the estate that came to the wife was a benefit, less the 12½ per cent. chance which she had of inheriting had the accident not occurred. The learned judge did not take into account the benefit which the wife had during her husband's life from the capital which was invested in his name. In some cases, of course, a wife derives little benefit from capital invested in her husband's name. But in such a case as the present the wife could clearly call on it if it were needed almost to the same extent as if it stood in her own name. It may be said that there must always in theory be some material benefit in a wife having capital actually under her control instead of under the control of a husband, even when he is clearly prepared to use it for family purposes, and if need arises to spend it on his wife (for example, if an expensive illness so required). In this case that benefit was small in real fact. There was but little profit to the wife in having the capital (shorn by death duties) in her own hands instead of having a larger sum (not so shorn) in her husband's hands.

If it were necessary to uphold the figure of the learned judge, which in my judgment is the correct figure, I would hold that he gave too great an allowance to the defendant in respect of the capital which she inherited. But I do not find it necessary since in my view the path by which he arrived at his figure was a reasonable one and it led him to a reasonable conclusion. I do not accept the argument that his average net figure of £4,600 for income cannot be supported. Counsel for the defendant criticises with some force the top net figure at the end of the hypothetical scale of earnings, which would need an extremely large gross income to produce it. But that criticism is founded on surtax remaining as it is.

Counsel for the plaintiff fairly contends that that argument based on tax remaining as it is can be rebutted by changes of taxation that have arisen since the trial. For it may be that the judge took into account the possibility of surtax being lowered, and if so it now appears that he had justification for that view. Moreover, an average of £4,600 might have been reached by earlier increases of salary and fees without the deceased ever attaining a figure of £6,000, a possibility of which the judge no doubt was well aware. In my judgment he was entitled to calculate on the hypothesis of an average of £4,600 a year net.

His figure of two-thirds dependency is criticised. But it is clear that it was based on a very careful investigation of the way in which the deceased had

A spent his money. In the judge's view there would have been further and possibly even increased generosity to the family, including those who had already left the home. The only rivals to the family's claims on his generosity were the claims of charity. In the judge's view, which I accept, personal self-indulgence was not a competitor. The judge arrived at the conclusion, futura praeteritis auguratus, using the past as an augury of the future, that two-thirds was B the correct figure. He had a close and more personal insight into this family than we can derive merely from the transcript, and I find nothing to indicate any error in his estimate derived from it.

The question whether he made a mistake of £3,000 in his arithmetic is not easy but I feel little doubt as to the answer. I have already read the passage in which the judge dealt with that. The multiplier for fourteen years would C be 10.563, which would clearly not produce £33,000. But if one assumes that the judge used a multiplier of ten for convenience, that would explain his reference to retaining liberty to go between thirteen and fourteen years, that is between 9.865 and 10.563. The figure would then be £30,000. Then, I am inclined to think, the judge, remembering that he was doing the sum two and a half years after the accident (which was the date on which the sum became due), D and that by his multiplier he was taking from the total sum a discount for future interest at four per cent., felt that he must in fairness make an allowance to the widow for interest at the same rate during the time in which she had been out of her money. Interest on £30,000 for two and a half years at four per cent. is £3,000. Thus the total figure would properly be £33,000. It must be conceded that he should perhaps have made a similar addition to the other side of E the balance, namely, the net value of the estate. But that error of omission could easily occur in so complicated a calculation given in an oral judgment. Moreover he may have had some good reason for the omission.

The blatant error of arithmetic for which the defendant contends seems to me unlikely, for the following reasons. £33,000 was the final or master figure on one side of the balance. An obvious substantial error of commission is quite F out of character with the rest of the judgment. Moreover, the judge, as is shown by the transcript of a later application, read through the transcript of the judgment and corrected two errors of arithmetic without changing the figure of £33,000. In my judgment, therefore, no sufficient ground is shown for the suggested reduction of £3,000 or for thus altering the final figure of the judge's assessment.

G There is the final question of the value of the shares. It is not easy to value a minority holding in a private company. There is no free market, and the minority holders may find themselves in a difficult position, especially when they wish to sell. Asset value has an effect, but it is not a deciding factor since the shareholder cannot procure a winding-up. On the other hand, this was a company with a good future. That finding cannot be disregarded, though it was H a prophecy by the judge in gauging the prospects of the deceased and might not be fully reflected in the price obtainable for the shares. The judge, however, had the actual evidence of the limited market in these shares in 1958, namely, a sale of shares at 23s. and a sale at 25s. There was nothing to suggest that these were not sales by a willing seller to a willing buyer, or that they did not fairly represent the price which these shares would then command. The judge added I 5s. per share to the higher of the two prices. In my judgment, the evidence entitled him to find as he did.

The whole family of the deceased, and in particular the widow, suffered a very severe financial loss by the death of this highly paid, frugal and generous provider. If a jury had in a more rough and ready way, without any niceties of calculation, assessed the damages at £15,000, one would in my judgment consider it a good verdict. The learned judge, with a more scientific and judicial approach, has arrived at a figure of £14,700. In spite of counsel for the defendant's fair

and forceful argument, I see nothing to criticise either in his method or his conclusion. I would therefore on both counts dismiss this appeal.

WILLMER, L.J.: I have reached the same conclusion. The argument for the defendant, if it be sound, proves conclusively that the plaintiff and her family, so far from having suffered a pecuniary loss, are actually better off as the result of the death of the deceased. Such a result is so repugnant to common sense as to cast a good deal of suspicion on the validity of the argument which leads to it. The fallacy of the argument, I think, lies in the fact that it treats the question to be solved in a case such as this as if it were one of precise arithmetical calculation. But in point of fact the assessment of a claim under the Fatal Accidents Acts, 1846 to 1908, is essentially a jury question, as appears clearly enough from the wording of s. 2 of the Fatal Accidents Act, 1846, to which HOLROYD PEARCE, L.J., has already referred. The claim must, of course, be based on the actual known figures, both of the earnings of the deceased and of any pecuniary benefit accruing to the plaintiff as the result of his death. But these figures have to be related to all the other known circumstances of the particular case, and must be considered in the light of a great number of imponderable factors. The result must be largely a matter of estimation, and the jury are directed by the Act to award " such damages as they may think proportioned to the injury resulting from " the death.

The argument presented on behalf of the defendant in the present case was no doubt aided by the fact that the learned judge, in the course of an outstandingly careful and detailed judgment, showed his workings, in the sense that he made and disclosed a number of arithmetical calculations before arriving at his final figure. Even so I do not think that in a case of this character an appellant can succeed in this court merely by showing (assuming that he can show) that this or that figure is erroneous, or this or that calculation is inaccurate. In what is essentially a jury question the over-all picture is what matters. It is the wood that has to be looked at, and not the individual trees.

In these circumstances I do not propose to refer again to the detailed figures proved in evidence, which HOLROYD PEARCE, L.J., has already discussed. I content myself with referring in the broadest outline to what I conceive to be the essential features of the case. There is no doubt but that the deceased, who was clearly a man of quite exceptional ability, was earning a very large and increasing income at the time of his death. His gross earned income for the last year of his life was at the rate of about £6,000 a year, and the evidence showed that by the time of the trial it would, if he had lived, have increased in all probability to something in excess of £7,000 a year gross. He was not yet fifty-one years of age and could look forward to the probability that his best earning years still lay before him. But what is vitally important is to consider how he was in the habit of spending his income. The evidence showed that this was a singularly united family, and that the deceased was conscious to an unusual degree of his family obligations. He was a man of simple tastes and spent little on himself. He was, it appears, a generous subscriber to charity. But apart from this, he devoted the bulk of what was left of his income after taxation to making provision for his wife and family. I do not think it is right to look only at what he actually expended by way of allowances to them. In so far as he did not spend his income, but invested it, he was, as it seems to me, equally doing so for the benefit of his wife and family. They enjoyed the benefit not only of his generous expenditure on them, but also the security of living with a man of large income and growing capital resources, the great part of which was available for their benefit even if not immediately used in expenditure on them.

All this has been lost, thanks to the death of the deceased, and all there is to set against it is the fact that his estate, depleted to a considerable extent by the payment of death duties, has passed to his widow under his will. No doubt this is a matter to be taken into consideration, by way of set-off against the loss of

A the benefit of the deceased's income. But I do not at all assent to the proposition that, in the particular circumstances of this case, the value of the estate is to be set off pound for pound against the loss of income as a matter of precise arithmetical calculation. There has been considerable dispute as to the value of the deceased's estate. But whatever its value, the reality of the situation is that for all practical purposes the widow (and her family) were enjoying the B benefit of it almost as much before the death of the deceased as they do now. The fact that the wife, under the will of the deceased, has now become absolutely entitled to what is left of the estate is in the circumstances a change of form rather than of substance. Furthermore, I think that there is this additional factor to be taken into account. If the deceased had not been killed, it is reasonably certain that by wise investment of his surplus income he would have C been able, as the years passed, materially to increase the value of the estate, to which the widow would have succeeded if he had still pre-deceased her. If it be right to set off against the loss of income such pecuniary benefit as the widow received by succeeding now to the estate of the deceased, it must also be right to take into account the fact that, owing to the premature death of the deceased, the estate is of less value now than it would have been if he had completed his D normal expectation of life.

In these circumstances I have not thought it necessary to arrive at any concluded opinion as to the monetary value of the deceased's estate—or what was left of it after the payment of death duties—in the hands of the widow. For I cannot bring myself to think that the mere change in the title to the shares which passed brought any substantial benefit to the widow. I am disposed to E agree with the suggestion put forward during the argument by PEARSON, L.J., that the real change which has occurred has been the total loss of the deceased's very considerable and increasing earned income. This is a very real, and a very substantial, loss, for which the acquisition of what is left of his estate affords but little compensation.

I do not propose to go into the figures of what the income of the deceased was F and was likely to be if he continued to live. The learned judge was in my view well entitled to form the view that it was likely to go on increasing. It was, of course, an income which would necessarily attract a high rate of tax. But regard must be had to the possibility that over the years there might be some reduction in the liability to tax—a possibility which in one respect at least has become an actuality during the present year, and since the matter was before G the learned judge. In the circumstances I agree with HOLROYD PEARCE, L.J., that there is no sufficient ground for criticising the learned judge's estimate of what the average net income of the deceased was likely to be over the period which he took into consideration. Nor, having regard to what I have already said about the generosity which the deceased had always shown towards his wife and family, do I think that the learned judge can fairly be criticised for his H estimate that two-thirds of the net income should be regarded as available for their benefit. It is true that the unearned part of the income still remains available in the hands of the widow—subject to the depletion of capital consequent on the payment of death duties. But, as I have already said, there has been a total loss of the deceased's earned income. The capitalised value of what has thus been lost must, in my judgment, amount to a very substantial I figure. The sum awarded by the learned judge is no doubt a substantial one, but having regard to the considerations to which I have referred, I think it would have been difficult to criticise him if he had arrived at an even larger figure. I am certainly not disposed to reduce the sum awarded on any of the grounds put forward on behalf of the appellant. I accordingly agree that the appeal should be dismissed.

PEARSON, L.J.: I agree. The damages to be assessed under the Fatal Accidents Acts, 1846 to 1908, are to be proportioned to the injury resulting from

the death to the beneficiaries, that is to say the deceased's widow and children, for whose benefit the action is brought. The word "injury" is interpreted as meaning pecuniary loss. As the learned judge has said, there are several possible methods of assessment, and one can be used to check another. For the purpose of checking the substantial accuracy of the figure of damages at which he has arrived by applying one of the methods, or at any rate for the purpose of seeing whether it falls within the reasonable range of figures, it will be useful to apply a different method which is closely related to the special features of this case.

There is in this case an integrated family with a high degree of solidarity. That is proved by the evidence generally and especially by the facts that: (i) the deceased and his wife had a joint bank account; (ii) the deceased in the year 1955 gave large blocks of shares to his wife and children; (iii) the death duties charged on the gifts inter vivos to the children, though legally payable by them, are being paid by the widow.

The first and fundamental question is: "By how much have the prospective resources of the Daniels family been depleted by the death of the deceased?" The answer is, in general terms, "By a very large amount". Any assessment arriving at a small figure of loss would be wrong. To make a detailed valuation without the assistance of an accountant would be a hazardous venture, but a simple calculation will give a sufficient outline. Taking the figures for the full year 1958 and the evidence which the learned judge accepted, and the increase of the dividend rate in 1959 as shown by the company's accounts, I assume that by 1960 the deceased's earned income would have been £7,250 gross and his investment income would have been £5,000 gross. The whole of that earned income, £7,250 gross, has been lost. That is the main and inescapable fact in this case. Also, about £18,000 has been or will be paid for death duties, and this sum may have been raised partly by using insurance moneys but presumably investments had to be realised to a considerable extent. The figure is uncertain, but I am allowing £1,000 gross for loss of investment income and therefore £4,000 gross for the remaining investment income. Then in computing taxation one has to treat the lost income (£7,250 earned and £1,000 unearned) as added to the remaining £4,000 and therefore taxed at the rate appropriate to the income above £4,000. I have taken income tax at 7s. 9d. in the pound, the existing surtax rates, and the earned income relief (applying to income tax only) as set out in the Finance Act, 1957, s. 12. There may be some further allowances and there are some annuities to be deducted from the £4,000, which would therefore affect to some extent the appropriate rates for the lost income. The resulting figure of the net value of the lost income for 1960 is not less than £2,700. The year 1960 is taken because Mr. Johnson, who gave evidence, was making his estimates for the time when he was giving evidence, which was in July, 1960. For later years of the thirteen-year period there should be on the average rising figures of net loss. The evidence and the findings show the probability of a general rising trend in the turnover and profits of the companies and their distributions both in the form of dividend payments and in the form of salary and fees to the chairman and managing director. I should, however, have thought the learned judge's estimate of £200 as the average annual increase in the net income throughout the thirteen-year period to be excessive but for the important factor of the reduction of surtax rates on earned income.

It was not contended in argument that the 1961 Budget proposals should be wholly ignored in the assessment. If fully taken into account, they might increase the figure of net loss per annum from Jan. 1, 1963, onwards for an unknown duration by as much as or more than £1,000. On the other hand, if one merely allows for a reasonable expectation in 1960 that there would before long be some alleviation of the very high surtax rates then prevailing, it is still an important factor and strikingly illustrated by the 1961 Budget proposals.

On the other side there should be some deductions or set-offs or credits allowed. Money that would have been spent on the deceased has been saved. From the

A much reduced income probably less is being subscribed to charities. The widow has acquired title to the remaining investments, and, though as a matter of practical reality she is very little better off financially by reason of this transfer of title, probably some small allowance should be made under this head. Also the widow was nominated in the deceased's will to be a director of the principal company, and she has been earning an income in that capacity, and the oppor-
B tunity of doing so came by reason of the death of the deceased and perhaps some allowance should be made under this head, though that may be doubtful.

After bringing in all these factors, I would still estimate the average annual net loss to the beneficiaries over the thirteen-year period as not less than £1,500 per annum, which, when multiplied by the multiplier 9.9, which is not disputed, gives approximately the figure arrived at by the learned judge.

C Accordingly, I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Greenwoods* (for the defendant); *Field, Roscoe & Co.*, agents for *Little & Bloxham*, Stroud (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

D

SYKES *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Lord Denning, Lord Goddard, Lord Morton of Henryton, Lord Morris of Borth-y-Gest and Lord Guest), April 26, 27, May 1, 2, 3, June 23, 1961.]

E *Criminal Law—Misprision of felony—Whether offence exists—Whether active concealment essential ingredient of offence.*

Certain persons got into the weapon armoury at a United States Air Force Station in Norfolk, stole some firearms and ammunition, and took them to Manchester to arrange for their sale, the suggestion being that they were going to the I.R.A. The appellant played some part as a contact man, and
F he was charged, inter alia, with misprision of felony. He was convicted and sentenced to five years' imprisonment. His appeal against conviction was dismissed, but on appeal against sentence, this was reduced. He was granted leave to appeal to the House of Lords on the following points: (i) whether there was such an offence as misprision of felony; (ii) whether active concealment was an essential ingredient of the offence.

G **Held:** (i) there was and always had been an offence of misprision of felony and it was not obsolete.

(ii) active concealment was not an essential ingredient of the offence.

Dictum of LORD WESTBURY in *Williams* v. *Bayley* ((1866), L.R. 1 H.L. at p. 220) disapproved.

Observations by LORD DENNING on the essential ingredients of mis-
H prision of felony (see p. 41, letter H, to p. 42, letter D, post).

Per LORD GODDARD: where it is thought possible and proper to charge a person as an accessory, it is preferable to do so rather than have recourse to the offence of misprision (see p. 46, letter B, post).

QUAERE whether concealment of knowledge that an offence is contemplated is indictable (see p. 42, letter I, to p. 43, letter B, and p. 44, letters G and H,
I post).

Appeal dismissed.

[As to misprision of felony, see 10 HALSBURY'S LAWS (3rd Edn.) 293, para. 549; p. 315, para. 574; p. 632, para. 1201; and for a case on the subject, see 15 DIGEST (Repl.) 849, *8160.*]

Cases referred to:

Bowman v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J. Ch. 568; 117 L.T. 161; 15 Digest (Repl.) 880, *8489.*

M'Daniel's Case, (1755), 19 State Tr. 745; Fost. 121, 364 (168 E.R. 60); 14 Digest (Repl.) 105, *684*. A

R. v. *Aberg*, [1948] 1 All E.R. 601; [1948] 2 K.B. 173; 112 J.P. 206; 32 Cr. App. Rep. 144; 14 Digest (Repl.) 338, *3308*.

R. v. *Burgess*, (1885), 16 Q.B.D. 141; 55 L.J.M.C. 97; 53 L.T. 918; 50 J.P. 520; 14 Digest (Repl.) 240, *2069*.

R. v. *Chapple*, (1840), 9 C. & P. 355; 173 E.R. 866; 14 Digest (Repl.) 109, *747*. B

R. v. *Crimmins*, [1959] V.L.R. 270.

R. v. *Jones*, [1948] 2 All E.R. 964; [1949] 1 K.B. 194; 113 J.P. 18; 33 Cr. App. Rep. 33; 14 Digest (Repl.) 116, *762*.

R. v. *Levy*, [1912] 1 K.B. 158; 81 L.J.K.B. 264; 106 L.T. 192; 76 J.P. 123; 7 Cr. App. Rep. 61; 14 Digest (Repl.) 109, *750*. C

R. v. *Manley*, [1932] All E.R. Rep. 565; [1933] 1 K.B. 529; 102 L.J.K.B. 323; 148 L.T. 335; 97 J.P. 6; 24 Cr. App. Rep. 25; 15 Digest (Repl.) 913, *8783*.

R. v. *Vreones*, [1891] 1 Q.B. 360; 60 L.J.M.C. 62; 64 L.T. 389; 55 J.P. 536; 15 Digest (Repl.) 842, *8058*.

R. v. *Wilde* (Dec. 14, 1959), Leeds Assizes, [1960] Crim. L.R. 116. D

Roberts' Case, (1569), 3 Coke's Institutes 139.

Williams v. *Bayley*, (1866), L.R. 1 H.L. 200; 35 L.J.Ch. 717; 14 L.T. 802; 30 J.P. 500; 15 Digest (Repl.) 848, *8160*.

Appeal.

Appeal by Basil Landon Sykes from an order of the Court of Criminal Appeal (HILBERY, STEVENSON and VEALE, JJ.), dated Jan. 23, 1961, by leave of that court (LORD PARKER, C.J., WINN and WIDGERY, JJ.), dated Feb. 13, 1961, and reported sub nom. *R.* v. *Sykes*, [1961] 1 All E.R. 702. On Jan. 23, 1961, the appellant's appeal against his conviction at Manchester Crown Court (SIR BASIL NIELD, Q.C., sitting with a jury) on May 9, 1960, of inter alia, misprision of felony, was dismissed. On Feb. 13, 1961, his sentence of five years' imprisonment was reduced. The facts are set out in the opinion of LORD DENNING. E F

E. Clarke, Q.C., and *J. Hugill* for the appellant.

The Solicitor-General (*Sir Jocelyn Simon, Q.C.*), and *W. D. T. Hodgson, Q.C.*, for the Crown.

Their Lordships took time for consideration.

June 23. The following opinions were read. G

LORD DENNING: My Lords, this case raises the question whether there is today such an offence as misprision of felony. Counsel for the appellant says that there has never been such an offence known to our law; or, if there has, he says it has ceased to be an offence by becoming obsolete. Counsel for the Crown says that there always has been such an offence, and the present case is a good example of its continuing usefulness. The facts giving rise to the question were as follows: About Mar. 18, 1960, thieves got into the weapon armoury at a United States Air Force station in Norfolk. They stole one hundred pistols, four sub-machine guns and about 1960 rounds of ammunition. They hired a taxi and took the stolen goods to Manchester. They took them into the house of a man named Kenny. A day or two later, a man named Whittle brought a van to Kenny's house and took the "stuff" to the house of a man named Black. On Mar. 23, 1960, the appellant comes into the story. We do not know how he came to know about the guns and ammunition, but we know that he went up to an Irishman named Kerwin who was a waiter in a Manchester club and asked him: "Have you any contacts with the I.R.A.?" Kerwin said: "I don't want to talk about it in the club." They talked about it later; and they went to a hotel where they met two men. One of them was Kenny (the man who first received the guns in Manchester) and the other was a man named Tucker (who has not appeared H I

A in the story before). Kenny said they had one hundred revolvers, some sub-machine guns and ammunition for sale. Kerwin led them to think that he had contacts with the I.R.A. and would have to go to London to see them. But, instead of going to London, he went to the police and acted under their instructions. On Mar. 27, 1960, Kerwin (prompted thereto by the police) told the appellant that he had arranged to dispose of the guns, but he needed a sample to convince B the organisation that the guns were there. Kerwin that night asked the appellant what he expected to gain financially and he said: "Half of what Tucker gets for his share". On Mar. 20, 1960, Kenny took a sample of one of the pistols and gave it to Kerwin (who gave it to the police). Later the police disguised themselves as would-be purchasers of the guns. They were taken to Black's house and shown the goods. Whereupon the police officers disclosed their identity, and arrested C Kenny, Whittle and Black. They took possession of the stolen property. Afterwards they arrested Tucker and the appellant. In the early morning of Mar. 29, 1960, at the police station, the superintendent said to the appellant:

> "I have reason to believe that you were the man who first got into touch with an Irishman and asked him to contact the I.R.A. so that they could buy the guns and that you have been actively helping Kenny and Tucker D in arranging for the sale of these guns during the past week."

The appellant said: "Look, Inspector, that can't be possible. I don't know this man Kenny and I haven't seen Tucker for four months." All five men were taken before the magistrates. Kenny, Tucker, Whittle and Black were charged with receiving the goods, knowing them to have been stolen. The appellant E was charged as being accessory after the fact. After the evidence was taken, counsel for the appellant urged strongly that he ought not to be committed for trial on the charge of being accessory; there was no evidence that he had taken any active steps to conceal the felony or had done any act for *the purpose* of assisting the others to escape conviction. He relied on *R.* v. *Jones* (1). But the magistrates committed all five men for trial.

F When counsel was instructed to draft the indictment, he was so impressed by the argument which had been urged before the magistrates that he did not put in a count charging the appellant with being an accessory after the fact but charged him with misprision of felony. The indictment against the five men was as follows: First count: Kenny, Tucker and the appellant were charged with receiving stolen goods, knowing them to have been stolen. Second count: G Tucker and the appellant were charged with misprision of felony. Third count: Black and Whittle were charged with receiving. Fourth count: Kenny, Tucker and the appellant were charged with attempted sale of firearms, contrary to s. 17 (1) of the Firearms Act, 1937.

On May 9, 1960, when the case was called on, counsel for the appellant moved to quash counts 1 and 2 against the appellant on the ground that there was no evidence to warrant them. The judge (SIR BASIL NIELD, Q.C.) upheld this H contention so far as regards count 1 for receiving—there was clearly no evidence of his having possession of the goods—but disallowed it on count 2. So the charge of misprision of felony remained. On arraignment, Black pleaded guilty to receiving. The rest pleaded not guilty and were put in charge of the jury. After the evidence for the prosecution had been called, Kenny, Tucker and Whittle withdrew their pleas of not guilty and pleaded guilty to certain of the charges I against them, including, be it noted, a plea of guilty by Tucker to misprision of felony. So, at that point, all except the appellant had pleaded guilty, and the case went on against the appellant alone. He gave evidence and the judge summed-up. The jury found him guilty of misprision of felony but not guilty of attempted sale of firearms. On May 26, 1960, the judge sentenced Kenny to seven years for receiving (and two years concurrent for attempted sale of firearms), Tucker to five years for misprision of felony (and two years concurrent for attempted sale

(1) [1948] 2 All E.R. 964; [1949] 1 K.B. 194.

of firearms), Black and Whittle each to fifteen months for receiving and the appellant to five years for misprision of felony. A

Kenny and Tucker applied for leave to appeal against their sentences but their applications were refused. The appellant applied for leave to appeal against conviction and sentence. On Jan. 23, 1961, the Court of Criminal Appeal refused him leave to appeal against conviction but granted leave to appeal against sentence. On Feb. 13, 1961, the Court of Criminal Appeal set aside the sentence on the appellant of five years and substituted such a period of imprisonment as would allow him to be discharged on the next day, Feb. 14, 1961. It transpired, however, that the appellant did not need leave to appeal against conviction because he had a right of appeal on a point of law. So the court treated his application as if it was a final appeal against conviction which had been dismissed; and they gave him leave to appeal to this House limited to the following points: (i) Whether there is such an offence as misprision of felony. (ii) Whether active concealment is an essential ingredient of the offence. B C

The question whether there is such an offence as misprision of felony is of great importance, and we were privileged to have the results of much research placed before us by counsel on both sides. Most lawyers know, roughly speaking, what "misprision of felony" means. It means that a man knows that a felony has been committed and neglects to disclose it. But many laymen are perplexed by the word "misprision". What does it mean? Whence its derivation? LORD COKE (2) attempted to fit it in with present notions when he said that "Misprisio comneth of the French word mespris, which properly signifieth neglect or contempt"; but the authors of the OXFORD ENGLISH DICTIONARY, who included SIR FREDERICK POLLOCK, in a very learned article say that the word "misprision" is derived from the old French word "mesprendre" which means to act wrongly; and in early times it meant simply a wrong action or omission. This is borne out by the old law books, where it is used almost as synonymous with misdemeanour, that is to say, something less than felony which did not carry the death penalty. One of the earliest records of its use is in the YEAR BOOK in 1484 (2 Richard III case 22 pp. 9 et seq.), where a man called Mundy had falsified a writ. It was a felony and, if charged as such, would carry the death penalty; but for mercy's sake, and may be for convenience also, the judges said he could be indicted for a misprision. "It was allowed it was felony and so included misprision, etc." As a result of this case, it was held that every treason or felony included a misprision. The King used to take advantage of this rule in cases of treason, so that, if the man did not deserve the death penalty, he was indicted only with "misprision of treason". Now concealment of treason was itself treason. If anyone knew that another was guilty or in any way incriminated in treason, he was bound at once to go to the King or to anyone in his immediate circle and tell him all that happened; see BRACTON, DE LEGIBUS, Book III, fol. 118, 119. If he did not do so, he could be indicted either for treason which carried the death penalty, or misprision of treason which did not. But this alternative was taken away in 1555. By the statute of 1555 (1 & 2 Phil. & Mar. c. 10), s. 8, it was enacted that "conceylement or keping secrett of any highe treason be demed and taken onely misprision of treason . . .". From this time forward the phrase "misprision of treason" was taken to denote only the concealment or keeping secret of treason. And by a natural sequence "misprision of felony" denoted only the concealment or keeping secret of felony. D E F G H I

So much for the meaning of the phrase. But now comes the question: Has it ever been an offence known to the law? My Lords, it has been an offence for the last seven hundred years or more, not always under the name "misprision of felony", but still an offence. Ever since the days of hue and cry, it has been the duty of a man who knows that a felony has been committed to report it to the proper authority so that steps can be taken to apprehend the felon and

(2) In 3 COKE'S INSTITUTES, p. 36.

A bring him to justice. In the thirteenth century, it was his duty " to raise hue and cry ", that is to say, he had to report it to the sheriff of the county or his officer or to the constable of the town; whereupon it was the duty of that officer to levy hue and cry, that is, to shout aloud calling on all able-bodied men over the age of fifteen to pursue the offender and arrest him; and it was their duty to join in the pursuit. The duty on the officer to levy hue and cry and on the citizens B to join in pursuit was reinforced by various statutes, and particularly by the Statute of Westminster, the First (1275), 3 Ed. I, c. 9. Under that statute, if the officer failed to levy hue and cry when he should have done so, he was liable to imprisonment for a year and to a fine. If a citizen failed to join in pursuit, he was liable to a fine. This statute was re-enacted as recently as 1887 when, in s. 8 (1) of the Sheriffs Act, 1887, it was laid down that

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> " Every person in a county shall be ready and apparelled at the command of the sheriff and at the cry of the country to arrest a felon . . ."

Although these statutes dealt with the duty of the officers and of citizens to join in pursuit, there was no statute dealing with the duty of the man, who knew of the felony, to report it. This duty rested solely on the common law. D There are several cases in the Rolls of the Justices in Eyre where a man was present where a felony was committed, or in the house at the time, or found the dead body of a man who was slain. If he did nothing—did not " raise the hue and cry or do anything "—he was guilty of an offence and liable to be fined. The case which is usually cited in this regard is a case in 1315 which was noted by FITZHERBERT in his GRAND ABRIDGMENT, TITLE CORONE ET PLEZ DEL CORONE, para. 395; but it can be found much more fully reported now in the E SELDEN SOCIETY, vol. 24 p. 152, where ORMESBY, J., said:

> " It is the law of the land that such as be present when such a felony as this is committed shall raise hue and cry and give their aid towards arresting the felons. Wherefore you will make fine with the King."

The other case on the point is also noted by FITZHERBERT in his GRAND ABRIDGE- F MENT, TITLE CONSPYRACIE, para. 5. It was a case in the year 1457 where a man, who had been present at a killing, reported it to a guardian of the peace. On this account he was charged with conspiracy. The judges rejected the charge; and PRISOT, the Chief Justice of the Common Pleas said: " He was bound by the law to do what he did." SIR WILLIAM STAUNDFORD summarised these cases in this way:

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> " If anyone happens to be present, when another is killed, or when a felony is committed, and did not come there in the company of the felons, nor was part of their confederacy, but nevertheless did not intervene, or disturb the felons, or raise hue and cry, he is not on that account to be held a principal or accessory, for it is not a felony in him but only an offence for which he can be fined like trespass ":

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see STAUNDFORD, PLEES DEL CORONE, c. 44, p. 40E. In those early cases, the accused man was *present* at the killing and so knew of it. But any other proof of knowledge would suffice. In 1550, there was a case where the man was not present but knew of the felony, and was held to be under duty to report it. This was the case: I. S. was robbed of his goods. After the robbery, he pursued the felon I and retook his goods. But he let the felon go. All the judges at Serjeant's Inn agreed that he was not to be held to be an accessory but he was guilty of " un concealment "; see MOORE K.B., p. 8. It was said to be " le duty de chescun home sur son allegiance de discoverer felonies."

This offence—concealing or failing to report a felony—does not seem to have acquired a name for itself until 1557 when STAUNDFORD gave it one. At the time, he wrote, there had recently been enacted the statute of 1555 dealing with misprision of treason, which was the " concealing or keeping secret of any high treason ". STAUNDFORD seems to have seen here a parallel with the common

law offence of concealment of felony. So he, by analogy with the statute, used the words "misprision of felony" to denote the concealment or keeping secret of felony. He gave a separate chapter to Misprisions (c. 38, p. 37C) and started off with these words:

> "Misprision est properment quant ascun sciet ou conust, que un auter ad fait treason ou felony, & il ne voille luy discoverer al roy, ou son counsele, ou a ascun magistrat, eins conceala son offence, ceo est misprision . . ."

which may be translated as follows:—

> "Misprision: this is properly when anyone learns or knows, that another has committed treason or felony, and he does not choose to denounce him to the King, or his Council, or to any magistrate, but conceals the offence; this is misprision . . ."

My Lords, it was suggested that STAUNDFORD in this passage made a clerical mistake. "Ou" should be "et"; or, in the translation "or" should be "and". I cannot subscribe to this for a moment. There is internal evidence from the book itself which shows it was no mistake. But, apart from this, it was, as I have said, always an offence for a man to conceal or keep secret a felony of which he knew. Actual *presence* at the felony or actual *finding* of the body was proof positive of knowledge. But other proof of knowledge would suffice, as in the case of the man who retook stolen goods from the thief. All that STAUNDFORD did was to state the principle disclosed by the cases. Let no one mistake the high standing of SIR WILLIAM STAUNDFORD. He was a judge of the Commons Pleas from Michaelmas, 1554, till his death on Aug. 28, 1558. Foss tells us (3) that he was a great and learned lawyer and he distinguished himself as the author of a highly esteemed TREATISE ON THE PLEAS OF THE CROWN, which is of great authority. The first edition of it appeared in 1557 during his lifetime and it has been repeatedly followed by subsequent writers. They have often taken his exact words and acknowledged him as the source of what they say. On this very subject of misprision of felony, you will find him quoted verbatim in 1579 in RASTELL'S "LES TERMES DE LA LEY"; in 1583, in CROMPTON'S edition of FITZHERBERT'S JUSTICES OF THE PEACE (FITZHERBERT himself had died in 1538 so his own edition did not mention it); in 1607 in COWELL'S "THE INTERPRETER OF WORDS AND TERMS"; and in 1609 in PULTON'S "DE PACE REGIS ET REGNI". It was quite apparent to the lawyers of that time that STAUNDFORD derived his principle from the "hue and cry" cases; for both CROMPTON in his FITZHERBERT (p. 44), LAMBARD in his EIRENARCHA (1614), p. 289, and DALTON in his COUNTRY JUSTICE (1619), p. 284, refer to the "hue and cry" cases, and say that a man who is present at a felony and does not raise hue and cry or do anything is guilty of misprision of felony; and they cite the case in 1315 from FITZHERBERT, PLEAS OF THE CROWN, 395.

My Lords, if STAUNDFORD stood alone, it would suffice. But, in 1628, LORD COKE in his 3rd INSTITUTE gave the great imprint of his authority to it. He had evidently studied STAUNDFORD'S book with great care—indeed, he pays special tribute to him (at p. 138)—and, dealing with misprisions, he says (at p. 139):

> "Now are we to speak of concealement or not discovery of felony. As in case of high treason, whether the treason be by the common law, or statute, the concealment of it is misprision of treason. So in case of felony, whether the felony be by the common law, or by statute, the concealement of it is misprision of felony . . . And as the concealment of high treason is higher by many degrees then the concealment of felony, so the punishment for the concealment of the greater is heavier then of the lesser, and yet the concealment of felonies in sherifs, or bailifs of liberties is more severely

(3) FOSS, JUDGES OF ENGLAND, Vol. V, p. 391.

A punished then in others, viz. by imprisonment by one year, and ransome at the will of the King. [This is clearly a reference to the Statute of Westminster, 1275, c. 9, and shows that COKE too had in mind the "hue and cry" cases.] From which punishment if any will save himself he must follow the advice of BRACTON, to discover it to the King, or to some judge or magistrate, that for administration of justice supplieth his place, with all B speed that he can . . . And this is intended of a concealment, or not discovery [that is, non-disclosure] of his meer knowledge: for if in case of high treason, he that knoweth it, before it be done, and assenteth to it, is particeps criminis, and guilty of treason: and in case of felony, he that receiveth the thief, and assenteth to it, is accessory."

But great as is the authority of LORD COKE, greater still is the authority C of the great Chief Justice, SIR MATTHEW HALE, on such a subject as this. Writing about the year 1670, he said in his PLEAS OF THE CROWN, Vol. 1 (p. 374):

"By what hath been said touching misprision of treason we may easily collect what is the crime of misprision of felony, namely, that it is the concealing of a felony which a man knows, but never consented to, for if he consented, he is either principal or accessary in the felony, and conse- D quently guilty of misprision of felony and more."

Now what SIR MATTHEW HALE there said has ever since been regarded as a correct statement of the law of England. In 1755, it was so treated by FOSTER, J. (himself no mean authority), who quoted it in *M'Daniel's Case* (4); and a few years later SIR WILLIAM BLACKSTONE took it verbatim into the fourth E book of his COMMENTARIES, borrowing the rest from LORD COKE (p. 121):

"Misprision of felony is also the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal, or accessory. And the punishment of this, in a public officer, by the statute Westm. 1. 3 Edw. I. c. 9. is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, F in both, fine and ransom at the king's pleasure . . ."

Every author of any note from that day to this has followed these great names, and has said there is an offence of misprision of felony and described it in much the same terms. What need we of any further authority? If STAUNDFORD, COKE, HALE and BLACKSTONE all say there is such an offence as misprision of felony, are we to say the contrary? Counsel for the appellant G invited your Lordships to do so. He said there are no precedents, no recorded cases where any man has been ever indicted for misprision of felony, not from the time that STAUNDFORD wrote in 1557 till the year 1938. He said that STAUNDFORD made a mistake, and all the authors copied from him like automata and fell into error with him. The mere repetition of the cantilena of lawyers cannot, he said, make law. But I would say in answer that there are precedents. H There are all the "hue and cry" cases before STAUNDFORD wrote. And since he wrote there are records to carry us down to date.

In 1813, THOMPSON, B., (5) in his charge to the grand jury at York, drew their attention to the offence of misprision and thus invited them to find a true bill for it. In 1826, JOSEPH CHITTY (6) gives a precedent of an indictment for misprision of felony which he says "was settled by a very able crown lawyer". I This must have been an actual case. The precedent, after setting out the offence by P.P., the original offender, proceeds as follows:—

". . . did conceal, keep secret, and neglect to discover the said felony so committed by the said P.P. as aforesaid, and the name, person, and usual place of resort of the said P.P. did utterly refrain and forbear to disclose and make known . . ."

(4) (1755), 19 State Tr. at p. 805. (5) (1813), 31 State Tr. at p. 969.
(6) In CRIMINAL LAW (2nd Edn.), Vol. 2, p. 232.

In 1852, PARKE, B., when he went to the Home Circuit, addressed the Grand Jury at Lewes in these words (7): A

> "in the western division particularly a great many felonies were committed of which the parties who were the sufferers by them gave no information to the authorities or the police. He therefore felt himself called upon to say publicly, that it should be known that this proceeding, which was known to the law by the name of 'misprision of felony', was a very serious offence, and subjected the persons who were convicted of it to imprisonment for a year. The law with regard to this matter had certainly fallen into desuetude, but it was very necessary that it should be known it still existed, and during the last twenty years he had himself been called upon to make use of it in the county of Durham, and he had sentenced two persons to a year's imprisonment for having wilfully withheld information relating to an act of felony that had been committed." B C

We do not know whether any prosecutions for misprision of felony followed on the words of PARKE, B., and we have to pass over close on one hundred years before we find records of other prosecutions for misprision of felony. And then we find a series of them. Seven or eight were drawn to the attention of your Lordships. I would only mention the case of Mrs. Casserley tried by HUMPHREYS, J., at the Central Criminal Court in May, 1938 (8), the case of Thomas Prothero tried by HILBERY, J., at Salop Assizes in June, 1949, and the case of Chapman, Wood and Hyde tried by DEVLIN, J., at Hampshire Assizes in July, 1952. Each of those learned judges accepted pleas of guilty to charges of misprision of felony and passed sentence on them. D E

In the light of this history, it is plain that there is and always has been an offence of misprision of felony and that it is not obsolete. It is true that until recently it has been rarely invoked, but that is no ground for denying its existence.

This disposes of the first point on which leave to appeal was granted. There remains the second point whether active concealment is an essential ingredient of the offence. Now the ingredients of the offence can best be seen by comparing it with offences of like degree which have other ingredients. F

First: *Accessory after the fact.* The classic definition of an accessory after the fact is when a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; see 1 HALE, PLEAS OF THE CROWN 618; 4 BLACKSTONE'S COMMENTARIES 37. These are all *active* acts of assistance from which it can be inferred that he assented to the felon going free, in contrast to misprision which consists of concealment only, from which no inference of assent need be drawn. It might be thought that the acts of assistance given by the appellant in the present case would be such as to make him an accessory after the fact. But it has been said that, to make a man an accessory, the assistance must be given to the felon *personally*, in order to prevent or hinder him from being apprehended or tried or suffering punishment; see 2 HAWKINS, PLEAS OF THE CROWN ch. 29, s. 26, and 4 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND (21st Edn.), ch. 3, *R.* v. *Chapple* (9), *R.* v. *Levy* (10); so that, if the assistance was not given the felon personally, but only indirectly by persuading witnesses not to give evidence against him (see *Roberts' Case* (11)); or if the acts of assistance were done, not to hinder the arrest of the felon, but with another motive, such as to avoid arrest himself (see *R.* v. *Jones* (12)), or to make money for himself without regard to what happened to the felon (as in the present case), he would not be guilty as an accessory after the fact. It was these limitations on the offence of being an accessory that led to the appellant being charged with misprision of felony. G H I

(7) (Mar. 18, 1852), "The Times".
(8) *R.* v. *Casserley*, (May 28, 1938), "The Times". (9) (1840), 9 C. & P. 355.
(10) [1912] 1 K.B. 158. (11) (1569), 3 COKE'S INSTITUTES, p. 139.
(12) [1948] 2 All E.R. 964; [1949] 1 K.B. 194.

A Second: *Compounding a felony.* This is the old offence of theft-bote, now made of general application to all felonies and probably also to misdemeanours. LORD COKE says that

> "This offence is more then misprision of felony, for that is not a concealment of his bare knowledge only; but theft-bote is when the owner not onely knowes of the felony, but taketh of the thief his goods again, or amends for the same to favour or maintain him, that is, not to prosecute him, to the intent he may escape . . ."

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see 3rd INSTITUTE, p. 134. The offence of compounding a felony in short is *an agreement* not to prosecute a felon in consideration of the return of the goods or other reward; see 4 BLACKSTONE'S COMMENTARIES, p. 133, *R.* v. *Burgess* (13); whereas in misprision there need be no benefit. This distinction was overlooked by LORD WESTBURY in *Williams* v. *Bayley* (14). He seems to have thought that for "misprision of felony" the man must not only have concealed his knowledge of the felony but further converted it into a source of emolument to himself. That is essential in compounding a felony, but not in misprision of felony. LORD WESTBURY'S dictum has been frequently cited as, for instance, in *R.* v. *Aberg* (15); but it is not correct and should no longer be relied on.

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Third: *Interfering with the course of justice.* It is an offence at common law to interfere with the course of justice, such as persuading witnesses not to give evidence (*Roberts' Case* (16)); or fabricating evidence (*R.* v. *Vreones* (17)); or making a false accusation of crime to the police (*R.* v. *Manley* (18)). But this offence requires something *active* to be done to pervert the course of justice.

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Fourth: *Obstructing the police.* It is an offence by statute wilfully to obstruct any constable or peace officer when in the execution of his duty. This offence is not confined to physical obstruction. If a policeman was investigating a crime, and someone wilfully misled him by false information, he might well be guilty of this offence. But it is one thing to obstruct a policeman. It is another thing to refuse to help him. Take the case in Australia where a man, who was shot and wounded in an affray, refused to disclose to the police the name of the person who had shot him. It would seem that he was engaged in gang warfare, for he said that he would "cop it sweet" if he did disclose the name. He said he would attend to the matter himself, that is, take his own revenge. No civilised community can tolerate such behaviour. But his offence is not obstructing the police. It is misprision of felony: see *R.* v. *Crimmins* (19).

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It comes to this, therefore, that these other offences require something active to be done to conceal the crime; whereas misprision requires nothing active. The failure or refusal to disclose the felony is enough. This disposes of the second point on which leave to appeal was granted.

This review of the authorities shows that the essential ingredients of misprision of felony are—

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1. *Knowledge.* The accused man must know that a felony has been committed by someone else. His knowledge must be proved in the way in which the prosecution have been accustomed in other crimes when knowledge is an ingredient, such as receiving, accessory after the fact, compounding a felony, and so forth. That is to say, there must be evidence that a reasonable man in his place, with such facts and information before him as the accused had, would have known that a felony had been committed. From such evidence the jury may infer that the accused man himself had knowledge of it. He need not know the difference between felony and misdemeanour—many a lawyer has to look in the books for the purpose—but he must at least know that a serious offence has been committed: or, as the commissioners of 1840 put it, an offence of an

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(13) (1885), 16 Q.B.D. 141.
(14) (1866), L.R. 1 H.L. at p. 220.
(15) [1948] 1 All E.R. at p. 602; [1948] 2 K.B. at p. 176.
(16) (1569), 3 COKE'S INSTITUTES, p. 139.
(17) [1891] 1 Q.B. 360.
(18) [1932] All E.R. Rep. 565; [1933] 1 K.B. 529.
(19) [1959] V.L.R. 270.

"aggravated complexion"; for, after all, that is still, broadly speaking, the difference between a felony and misdemeanour. Felonies are the serious offences. Misdemeanours are the less serious. If he knows that a serious offence has been committed—and a lawyer on turning up the books sees it is a felony—that will suffice. This requirement that it must be a serious offence disposes of many of the supposed absurdities, such as boys stealing apples, which many laymen would rank as a misdemeanour and no one would think he was bound to report to the police. It means that misprision comprehends an offence which is of so serious a character that an ordinary law-abiding citizen would realise he ought to report it to the police.

2. *Concealment.* The accused man must have "concealed or kept secret" his knowledge. He need not have done anything active; but it is his duty by law to disclose to proper authority all material facts known to him relative to the offence. It is not sufficient to tell the police that a felony has been committed. He must tell the name of the man who did it, if he knows it; the place, and so forth. All material facts known to him; see *R.* v. *Crimmins* (20). If he fails or refuses to perform this duty when there is a reasonable opportunity available to him to do so, then he is guilty of misprision. He can perform this duty by reporting to the police or a magistrate or anyone else in lawful authority. Failure to do so is a misprision of felony.

Misprision of felony is itself a misdemeanour and is punishable by fine and imprisonment. Whatever limitations may have existed in olden days on the period of imprisonment that might be imposed, the only limitation now is that it must not be an inordinately heavy sentence.

My Lords, it was said that this offence is out of date. I do not think so. The arm of the law would be too short if it was powerless to reach those who are "contact" men for thieves or assist them to gather in the fruits of their crime; or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of misprision of felony. I am not dismayed by the suggestion that the offence of misprision is impossibly wide; for I think it is subject to just limitations. Non-disclosure may be due to a claim of right made in good faith. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the master of a college and a student. But close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported. In 1315, it was held that it was the duty of a brother to raise hue and cry against his brother and he was fined for not doing so; see 24 SELDEN SOCIETY, pp. 144, 145: and in 1938 a mistress was found guilty of misprision for shielding her lover (Mrs. Casserley's case (21)). The judges have not been called on further to define the just limitations to misprision, but I do not doubt their ability to do so, if called on.

My Lords, there was some discussion before us whether a man was bound to disclose a contemplated felony which comes to his knowledge, such as a planned raid on a bank. There is a striking passage in LAMBARD'S EIRENARCHA (1614), p. 289, which says that failure to do so is misprision of felony. So does DALTON'S COUNTRY JUSTICE (1619), p. 211, and 2 HAWKINS, PLEAS OF THE CROWN, ch. 29, s. 23. These are weighty authorities and the Commissioners who reported on the Criminal Law in 1843 were clearly in favour of it. They said:

(20) [1959] V.L.R. 270.

(21) (May 28, 1938), "The Times".

A "The necessity for making such disclosures extends, perhaps, with greater force, to the knowledge of a meditated crime, the perpetration of which may, by means of such a disclosure, be prevented, than it does to the knowledge of one already committed."

This is good sense and may well be good law. I would, therefore, reserve this point which does not arise in the present case.

B I ought to mention one other matter. Counsel for the appellant sought to raise a point of misdirection on which leave to appeal was not granted. He said that, once leave to appeal was given, the appellant in this House can open up all grounds available to the court below. He is not limited to the point on which leave was granted. Counsel for the Crown denied this. He said that the appellant was limited to the point of general public importance but the respondent was not. I do not think it necessary to resolve this question today because there is no substance in the point which counsel for the appellant sought to raise. He suggested that the judge had misdirected the jury in drawing their attention to the fact that Kenny had pleaded guilty to receiving. I see no misdirection in the judge telling the jury what they very well knew—Kenny had pleaded guilty in their presence—for the judge had already warned them that the pleas of guilty should not be allowed to prejudice the appellant.

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I would dismiss the appeal.

LORD GODDARD: My Lords, the appellant was convicted at Manchester Crown Court of the misdemeanour known as misprision of felony. His appeal to the Court of Criminal Appeal was dismissed, and he applied for and obtained a certificate that a point of law of general public importance was involved and was given leave to appeal to this House limited to two points: (i) Whether there is such an offence as misprision of felony, and (ii) Whether active concealment is an essential ingredient of the offence. Before this House, counsel for the appellant contended that there never was known to the law such an offence but that, if there ever had been, it had disappeared by obsolescence and should no longer be indictable. On the question whether there ever was such an offence, counsel with immense industry had brought to your Lordships' notice a very large number of authorities, consisting of extracts from institutional writers on the criminal law, and cases decided not only in England but in other jurisdictions where the English common law prevails, and the result is, as it appears to me, to show that for centuries there has been communis opinio among all the writers and such of the judges who have had to consider the matter that there is such an offence and no trace of it ever having been doubted until the present case.

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The first book that was discussed in argument was an edition of STAUNDFORD'S PLEES DEL CORONE, published in 1607 some years after the author's death. He was a judge of the Common Pleas from 1554 to 1558, and seems to have been a fairly prolific writer on the law. He describes misprision as (22)

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"properly when anyone knows or understands, that another has committed treason or felony, and will not disclose it to the King, or his Council, or to any magistrate, and so conceals the offence . . .",

and then he quotes a passage from BRACTON which is wide enough to cover misprision both of treason and felony. No one doubts that misprision of treason was and is a crime and it was specially the subject of a statute 1 & 2 Phil. & Mar. c. 10. Counsel for the appellant contended that STAUNDFORD was mistaken in treating misprision of felony as distinct from treason as a crime and that this mistake has continued and misled all the subsequent writers on the subject. As I understood the argument, it was that when the writer refers to treason *or* felony the *or* is a misprint or mistake for *and*. If so, it is remarkable that it is repeated three times in the article and has misled, to name only a few, COKE,

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(22) c. 38, p. 37c.

HALE and BLACKSTONE, all of whom name misprision of felony as a misdemeanour while at the same time they deal with misprision of treason as quite a separate offence. I cannot think that either STAUNDFORD or the editor of his work were under any misapprehension on this matter. It is stated to be an offence by FITZHERBERT who was a judge of the Common Pleas from 1522 to 1538. He was the author of THE NATURA BREVIUM, and has always been regarded as a writer of the highest authority. It is in his book entitled L'OFFICE ET AUTORITÉ DE JUSTICES DE PEACE, that he deals with this offence. An English edition of this book according to DR. ROUND was first published in 1538 and frequently republished with additions by RICHARD CROMPTON, a Bencher of the Middle Temple, and it may well be that some part of the article on misprision was added by the editor, as he quotes STAUNDFORD in support. That there seem to have been at least six editions of this work, the last in 1617, shows the respect in which it was held. The offence was discussed in detail by DALTON in his COUNTRY JUSTICE, first published, again according to DR. ROUND, in 1618, and held in such high repute that it was constantly republished, the last edition being dated 1742. It may, indeed, be described as the eighteenth century "STONE". Then the offence is described and discussed in detail by COKE in his 3rd INSTITUTE (c.lxv, p. 139) and at even greater length by SIR MATTHEW HALE (23), who became a judge of the Common Pleas in 1654 and was afterwards Lord Chief Justice of the King's Bench from 1671 to 1676. His works on the PLEAS OF THE CROWN have always been regarded as of the highest authority and are still cited at the present day. BLACKSTONE deals with the matter (24), quite shortly defining the offence as the concealment of a felony which a man knows but never assented to; for if he assented this makes him either principal or accessory. Before parting with the writers of the eighteenth century, and there are several others, all to the same effect, it is worth noticing *M'Daniel's Case* (25). All the judges had considered at Serjeant's Inn the effect of a special verdict returned by a jury at the Newgate Sessions and FOSTER, J., who afterwards delivered the judgment, quoted as an authority (26):

> "LORD HALE saith (1 Hale 374) 'Misprision of felony is concealing a felony which a man knoweth, but never consented to; for if he consented, he is either principal or accessary'."

It appears to me, therefore, to be beyond question that at least by the middle of the eighteenth century it was firmly established that misprision of felony was an offence. But I would add that it is not so clear whether the concealment of knowledge that an offence was contemplated is indictable. This, indeed, is stated by LAMBARD, DALTON and HAWKINS as included in the offence of misprision but not by any other authority. One can well understand the opinion that it ought to be. It arises out of the recognition that it is the duty of every citizen to assist in the detection and suppression of crime, and that prevention is better than cure. The offence may be said to be in the same category as refusing to aid in arresting a suspect when called on by an officer of the law or refusing to comply with the sheriff's call on the posse comitatus or failing to take part in the hue and cry, but to hold that there was a positive duty to inform the executive that a crime was or might be contemplated might in practice cause many difficulties and as, except for the observations of the three writers to whom I have referred, there is otherwise no authority on the point as at present advised, I hesitate to hold that it is established there is such a duty.

But it is contended that the offence is obsolete or fallen in desuetude. On this subject we have the guidance of LORD SUMNER in *Bowman* v. *Secular Society, Ltd.* (27), where he said:

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(23) In 1 PLEAS OF THE CROWN, c. xxviii, p. 371 et seq.
(24) In 4 COMMENTARIES, Ch. 9, p. 121.
(25) (1755), 19 State Tr. 745.
(26) (1755), 19 State Tr. at p. 805.
(27) [1917] A.C. at p. 454.

A "If [a] maxim expresses a positive rule of law, once established, though long ago, time cannot abolish it nor disfavour make it obsolete."

This in no way detracts from the wisdom of BACON who, in his essay on JUDICATURE, observes:

"let penal laws, if they have been sleepers of long, or if they be grown B unfit for the present time, be by wise judges confined in the execution,"

which seems to me to mean that they should be sparingly enforced. But this law has not been sleeping for a long time. So far I have traced it to the end of the eighteenth century. No doubt it was seldom prosecuted in the nineteenth century, but we have been referred to a report of a charge to the Grand Jury at York by THOMPSON, B., in 1813 (28), from which it appears that, in his opinion, misprision C of felony was indictable as a misdemeanour, and even more striking is it that JOSEPH CHITTY, whose pre-eminence as a pleader both in civil and criminal matters and as an author on many branches of the law is well known, in his second edition of CRIMINAL LAW (29) sets out one for this offence with a note that it was settled by a very able Crown lawyer. CHITTY'S works were essentially working books for practitioners, and it is most unlikely that he would have D included a precedent for this offence if by this time, 1826, it was regarded as obsolete. Then we were supplied with a report of a charge given to the Grand Jury of Sussex in 1852 by PARKE, B., one of the greatest Victorian judges, in which he said (30) it should be known that failure to give information as to felonies to the authorities, known to the law as misprision of felony, was a very serious offence. That law, he said, had certainly fallen into desuetude, E but it was very necessary it should be known that it still existed and that, during the previous twenty years, he had been called on to make use of it. In 1866, LORD WESTBURY referred to misprision of felony in his speech in *Williams* v. *Bayley* (31), though he added a dictum with regard to the constituents of the offence that the concealment must be for the benefit of the person concealing the matter. It seems that his Lordship was momentarily confusing F misprision with compounding a felony, which was what the case was concerned with and, in my opinion, there is no authority for that dictum and it matters not what induces the concealment. This was the view of the Supreme Court of Victoria, whose careful and interesting judgment on this subject in *R.* v. *Crimmins* (32) was delivered as recently as February, 1959. The court emphatically affirmed the existence of the offence at the present day. Finally, it is to be ob- G served that SIR FITZJAMES STEPHEN in 1877 described the offence in his DIGEST OF CRIMINAL LAW (33). Though, in my opinion, the offence should be sparingly prosecuted, I am by no means prepared to say that it has no use in our criminal law at the present day; it may well be used when there is technical difficulty in framing a charge of being an accessory after the fact to a felony, and counsel who had acted for the prosecution told us that was the reason for using it H in the instant case. Moreover, it is almost a commonplace in these days to find the police appealing for persons whom they think must be able to throw light on some serious crime to come forward and give their assistance. And there have been instances quite recently in wounding cases arising out of gang warfare of refusing to assist the police as to the identity of the attackers, whether from fear of reprisals or from a mistaken sense of loyalty. It is very easy to I poke ridicule at the offence and say that it obliges people to inform against a boy stealing an apple. The law is nowadays administered with dignity and common sense. And if it is said it obliges a father to inform against his son, or vice versa, I would answer that, in the case of a really heinous crime, be it so.

In my opinion, therefore, misprision of felony is today an indictable misdemeanour at common law, and a person is guilty of the crime if, knowing

(28) See 31 State Tr. at p. 969.
(29) Vol. 2, p. 232.
(30) See "The Times", Mar. 18, 1852.
(31) (1866), L.R. 1 H.L. at p. 220.
(32) [1959] V.L.R. 270.
(33) In art. 157, p. 93.

that a felony has been committed, he conceals his knowledge from those responsible for the preservation of the peace, be they constables or justices, within a reasonable time and having a reasonable opportunity for so doing. What is a reasonable time and opportunity is a question of fact for a jury and also whether the knowledge that he has is so definite that it ought to be disclosed. A man is neither bound nor would he be wise to disclose rumours or mere gossip, but, if facts are within his knowledge that would materially assist in the detection and arrest of a felon, he must disclose them as it is a duty he owes to the state. The gist of the offence is concealment which may be passive, that is mere non-disclosure, or active in destroying or hiding evidence, though in the latter case it would probably often amount to being an accessory after the fact, and I would add that, where it is thought possible and proper to charge a person as an accessory, it is preferable to do so rather than have recourse to the offence of misprision. I would also add that it matters not what induces the concealment and that the dictum of LORD WESTBURY referred to above should be regarded as incorrect.

My Lords, I would dismiss the appeal.

LORD MORTON OF HENRYTON: My Lords, in my opinion, (i) there is such an offence as misprision of felony, and (ii) active concealment is not an essential ingredient of that offence. I gratefully adopt the following passage in the judgment of the Supreme Court of Victoria (SIR EDMUND HERRING, C.J., O'BRYAN and DEAN, JJ.) in *R.* v. *Crimmins* (34):

> "In our opinion . . . the citizen's duty to disclose . . . any treason or felony, of which he has knowledge, remains the same and is still as binding upon him as it was in the early days of the common law. And no doubt cases will arise, from time to time, when the public interest will be best served by the citizen, who fails in this duty, being prosecuted for misprision of felony. There is certainly no justification for the view that such a prosecution is no longer available to the Crown. The question then is: what are the constituent elements of the crime? We think they are really determined by what we have already said. The offence lies in the failure to perform the duty to disclose . . . And so it matters not what induced the citizen concerned not to do his duty."

I refrain from dealing with the earlier authorities on this important matter, as they have been fully discussed in the speeches of my noble and learned friends, LORD DENNING and LORD GODDARD. As to the recent authorities, although I agree with the last sentence in the passage which I have quoted from the judgment in *R.* v. *Crimmins* (34), I have much sympathy with the view recently expressed by SLADE, J., when summing-up to the jury in *R.* v. *Wilde* at Leeds autumn assizes on Dec. 14, 1959. That case is shortly reported in the CRIMINAL LAW REVIEW, 1960, p. 116, and a transcript was provided for your Lordships' use. The learned judge introduced a limitation in putting to the jury the question whether the accused men had failed in their duty to disclose certain thefts by a woman employee. He put the question thus (35):

> "Has the prosecution proved beyond reasonable doubt . . . that the nature and extent of her thefts, as known to the defendants, was such that a reasonable man would consider it his duty to inform . . . the police?"

And he added: "I put that in to eliminate the case of the small boy and the windfalls." Earlier, the learned judge had said:

> "Counsel . . . urged upon me not to regard as a sufficiently serious offence to require reporting to the police if you saw, for example, a fifteen years old boy picking up a couple of windfalls in your garden and you knew that in fact he had stolen them. In law it is as much a felony as the most serious

(34) [1959] V.L.R. at p. 272. (35) See [1960] Crim. L.R. at p. 118.

A bank robbery. I have endeavoured, because I prefer to err, if at all, in favour of the accused, to draft a question to embody that limitation."

My Lords, I think the learned judge erred in law in importing that limitation into the offence of misprision of felony; but his words may well be regarded as a valuable indication of the type of case in which a prosecution for that offence is appropriate.

B

I would dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, it was contended on behalf of the appellant that no such offence as misprision of felony has existed in English criminal law and that the manifold references to its supposed existence have been based on mistaken repetitions of error or misapprehension which was C contained in STAUNDFORD'S PLEES DEL CORONE. Alternatively, it was contended that, if this common law misdemeanour was ever known to the law, it has now become obsolete so that today no such offence exists. I have had the privilege of reading in advance the speeches which have been delivered by my noble and learned friends, LORD DENNING and LORD GODDARD, and I concur with the view that for centuries misprision of felony has been recognised as an offence. D I find no convincing justification of the suggestion that STAUNDFORD made a misstatement or a mistake. Furthermore, the words of COKE and of HALE and of BLACKSTONE are as clear as their authority is massive. Not only have they declared that there is such an offence, but they have shown that it consists in the concealment of a felony of which a man knows though he has not assented to it. The authorities do not support the view that some active concealment E must be proved. If there is knowledge that a felony has been committed, then the mere failure and omission to report and disclose what is actually known is an offence. The suggestion contained at one point in the speech of LORD WESTBURY in *Williams* v. *Bayley* (36) that the concealment must be of advantage or a source of profit is not founded on authority. The question whether any offence is committed if there is a failure to disclose knowledge that some felony is being F planned and projected does not now call for decision. It may well be that long periods passed during which there were no recorded convictions for this offence, but this does not warrant an assumption that, in some way or by some process, the law became changed. The references in *M'Daniel's Case* (37), in the charge of THOMPSON, B., (38) in 1813 and in the charge of PARKE, B., (39) in 1852, demonstrate that judges regarded the offence as existing at those dates and G several examples of convictions of the offence within this century have been cited. Situations and circumstances can be postulated in which it can be urged that it would seem to run counter to the fitness of things to acknowledge that the offence has been committed. On the other hand, situations and circumstances can also be contemplated in which a failure to disclose knowledge would be condemned as being outrageous. The fact that prosecutions have been, and H doubtless will continue to be, infrequent demonstrates that the law is the handmaid of reason.

I would dismiss the appeal.

LORD GUEST: My Lords, the Court of Criminal Appeal granted leave to appeal to the House of Lords limited to the following points: (i) Whether I there is such an offence as misprision of felony: (ii) Whether active concealment is an essential ingredient of that offence.

On the first question, I agree with the opinion expressed by my noble and learned friend, LORD GODDARD, that the answer to this question must be "Yes" for the reasons given by him.

On the second question, I also agree with your Lordships who have preceded me that the answer is "No". Reference has already been made to the numerous

(36) (1866), L.R. 1 H.L. at p. 220.
(37) (1755), 19 State Tr. 745.
(38) (1813), 31 State Tr. at p. 969.
(39) See "The Times", Mar. 18, 1852.

institutional writers who have defined this offence, and I cannot find in these writers any statement that active steps of concealment are required to constitute the offence. STAUNDFORD'S PLEES DEL CORONE (1607), p. 37c: A

> "Misprision is properly when anyone knows or understands, that another has committed treason or felony, and will not disclose it to the King, or his Council, or to any magistrate, and so conceals the offence; this is misprision, which offence BRACTON has put amongst the offences of treason, because it seemed to him, that concealments sometimes, were closer to treason, than to a misprision, and on that account these are his words:—" B

He then quotes from BRACTON the passage already cited. The writers who follow in describing misprision of felony refer to the failure to disclose the commission of a felony as an offence of omission. If more active steps were required to constitute the offence of misprision of felony, this would equiparate the offence to that of being accessory after the fact which is an entirely distinct offence. SIR BASIL NIELD, in his summing-up to the jury, incorporated in his definition of misprision of felony the conception of deliberate concealment which would suggest that the concealment must be wilful. There is no, in my opinion, sufficient justification in the authorities for limiting the offence in this way. The offence consists in a mere omission to disclose a felony. C D

SIR BASIL NIELD also directed the jury that the concealment must be for gain or reward to the misprisor. I have no doubt that this direction was derived from an expression of an obiter dictum of LORD WESTBURY in *Williams* v. *Bayley* (40), where he said:

> "If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, 'misprision of felony.' That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, farther, converted it into a source of emolument to himself." E F

There is, in my opinion, no warrant for this limitation and the direction which was, of course, favourable to the accused did not correctly express the law.

I would for these reasons refuse the appeal.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co.* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(40) (1866), L.R. 1 H.L. at p. 220.

A

MITCHELL AND ANOTHER (INSPECTORS OF TAXES) v. ROSS.

MITCHELL AND ANOTHER (INSPECTORS OF TAXES) v. HIRTENSTEIN.

MITCHELL AND ANOTHER (INSPECTORS OF TAXES) v. MARSHALL.

B

TAYLOR-GOOBY (INSPECTOR OF TAXES) v. TARNESBY.

TAYLOR-GOOBY AND ANOTHER (INSPECTORS OF TAXES) v. DREW.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Tucker, Lord Cohen and Lord Guest), May 11, 12, 15, July 6, 1961.]

C

Income Tax—Deduction in computing profits—Expenses—Medical specialist in private practice—Holder of part-time appointments as consultant—Profits of office assessable under Sch. E—Expenses not deductible under Sch. E—Whether deductible as expenses of profession under Sch. D—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 122 (*Sch. D, para.* 1, *proviso*), *s.* 156 (*Sch. E, para.* 2).

D

A consultant radiologist held an appointment as a part-time consultant under the National Health Service and had also private patients. He was assessed to income tax under Sch. E (Income Tax Act, 1952, s. 156) in respect of the profits or gains arising from his part-time appointment and under Sch. D (Income Tax Act, 1952, s. 122) in respect of the profits or gains arising from his private practice. It was conceded that the profits from the part-time appointment were those of a public office properly assessable under Sch. E. It was found as a fact that the holding of the part-time appointment was a necessary part of the exercise of the taxpayer's profession. The question arose whether expenses incurred in earning the profits and gains assessable under Sch. E were, in so far as they were not allowable under that Schedule, deductible for the purpose of the assessment under Sch. D.

E

F

Held: expenses incurred in relation to the office taxable under Sch. E and disallowed under that Schedule were not allowable as expenses of earning the profits of the profession taxable under Sch. D, since the two Schedules were mutually exclusive; and although the holding of the part-time appointment had been found to be a necessary part of the exercise of the profession, yet the consequence was merely that the taxpayer had two distinct taxable sources of income, not that expenses of the office could be regarded as deductible expenses in computing for tax purposes the profits of the profession.

G

Fry v. *Salisbury House Estate, Ltd.* ([1930] All E.R. Rep. 538) applied.

Hughes v. *Bank of New Zealand* ([1938] 1 All E.R. 778) distinguished.

Decision of the COURT OF APPEAL ([1960] 2 All E.R. 218) reversed.

H

[As to the position of consultants and specialists in relation to the hospital authority, see 26 HALSBURY'S LAWS (3rd Edn.) 19, 20, para. 27.

As to what constitutes an office within Sch. E, s. 156 of the Income Tax Act, 1952, as amended by s. 10 of the Finance Act, 1956, see 20 HALSBURY'S LAWS (3rd Edn.) 306, para. 563; and as to expenses incurred for the purposes of a profession, see ibid., 166-170, paras. 286-292; and for cases on the subjects, see 28 DIGEST (Repl.) 222 et seq., *955* et seq.; 87 et seq., *329* et seq.

For the Income Tax Act, 1952, s. 122 and s. 156, see 31 HALSBURY'S STATUTES (2nd Edn.) 112, 149.]

I

Cases referred to:

Fry v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.*, [1930] All E.R. Rep. 538; [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; 28 Digest (Repl.) 33, *148*.

BIBL. LONDIN UNIV

Hughes v. *Bank of New Zealand*, [1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; 28 Digest (Repl.) 264, *1174*. A

Appeals.

Consolidated appeals by the Crown and cross-appeals by the taxpayers from orders of the Court of Appeal (LORD EVERSHED, M.R., PEARCE and HARMAN, L.JJ.), dated Mar. 24, 1960, and reported [1960] 2 All E.R. 218, affirming in part and reversing in part orders of UPJOHN, J., dated July 21, 1959, and reported [1959] 3 All E.R. 341, on Cases Stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1952, s. 64. The first taxpayer, Dr. Harold Leslie Ross, who for the material years held a part-time appointment as a consultant radiologist to the Birmingham Regional Hospital Board, appealed to the Special Commissioners of Income Tax against assessments to income tax as follows: for 1951-52 under Sch. E £3,024; for 1952-53 under Sch. E £3,276 and under Sch. D £1,500; for 1953-54 under Sch. E £3,385 and under Sch. D £1,000; and for 1954-55 under Sch. D £1,000. The second taxpayer, Dr. Arnost Hirtenstein, held a part-time appointment as a consultant ophthalmologist to the Birmingham Regional Hospital Board and also undertook certain lecture work to nurses. The third taxpayer, Dr. Alfred Gordon Marshall, held a part-time appointment as consultant pathologist to the Birmingham Regional Hospital Board. The fourth taxpayer, Dr. Herman Peter Tarnesby, held two part-time appointments as a psychiatrist, one with the North West Metropolitan Regional Hospital Board and one as clinical assistant in the Department of Psychological Medicine of the West London Hospital, a teaching hospital. He also undertook work as a locum tenens in respect of national health appointments. The fifth taxpayer, Mr. Charles Edwin Drew, held three appointments as a consultant thoracic surgeon: (i) with the Westminster Hospital, a teaching hospital; (ii) with the South West Metropolitan Regional Hospital Board; and (iii) as chief assistant at the Brompton Hospital for Diseases of the Chest. He also undertook certain locum-tenens work in respect of national health appointments and also lectured to medical students. All the taxpayers had private patients. All the taxpayers' cases raised similar questions of principle.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *F. N. Bucher, Q.C., E. Blanshard Stamp* and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *J. L. Creese* for the taxpayers.

Their Lordships took time for consideration.

July 16. The following opinions were read.

VISCOUNT SIMONDS: My Lords, these consolidated appeals and cross-appeals raise a question of general importance to medical specialists who hold appointments as part-time consultants under the National Health Service and also have private patients. The appeals relate to assessments to income tax of five such specialists who held part-time appointments, respectively as consultant radiologist, ophthalmologist, pathologist, psychiatrist and thoracic surgeon and also engaged in private practice. I will consider the case of Dr. Harold Leslie Ross, a consultant radiologist to the Birmingham Regional Hospital Board. The other cases stand or fall with his. Dr. Ross, having been assessed to income tax under the Income Tax Act, 1952, Sch. E, in respect of the profits and gains arising from his part-time appointment and under Sch. D in respect of the profits and gains arising from his private practice, appealed against the assessments to the Special Commissioners on two grounds. He claimed, in the first place, that he should be assessed in respect of the whole of his profits and gains under Sch. D, and, in the second place, that, if this claim was not upheld, he was entitled in the computation of his liability under Sch. D to deduct the expenses incurred in the exercise of his appointment to the extent that they were

A not allowed under Sch. E. The first of these two claims was not maintained before this House, learned counsel conceding that an appointment under the National Health Service to such a post as that held by Dr. Ross fell within Sch. E and that an assessment to tax must accordingly be made under that Schedule. In my opinion, the concession was rightly made and the opposite view was not arguable. I may add here that some subsidiary questions were B raised as to the category into which the fees earned by so-called domiciliary visits and "locum-tenens" services fell. But these matters also are no longer in issue.

The single question, therefore, that remains is whether expenses incurred in earning the profits and gains which are assessable under Sch. E are, so far as they are not allowed in that assessment, deductible for the purpose of the C assessment under Sch. D. The Special Commissioners held that they are, UPJOHN, J., on Case Stated that they are not, and the Court of Appeal on appeal from him that they are. My Lords, in my opinion, UPJOHN, J., was right, and I can state my reasons shortly.

I regard it as fundamental and well-settled law that the Schedules to the Income Tax Acts are mutually exclusive and that the specific Schedules A, D B, C and E, and the rules which respectively regulate them, afford a complete code for each class of income, dealing with allowances, deductions and exemptions relating to them respectively. Accordingly, when it is conceded, as it has to be conceded, that Dr. Ross was assessable under Sch. E and also Sch. D, I cannot look further than the Rules under Sch. E to determine his liability under that Schedule and the Rules under Sch. D to determine his liability under that E Schedule. It was found by the Special Commissioners, and much importance was attached to the finding, that

> "at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession and merely incidental thereto, notwithstanding F that a great deal of his time was thereby taken up."

But this means no more than that it was necessary, if he was to carry on his profession, that he should accept a post, in respect of which he would be assessable under Sch. E. He would, therefore, have two taxable sources of income, but that fact lends no support to the view that he can deduct expenses incurred G in respect of income assessed under one Schedule from income assessed under another. It appears to me, if I may say so with the greatest respect to the Court of Appeal, that they have given undue weight to the undoubted fact that Dr. Ross carried on the profession of a radiologist whether he was exercising his appointment or seeing private patients, but ignored the fact that, for income tax purposes, he was, no less undoubtedly, not engaged in a single activity. H He may be called a consultant radiologist and so he is, but his activities (and that is what matters) are for tax purposes those of a radiologist holding an employment and a radiologist engaging in private practice. In respect of the former, the amount that he can deduct from his emoluments for tax purposes is governed by r. 7 in Sch. 9 to the Income Tax Act, 1952; in respect of the latter, s. 137 of the same Act, which is expressed in negative terms, affords no I grounds for the claim that expenses incurred in earning profits or gains under another Schedule can be brought into account. In my opinion, the Court of Appeal were in error in thinking that, in order to reach this conclusion, some gloss must be put on the words of the Act. On the contrary, without writing into the Act words that are not there (and, if they were there, might be difficult to harmonise with the scheme of taxation under the several Schedules), I do not see how the claim of Dr. Ross can be sustained. Support is given to this view by a consideration of s. 18 of the Finance Act, 1922. That section, by sub-s. (1), provided that such profits or gains arising or accruing to any person from an

office, employment or pension as were, under the Income Tax Act, 1918, chargeable to income tax under Sch. D (other than as therein mentioned) should cease to be chargeable under that Schedule and should be chargeable to tax under Sch. E, and that the Rules applicable to that Schedule should apply accordingly subject to the provisions of that Act, and, by sub-s. (7), that income tax in respect of profits or gains which would, but for the provisions of that section, have been chargeable under Sch. D for the year 1922-23, might be charged for that year either under Sch. D or under Sch. E, but the tax should in all cases be computed in accordance with the provisions and Rules applicable to Sch. E, as amended by that Act. I find this provision quite inconsistent with the view that any other rules than those applicable to Sch. E can be applied to an assessment under that Schedule.

My Lords, I have said that the conclusion to which I have come in the present case accords with well-settled law. I need refer only to *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.* (1). It is a familiar case which I can state very shortly. The respondent company, being the owner of a block of buildings which was let out as unfurnished offices to tenants, was assessed to tax under Sch. A. It provided certain services, such as heating and cleaning, at an additional charge, and admitted its liability to assessment under Sch. D in respect of its profits from these services. The Crown, however, claimed, in making the assessment under Sch. D, to include the rents of the offices as part of the receipts of the trade, making allowance for tax assessed under Sch. A. It was held that the rents were profits arising from the ownership of land in respect of which the assessment under Sch. A was exhaustive, that they, therefore, could not be included in the assessment under Sch. D as trade receipts of the company. I will cite a single passage from the speech of LORD ATKIN (2):

> "I think that this case should be decided in favour of the respondents on the simple ground that annual income derived from the ownership of lands, tenements, and hereditaments can only be assessed under Sch. A *and in accordance with the rules of that Schedule.* [The italics are mine.] In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of Sch. D the income so derived is not to be brought into account. The option of the revenue authorities to assess under whichever schedule they prefer in my opinion does not exist and is inconsistent with the provisions of the Income Tax Acts throughout their history."

Here, my Lords, is conclusive authority for the proposition that the scheme of the Income Tax Acts demands that each source of profit should be assessed under the appropriate schedule and in accordance with the rules applicable to that schedule alone.

It was, however, urged by the respondents that the authority of *Fry* v. *Salisbury House Estate, Ltd.* (1) had been qualified by a later decision of this House in *Hughes* v. *Bank of New Zealand* (3). This view, which found favour with the Court of Appeal, cannot, in my opinion, be supported. It may be noted that LORD ATKIN himself, and also LORD MACMILLAN who took part in the earlier case heard the later case also. The leading, indeed the only, speech was delivered by LORD THANKERTON, the other noble and learned Lords concurring. But neither in the argument of counsel as reported nor in the speech of LORD THANKERTON was any mention made of the *Salisbury House* case (1). I can only suppose that this was because it did not occur to anyone that any encroachment was being made on the broad principle laid down in that case. In fact, I do not think that there was, and that UPJOHN, J., was right when, after stating the decision in *Hughes'* case (3) he said (4):

(1) [1930] All E.R. Rep. 538; 15 Tax Cas. 266.
(2) [1930] All E.R. Rep. at p. 551; 15 Tax Cas. at p. 318.
(3) [1938] 1 All E.R. 778; 21 Tax Cas. 472. (4) [1959] 3 All E.R. at p. 349.

A "That seems to me a very different case and does not lay down any principle which assists me in this case."

In that case, the Bank of New Zealand, which was registered and resident in New Zealand, carried on banking business at a branch in London. It was assessed to tax on the profits arising from its trade exercised in London under Case I of Sch. D to the Act of 1918 for the financial year 1928-29 in the sum of B £94,448. It possessed as part of the assets of its London branch certain five per cent. war loan and other stocks and securities which had been purchased out of the floating capital of the London branch and other moneys obtained in New Zealand, to borrow which it had expended £41,262. The interest on the war loan and other stocks amounted to £78,556 for the period in question. Two questions arose and were answered. In the first place, it was held that the C interest on the stocks in question being exempt from tax under s. 46 of the Income Tax Act, 1918, or as the case might be, did not become taxable by being included in trading profits assessable under Case I of Sch. D. Secondly, it was held that the bank was entitled for the purpose of assessment to deduct from its profits its proper trading expenses including therein the sum of £41,262 being the expenses particularly attributable to the earning of the sum of D £78,556 of interest notwithstanding that the latter sum was exempt from taxation. It was presumably the second holding on which the respondents relied. But it appears to me that the analogy—for it is no more—fails in this, that in *Hughes*' case (5) the disbursements and expenses in question were found to be disbursements and expenses laid out for the purpose of the trade which was the subject-matter of taxation under Sch. D. That was not so in the present E case. If it were so, all the disbursements and expenses of Dr. Ross laid out for the purposes of his office could be deducted in computing his Sch. D profits and not merely the part of those expenses disallowed in computing his Sch. E profits. This conclusion would be at direct variance with the provisions of s. 137 of the Act of 1952, for, ex hypothesi, they were not exclusively laid out or expended for the purpose of the profession the profits of which were taxable under F Sch. D. I cannot accept the contention that *Hughes*' case (5) in any way qualifies the principle laid down in the *Salisbury House* case (6).

Finally, it was urged that great administrative difficulties arise from a division of expenses incurred in the course of engaging in private practice and carrying out the duties of an appointment. That may be so, though it is a commonplace that the allowance of expenses can seldom be a matter of scientific precision. G But, be the difficulties great or small, the language of the Act is, in my opinion, too plain to allow them to prevail.

The appeals must in each case be allowed and the cross-appeals dismissed and the orders of UPJOHN, J., restored. The respondents must pay the Crown's costs here and below.

H **LORD RADCLIFFE:** My Lords, these appeals, though far-reaching in their consequences, have come down to a very short point. If a professional man holds an appointment that is a public office or employment of profit or is otherwise an office or employment, tax in respect of which is chargeable under Sch. E to the Income Tax Act, 1952, and the holding of that employment is found to be a necessary part of the exercise of his profession and merely incidental I thereto, is he entitled to set against any receipts of his profession taxed under Sch. D such expenses incurred in respect of this Sch. E appointment as are not allowable under the rule of that Schedule that governs the deduction of expenses?

It has taken some time for the case to come down to this point. Before the Special Commissioners, the High Court and the Court of Appeal, it was much in debate whether the appointments now in question, part-time appointments under the National Health Service, constituted public offices or offices

(5) [1938] 1 All E.R. 778; 21 Tax Cas. 472.
(6) [1930] All E.R. Rep. 538; 15 Tax Cas. 266.

at all within the meaning of Sch. E and, apart from that, whether fees in respect of certain special activities arising out of the appointments, domiciliary visits and locum-tenens work, were attributable to those offices. The Special Commissioners, by a process of reasoning that I cannot follow and in reliance on two judicial decisions which were, I think, irrelevant, decided that the appointments under the National Health Service were offices within the meaning of Sch. E, but, nevertheless, thought themselves bound to hold that the profits and gains arising therefrom should be assessed as part of the professional earnings under Case II of Sch. D. The respondents have not sought to argue that this could be an admissible result. The appeals came before UPJOHN, J., in the High Court. In his judgment, with which I may say that I entirely agree, he held that the appointments were public offices; that the respondents were, accordingly, assessable in respect of the profits arising therefrom under Sch. E, not Sch. D; and that the expenses attendant on the exercise of the office must be deducted under the Rules applicable to Sch. E, but not under any rule found in any other Schedule. The Court of Appeal agreed with the Special Commissioners and UPJOHN, J., that these appointments were offices, and agreed with the learned judge that the profits of these offices must be charged under Sch. E. They held, however, that outgoings incurred in respect of the offices ought to be treated as allowable deductions in computing professional earnings under Sch. D to the extent that they were not allowed as deductions under Sch. E. I am afraid that I have rather paraphrased their order in stating it as I have, but I think that I have given the substance of its meaning. One, but not the only one, of my difficulties in looking at the matter in this way is that I do not see why it is only the balance of unallowed deductions that is thus thrown on Sch. D; but perhaps a judgment phrased in such a form does something to obscure the inescapable fact that Sch. D and Sch. E each contains its own independent rule about the allowance of expenses in the assessment of profits and that it is insuperably difficult to see how one item of profit can be subject at one and the same time to the inconsistent rules of both Schedules. On the appeal before this House, the respondents did not contend that the appointments were not offices or that a Sch. E assessment in respect of them was not correct or that there was any material difference between the various kinds of fee or remuneration that were received in respect of the appointments. The argument was, therefore, confined to this question, whether the judgments of the Court of Appeal were correct in holding that Sch. D receipts could have set against them some expenses that were incurred in obtaining Sch. E earnings. I appreciate, of course, that such a way of stating the problem does not do justice to the subtler conception which the respondents would have us accept. They want to say that, on the basis of the facts found in these cases, all the expenses of the "profession", including what I may call the Sch. E branch, are ultimately Sch. D expenses, and it is of no particular importance that some of them have already been taken account of in arriving at the assessable figure of Sch. E profits.

My Lords, in my opinion, this conception is untenable. I think that it is contrary to what the Income Tax Act itself requires and I think it inconsistent with those rules about the structure of the taxing system and its necessary implications which we conveniently associate with the speeches made in this House in *Fry* v. *Salisbury House Estate, Ltd.*, *Jones* v. *City of London Real Property Co., Ltd.* (7). I do not mean, of course, that those rules originated with that decision, but they are there recognised and expressed in what I have always thought to be conclusive form. Generally speaking, the five Schedules of taxable categories are distinguished from each other by distinctions as to the nature of the source from which the chargeable profit arises. The source may be property in the ordinary sense such as land, securities, copyright, office, or it may be an activity sufficiently coherent, trade or profession, for example, to be

(7) [1930] All E.R. Rep. 538; 15 Tax Cas. 266.

A regarded as itself the stock on which profits grow. That is not an exhaustive account, but it is, I think, a sufficient general introduction. Before you can assess a profit to tax, you must be sure that you have properly identified its source or other description according to the correct Schedule; but, once you have done that, it is obligatory that it should be charged, if at all, under that Schedule and strictly in accordance with the Rules that are there laid down for B assessments under it. It is a necessary consequence of this conception that the sources of profit in the different Schedules are mutually exclusive. This is what VISCOUNT DUNEDIN said in the *Salisbury House* case (8), when he accepted the proposition that

> "when income is dealt with in the proper schedule the same income cannot be dealt with again under another schedule."

C

Also it is what LORD ATKIN said (9):

> ". . . the dominance of each Schedule, A, B, C, and E, over its own subject-matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income dealing with allowances and exemptions, with the D mode of assessment and with the officials whose duty it is to make the assessments."

I do not see how anyone can doubt these propositions today; but, if they are accepted, they seem to me to rule out the idea that, though the respondents' appointments were offices and so chargeable under Sch. E, they could also form a part or a branch of the "profession" that is the subject of charge under E Sch. D. And yet that is the whole case. The profession, for this purpose, is a coherent series of activities of a particular character giving rise to assessable profits; it is not an abstract description in a dictionary. If the activities relating to the employment in the office are excluded, as they must be because they belong to Sch. E, the profession the profits of which are assessable under F Sch. D must consist only of the remaining activities. And, if that is so, the Rules of Sch. D (see s. 137 (a) of the Income Tax Act, 1952) prohibit the deduction in that assessment of any expenses incurred in relation to the activities of the office, since such expenses are not "wholly and exclusively laid out . . . for the purposes of the . . . profession . . ."

I am bound to say, therefore, that, in my opinion, the Court of Appeal's G judgment is wrong. I do not want, of course, to make any detailed criticisms of individual judgments; but, out of respect for what has been said, I ought to state briefly my view on the two main considerations that were, I think, responsible for the shape that those judgments took. There is, first, what has been called the commissioners' special finding that the hospital appointments were a necessary part of the exercise of the respondents' profession and merely H incidental thereto. The "necessity" here referred to is a practical necessity. Actually, I do not think that there is anything really special about this finding. So far as I can see, the proposition that the respondents wish to maintain would be just the same if there had been a finding to the effect that Dr. Ross, for example, carried on the profession of a consultant radiologist and that it was a reasonable and proper incident of that profession to hold a part-time appointment under the National Health Service. However that may be, I regard the I finding as irrelevant to the decision of the case, once it is accepted that the scheme of the tax code necessitates mutual exclusiveness between "profession" and "office" and the assessment of their profits by different sets of rules.

Then there is the decision of this House in *Hughes* v. *Bank of New Zealand* (10), which was evidently thought to amount to some qualification of what I will

(8) [1930] All E.R. Rep. at p. 545; 15 Tax Cas. at p. 308.
(9) [1930] All E.R. Rep. at p. 552; 15 Tax Cas. at p. 319.
(10) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

call the *Salisbury House* principle (11) and to an instance of a case in which the expenses of earning income under one Schedule (Sch. C) were treated as an allowable deduction in assessing the profits of a trade under Sch. D. The *Bank of New Zealand* situation (12) was certainly rather a complicated one, and it did not take Parliament long to introduce a new rule which nullified the effect of the decision. But I do not think that there is any ground for supposing that that decision was intended to introduce an exception from the *Salisbury House* principle (11), nor was the subject approached in that way. Again, I think that it is a misunderstanding of the case to describe it as one in which the expenses of earning income chargeable under one Schedule were allowed as a deduction in an assessment of income chargeable under another. There are no such things as the expenses of earning income chargeable under Sch. C. The Bank of New Zealand was assessed on the profits of their trade as bankers in London, which means their trade of dealing in money. Part of their trading stock, money, which they employed in London was obtained elsewhere, and the cost of obtaining it, primarily interest charges, was an unavoidable deduction in assessing the London profits. That was the strength of their case. It is true that a very small part of the interest on loans received in London which was tax free would have been chargeable direct under Sch. C, but no one seems to have attached any importance to that aspect of the matter. Nor was it, I think, important. The deductions that were claimed were not the expenses of obtaining the tax-free income but the expenses of obtaining the stock-in-trade that went into the investments that produced the income; and that is a different matter. The whole question in the *Bank of New Zealand* case (12) was whether anyone could see a way of eliminating from the deduction ex facie allowed by the Act a sector of the expenses of obtaining money because that money, when obtained, was put into investments that did not yield taxable income. No one could, until Parliament altered the law. The decision does not offer any useful analogy with the cases now before us, in which the argument for the Crown does not involve the putting of an unauthorised gloss on the statutory provisions, as the Court of Appeal seem to have thought, but the asking of the plain question why the words of s. 137 regulating deductions in the making of Sch. D assessments should not be given their full effect.

My Lords, I do not think that I need pursue the question further. I agree that these appeals must be allowed. I dare say that the respondents will feel that, in being told that the law is against them on this point, they are hardly used, and I am sorry for that. I doubt, however, whether it is possible for us in our present capacity to be sure whether their grievance is more directly with the law than with their employers, the National Health Service. I will only say with regard to some of the sympathetic observations that fell from the Master of the Rolls (LORD EVERSHED) in the Court of Appeal that I think that it might be a mistake to approach questions of this sort with the unqualified assumption that the law is anomalous if the Sch. D rule as to expenses is not in all cases available to Sch. E assessees. There may be real differences between the situations covered by the respective Schedules which justify a difference in formulas, even if the Sch. E rule is thought to be unduly restricted or too restrictively applied.

LORD TUCKER: My Lords, I agree that these appeals should be allowed for the reasons which have been stated by my noble and learned friends.

LORD COHEN: My Lords, while I agree with the Master of the Rolls (LORD EVERSHED) that the stricter standard of deductions permitted by the Rules applicable to Sch. E to the Income Tax Act, 1952, as compared with that permitted by the Rules applicable to Sch. D may operate harshly on the

(11) [1930] All E.R. Rep. 538; 15 Tax Cas. 266.
(12) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

A holders of offices the income from which is taxable under Sch. E and that Parliament might well consider whether and how far the considerable distinction between the two Schedules in the matter of permitted deductions is justified, I am unable to accept the construction of Income Tax Acts which the Court of Appeal have adopted in order to mitigate the hardship on the respondents to this appeal. In my opinion, the appeals must be allowed. I agree with the B reasons given by your Lordships for this conclusion and have but little to add.

It is not now disputed that each of the respondents is the holder of an office and that the profits or gains derived from that office are taxable under Sch. E. The respondents have been allowed such deductions as are permissible under r. 7 of Sch. 9 to the Income Tax Act, 1952, or the corresponding Rule applicable to Sch. E under the Act of 1918, but the deductions thus allowed are less by a C substantial amount than the respondents would have been allowed had the whole of their income from carrying on the profession of consultant been taxed under Sch. D. They, therefore, sought to deduct the disallowed balance from the income of their private practice which it was agreed was taxable under Sch. D, relying on the finding of the commissioners that (to cite the finding in the case of Dr. Ross) he

D "exercised the profession of consultant radiologist, *his part-time hospital appointments being a necessary part of the exercise of that profession and merely incidental thereto*, notwithstanding that a great deal of his time was thereby taken up."

UPJOHN, J., rejected this claim, but the Court of Appeal allowed it, relying on the E finding of the commissioners which I have cited and, in particular, on that part of it which I have italicised. They relied on the provisions of s. 137 of the Act of 1952 and said, in effect, that, since it was found that the part-time hospital appointment was a necessary part of the profession, it followed that any expenses incurred in connexion therewith and not allowed under Sch. E must be deducted from the receipts which must be brought into account in assessing the liability F under Sch. D. This conclusion seems to me to ignore the proviso to s. 122 (1), which directs that profits or gains arising from any office or employment shall (with certain exceptions irrelevant to the decision of this appeal) not be chargeable to tax under Sch. D. I agree with UPJOHN, J. (13), that

"Once the conclusion is reached that the national health appointment is the holding and exercise of an office . . . the expenses attendant thereon G must be deducted under the Rules applicable to Sch. E and . . . under no other Schedule."

This conclusion seems to me to follow from the decision of this House in *Fry* v. *Salisbury House Estate, Ltd.*, *Jones* v. *City of London Real Property Co., Ltd.* (14). Like UPJOHN, J., I will content myself with one citation from the speech of LORD ATKIN (15):

H "Believing as I do that the specific Schedules A, B, C, and E, and the rules thereunder contain definite codes applying exclusively to their respective defined subject-matters I find no ground for assessing the taxpayer under Sch. D for any property or gains which are the subject-matter of the other specific schedules."

I It is true that, in the present case, your Lordships are concerned, not with what property or gains shall be brought into tax, but with what deductions ought to be allowed, but the same principle seems to me to be applicable and to conclude the present case. The respondents relied on the decision of this House in *Hughes* v. *Bank of New Zealand* (16), but I agree with your Lordships and with UPJOHN, J., that this decision affords no assistance to the respondents. In that case,

(13) [1959] 3 All E.R. at p. 349. (14) [1930] All E.R. Rep. 538; 15 Tax Cas. 266.
(15) [1930] All E.R. Rep. at p. 552; 15 Tax Cas. at p. 320.
(16) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

there was only one indivisible trade taxable under Sch. D. In the present case, the proviso to s. 122 (1) requires the excision of the part-time appointment from Sch. D and its taxation under Sch. E, with the consequence that the only deductions permissible in respect of the income from the office taxed under Sch. E are those allowed by the Rules applicable to Sch. E.

I would allow the appeals.

LORD GUEST: My Lords, I agree that these appeals should be allowed for the reasons which have been stated by my noble and learned friends.

Appeals allowed; Cross-appeals dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Hempsons* (for the taxpayers).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

R. *v.* FLYNN.

[COURT OF CRIMINAL APPEAL (Slade, Ashworth, Paull, Salmon and Howard, JJ.), June 23, 1961.]

Criminal Law—Evidence—Character of accused—Imputation from nature of defence and accused's evidence as to character of prosecution witness—Discretion—Whether cross-examination of accused as to previous convictions should be allowed—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (*ii*).

Where the very nature of the defence to a criminal charge necessarily involves an imputation against a prosecution witness, the trial judge should, in general, exercise his discretion under s. 1 (f) (ii) of the Criminal Evidence Act, 1898*, in favour of the accused, and evidence as to his character or criminal record should be excluded (see p. 63, letter F, post).

The appellant was charged with robbing a Major X of a sum of money. His defence at his trial was, in accordance with a written statement that he had made to the police on his arrest, that Major X had made indecent suggestions to him which he had repulsed and that the major had given him the money as "hush money". He had added a paragraph to his statement to the effect that the major had indecently assaulted him. Counsel for the appellant cross-examined Major X suggesting that he had made homosexual advances to the appellant and the appellant gave evidence-in-chief to that effect. He was then cross-examined on the facts and persisted in his allegations against the major. Counsel for the prosecution asked, in the absence of the jury, for leave to cross-examine the appellant as to character under s. 1 (f) (ii) of the Criminal Evidence Act, 1898. In ruling on this submission, the recorder said "... I think as soon as [counsel] puts the accused into the witness box to tell that story on oath that entitles the prosecution to say, 'Right—you say the prosecutor is a man of bad habits, therefore the jury should be told the character you are'. In those circumstances ... this evidence is admissible, and the previous convictions can be put to the [appellant]". The appellant was then cross-examined about his previous convictions. He was convicted. On appeal,

Held: although the evidence of previous convictions was admissible, its admission in the present case involved an exercise of discretion that was wrong in principle for the reason stated at letter E, above, and the conviction would be quashed.

R. v. *Cook* ([1959] 2 All E.R. 97) applied.

Appeal allowed.

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* Section 1, proviso (f) (ii), is set out at p. 60, letter H, post.

A [As to cross-examination of defendant as to character, see 10 HALSBURY'S LAWS (3rd Edn.) 449-451, para. 828, especially note (e) and Supplement; and for cases on the subject, see 14 DIGEST (Repl.) 511-513, *4942, 4949, 4950, 4959, 4961,* and 515, *4987, 4989,* and 3rd DIGEST Supp.

For the Criminal Evidence Act, 1898, s. 1, proviso (f) (ii), see 9 HALSBURY'S STATUTES (2nd Edn.) 614.]

B Cases referred to:

R. v. *Brown,* (1960), 44 Cr. App. Rep. 181; 124 J.P. 391; 3rd Digest Supp.

R. v. *Cook,* [1959] 2 All E.R. 97; [1959] 2 Q.B. 340; 123 J.P. 271; 43 Cr. App. Rep. 138; [1959] 2 W.L.R. 616; 3rd Digest Supp.

R. v. *Hudson,* [1912] 2 K.B. 464; 81 L.J.K.B. 861; 107 L.T. 31; 76 J.P. 421; 7 Cr. App. Rep. 256; 14 Digest (Repl.) 512, *4961.*

C *R.* v. *Jenkins,* (1945), 114 L.J.K.B. 425; 173 L.T. 311; 110 J.P. 86; 31 Cr. App. Rep. 1; 14 Digest (Repl.) 512, *4950.*

R. v. *Turner,* [1944] 1 All E.R. 599; [1944] K.B. 463; 114 L.J.K.B. 45; 171 L.T. 246; 30 Cr. App. Rep. 9; 14 Digest (Repl.) 516, *5003.*

Stirland v. *Public Prosecutions Director,* [1944] 2 All E.R. 13; [1944] A.C. 315; 113 L.J.K.B. 394; 171 L.T. 78; 109 J.P. 1; sub nom. *R.* v. *Stirland,* 30 Cr. App. Rep. 40; 14 Digest (Repl.) 511, *4949.*

D

Appeal.

This was an appeal by Brian Michael Flynn against his conviction on Apr. 8, 1961, at Folkestone Borough Quarter Sessions before the recorder and a jury of robbing a Major X of £1 18s. He was sentenced to twelve months' imprisonment. The recorder granted on Apr. 25, 1961, a certificate for appeal and the case came before the court (ASHWORTH, SALMON and ELWES, JJ.) on June 12, 1961, when the matter was adjourned for hearing before a Full Court of five judges. The ground of appeal was whether the recorder was right in allowing counsel for the prosecution to cross-examine the appellant about his previous convictions in the presence of the jury and before they reached their verdict. The facts appear in the judgment of the court. The cases enumerated below were cited in argument in addition to those in the judgment*.

E

F

M. C. Parker for the appellant.

B. R. Clapham for the Crown.

SLADE, J., delivered the following judgment of the court: This appellant, Brian Michael Flynn, was convicted at Folkestone Borough Quarter Sessions of robbing a Major X of £1 18s. in money and was sentenced by the recorder to imprisonment for twelve months. He now appeals, by certificate from the learned recorder, against his conviction.

G

The only ground of appeal is whether the learned recorder was right in allowing counsel for the prosecution to cross-examine the appellant about his previous convictions, in the presence of the jury and before they reached their verdict.

H The material facts are these: The complainant was a retired army major of sixty-six years of age. He gave evidence that at about 4.30 p.m. on Friday, Mar. 3, 1961, he was urinating in a public lavatory when someone came in. He did no more than glance at him, but was conscious that this person was wearing something blue, a pullover of some kind. He had no conversation with this person and he left about fifteen seconds afterwards. As he walked along he became conscious of somebody behind him in a blue pullover whom he later picked out at an identification parade as the appellant. This man ordered him "in a menacing kind of way" to "keep on walking", and eventually directed him to a seat, where he told him he was a part-time police officer and a plain clothes officer, that he had been watching him all day, and had been in the navy and had been to a party and was "tight", and said: "Give me £3". The major, according

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* I.e., *R.* v. *Clark,* [1955] 3 All E.R. 29; *R.* v. *Flynn,* (1957), 42 Cr. App. Rep. 15; *R.* v. *Cunningham,* [1958] 3 All E.R. 711.

to his evidence, showed the stranger his wallet, which was empty, and was then made to turn out his pockets and hand over £1 18s., being put in fear of the appellant, and the appellant went away "like a flash of lightning", and the complainant, having got home and told his wife, reported the matter to the police within about half an hour. The complainant concluded his evidence-in-chief by saying that this same man, about a fortnight before, had made him hand over £2, also in a public lavatory, and he said he now realised what a great mistake on his part it was not to have reported that matter to the police.

The appellant, having been arrested, first told the police that he had an alibi, and then made a statement on Sunday, Mar. 5, that is two days after the incident, under caution, which he signed, and that statement was to the effect that the money which he had received from the major, which was 30s. and not 38s., was not received in the public streets of Folkestone but in a public lavatory. He said he went down to the lavatory and that the major, who was there, not only made indecent overtures to him which he, the appellant, repulsed, but also indecently assaulted the appellant by putting his hand over the appellant's private parts, and that the complainant then left the lavatory handing him 30s. with the words: "Don't go and say anything to anyone about it", in other words, voluntarily paid him 30s. as hush money. A little later he added an additional paragraph to the statement saying, amongst other things, that the complainant was a stranger to him, and he said then: "I forgot to say when he spoke to me up at the lavatory on the Leas the man touched my privates".

The appellant's defence at the trial was in accordance with his written statement, and it became obvious, firstly, that the duty on the prosecution was to prove (i) that the major handed over the 38s. or 30s., as the case may be, and (ii) he did so only because he was induced to do so by fear. The whole case for the appellant in accordance with his statement was that the money, 30s., was handed over without any request from the appellant, who had repulsed the overtures, but to keep his mouth shut. That was the defence which counsel, who represented him at the trial, was instructed to put forward. Of course, when the major had told his story in evidence-in-chief in the witness-box it was the duty of counsel for the appellant to put to him in cross-examination the version of how the money, whether 38s. or 30s., came to be handed over, the version given by the appellant how that money came to be handed over at all, and the court is satisfied that every single question which may be said to have been an attack on the appellant was in fact a question which was necessarily put for the proper conduct of the appellant's defence.

The Criminal Evidence Act, 1898, s. 1, provides:

> "Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . . Provided as follows . . . (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character [and now I come to the material words] or the nature or conduct of the defence [and I emphasise the words "the nature or conduct of the defence"] is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . ."

The questions that were necessarily put in cross-examination of Major X by counsel for the appellant suggested to Major X that his version was completely false and that the true story was the one contained in the statement of the appellant; that involved putting to Major X (i) that he had made indecent overtures to him, and (ii) that he had even committed an indecent assault on him, and that

A of course was an imputation on the character of Major X. That having been done, counsel for the Crown asked to make a submission, very properly, in the absence of the jury, and the jury retired for the learned recorder to consider whether counsel for the Crown's application should be granted. The application was that he should be allowed to cross-examine the appellant as to his character and previous convictions because he came within the words of s. 1 proviso (f) (ii) B of the Act of 1898, or would do in view of his imputations on the character of the prosecutor, namely, Major X. The learned recorder listened to the authorities (1), and, having heard the authorities on discretion, he held that the cross-examination was admissible.

In due course the jury returned, and questions were put, and it was elicited in cross-examination that the appellant had three findings of guilt and three con- C victions for assault occasioning actual bodily harm and wilful damage, and one can imagine the highly prejudicial effect that would have on a person accused of robbery.

In due course the learned recorder summed up, and quite rightly told the jury not to allow the fact of the convictions to influence them. The jury retired, and they convicted the appellant, and the recorder sentenced him to twelve months' D imprisonment.

The recorder was then asked to give a certificate for appeal under the Criminal Appeal Act, 1907, and he did so. The certificate, I am afraid, is not very enlightening because all it says is: "It is a fit case for appeal against conviction on a ground of appeal which involves questions of mixed law and fact". The notice of appeal in this case is no more enlightening, but the grounds on which E this appeal has been conducted are two—first, and this is a pure question of law, that the evidence of the prisoner's past character was inadmissible; and, second, if, contrary to that contention, it should be held that it was in law admissible, the learned recorder either failed to exercise his discretion at all in allowing it to be admitted or exercised his discretion wrongly having regard to the whole of the facts of the case.

F So far as the point of law is concerned, this court is unanimously of opinion that it is bound by this court's previous decisions, namely, *R.* v. *Cook* (2), in which case five judges sat to consider the matter, and a later case which followed that decision in the year 1960, *R.* v. *Brown* (3). In *R.* v. *Cook* (2), after considering the conflicting authorities, *R.* v. *Hudson* (4) and *R.* v. *Jenkins* (5) on the one hand and *R.* v. *Turner* (6) and *Stirland* v. *Public Prosecutions Director* (7) on the other, G DEVLIN, J., delivering the judgment of the Court of Criminal Appeal of five judges, said this (8):

> "In our opinion the difficulties created by s. 1, proviso (f) (ii) are, as a general rule, best dealt with in accordance with the principle in *R.* v. *Hudson* (4), as applied in *R.* v. *Jenkins* (5). The attempt to give the words a limited H construction had led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of s. 1, proviso (f) (ii) in favour of the defence. We think, therefore, that the words should be given

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I (1) I.e., quoted in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (34th Edn.), para. 1319 and 7th Cumulative Supp. to para. 1319—*R.* v. *Cunningham*, [1958] 3 All E.R. 711; *R.* v. *Cook*, [1959] 2 All E.R. 97; *Stirland* v. *Public Prosecutions Director*, [1944] 2 All E.R. 13; *R.* v. *Jenkins*, (1945), 31 Cr. App. Rep. 1.

(2) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340. (3) (1960), 44 Cr. App. Rep. 181.

(4) [1912] 2 K.B. 464; 7 Cr. App. Rep. 256.

(5) (1945), 114 L.J.K.B. 425; 31 Cr. App. Rep. 1.

(6) [1944] 1 All E.R. 599; [1944] K.B. 463.

(7) [1944] 2 All E.R. 13; [1944] A.C. 315.

(8) [1959] 2 All E.R. at p. 101; [1959] 2 Q.B. at pp. 347, 348.

their natural and ordinary meaning and that the trial judge should in his discretion do what is necessary in the circumstances to protect the prisoner from an application of s. 1, proviso (f) (ii) that would be too severe . . . It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision . . ."

That decision, followed by the decision in *R.* v. *Brown* (9) is binding on this court and any re-consideration of the question of law must be left to the House of Lords.

In the result, therefore, this court holds that the learned recorder was perfectly right in ruling that evidence of previous convictions and of the previous bad character of the appellant was legally admissible. Having come to that conclusion, he had to decide which way he should exercise his discretion, whether in the circumstances of the case he should allow the questions to be put or not. It is true that various authorities were cited to the learned recorder (10) in the absence of the jury, and that in these it was mentioned that the judge had a discretion; and indeed it has for years been the law, as the recorder well knew, that if such evidence was legally admissible he had a discretion to exclude it if he thought fit. The question was not whether he knew that he had a discretion but whether before allowing the evidence to be admitted he brought his mind to bear on the question whether, although legally admissible, it was desirable having regard to the paramount consideration of having a fair trial that it should be admitted. One could hardly imagine more prejudicial evidence than the three convictions of the accused. Several cases were cited in which the existence of the discretion was made clear, and counsel for the appellant, replying to counsel for the Crown's submission, said:

"If those matters are an integral part of the defence, as so often in a case of rape they are, in my submission the court ought to exercise its discretion on the basis of not permitting questions to be put as to the character of the defendant."

Then there came the learned recorder's decision on the legal submissions, and he said this:

"I have considered this matter; and I may say I started to consider it long before the question was raised, because I realised there was an imputation being made against the prosecutor here that he had been guilty of a criminal offence. Giving it the best consideration I can, I think the defence submission is quite wrong . . ."

The defence had made two submissions, one, as I have said, that the evidence was not legally admissible, and secondly that if legally admissible the recorder should exercise his discretion in favour of the accused. To say that the submission was quite wrong was wholly inapplicable to the exercise of discretion. A little later on he said:

"I think as soon as he puts the accused into the witness-box to tell that story on oath [that is, the story outlined in the statement] that entitles the prosecution to say: 'Right—you say the prosecutor is a man of bad habits, therefore the jury should be told the character you are'. In those circumstances, in my view anyhow, this evidence is admissible, and the previous convictions can be put to the accused."

"Entitles" is not normally the word to use for the exercise of a discretion; and I emphasise the words "In those circumstances", not, be it observed, "this evidence is admissible and in the exercise of my discretion, having applied my mind to the circumstances of this particular case, I propose to allow the convictions to be put". This court agrees that the evidence is admissible, but

(9) (1960), 44 Cr. App. Rep. 181.

(10) See footnote (1), ante p. 61.

A the words are—" this evidence is admissible . . . and the previous convictions can be put to the accused ". In the summing-up the learned recorder said this:

> " In this case [counsel for the appellant] has told you it is somewhat unusual that you should know so much about the accused person as you do. The only reason you were entitled to know that is because, when you were out of the court, I held the view, rightly or wrongly,—and if I am wrong in exercising my discretion it will be put right in a much higher hierarchy of the law—and I have ruled there was such an attack on the character of the prosecutor here in the suggestions made in the accused's statement that you were entitled to judge the prosecutor's character and measure it up against the character of the person who is accusing him, that is the prisoner; so you had the opportunity of hearing the sort of young man he is. Do not let those things influence you into finding him guilty."

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This court has considerable doubt whether the learned recorder did address his mind to the question of discretion at the only material time, that is to say, at the close of the submission of the evidence to the jury before the questions were put to the appellant. Assuming, however, that he did exercise his discretion at that time, this court is of opinion that he exercised his discretion wrongly in principle. This court is mindful of the remarks which I have already read of DEVLIN, J., in delivering the judgment of five judges of the Court of Criminal Appeal in *R.* v. *Cook* (11) and, indeed, it is a truism to say that any appellate court is slow to interfere with the exercise of a discretion by a judge unless they feel satisfied either that he exercised it on broad principles or has failed to give weight to matters which he should have had in mind when exercising the discretion. I have already emphasised that s. 1, proviso (f) (ii) of the Act of 1898 refers to both the nature and conduct of the defence. The exercise of a discretion must depend entirely on the facts of the particular case in which it falls to be exercised, but where, as in the present case, the very nature of the defence necessarily involves an imputation against a prosecution witness or witnesses, the discretion should, in the opinion of this court, be as a general rule exercised in favour of the accused, that is to say, the evidence as to his character or criminal record should be excluded. If it were otherwise, it comes to this, that the Act of 1898, the very Act which gave the charter, so to speak, to an accused person to give evidence on oath in the witness-box, would be a mere trap because he would be unable to put forward any defence, no matter how true, which involved an imputation on the character of the prosecutor or any of his witnesses, without running the risk if he had the misfortune of having a record, of his previous convictions being brought up in court while being tried on a wholly different matter. This court is of opinion that the discretion should have been exercised in favour of refusing the cross-examination as to previous convictions.

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Finally, counsel for the Crown has suggested that this is a case in which the court should apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. That would involve this court saying that without any reference to previous convictions a jury properly directed would without doubt have come to the conclusion that this appellant was guilty. The court is unable to take that view. In the circumstances, the appeal will be allowed and the conviction will be quashed and the accused discharged.

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Appeal allowed. Conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *N. K. Cooper*, Maidstone (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(11) [1959] 2 All E.R. at p. 101; [1959] 2 Q.B. at p. 347.

A

PRACTICE DIRECTION.

CHANCERY DIVISION.

Solicitor—Withdrawal—Application for order where no notice of change given —Appeal to Court of Appeal pending—Practice—R.S.C., Ord. 7, r. 4 (1). B

Where a solicitor who has ceased to act for a party in a pending appeal wishes to apply under R.S.C., Ord. 7, r. 4 (1), for an order to that effect, the application should be made by motion, supported by affidavit. The papers should be lodged with the "proper officer" as defined in R.S.C., Ord. 58, r. 5 (5). The "proper officer" will be, in relation to appeals of the nature specified in para. (a) to para. (e) inclusive of that rule*, the officers respectively indicated in those paragraphs. In reference to all other appeals, including county court appeals, the "proper officer" will be the officer indicated in para. (f) of that rule, viz., the Chief Chancery Registrar. The proper officer, on being satisfied that the application should be granted, will pass the papers to the President of the court concerned to be initialled, whereupon the order may be drawn up without being bespoken by the solicitor. C D

This Practice Direction relates only to pending appeals to the Court of Appeal, and not to any proceedings subsequent to the hearing of an appeal by the Court of Appeal.

Specimens of the forms appropriate for use under this Practice Direction are available for reference in the room of the Appeal and Cause Clerks, Room 136, at the Royal Courts of Justice, Strand, London, W.C.2. E

By the direction of the Master of the Rolls.

J. B. H. WYMAN,
Chief Registrar,
Chancery Division.

July 5, 1961.

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* By R.S.C., Ord. 58, r. 5 (5) (a)-(e), the proper officer is, in relation to appeals in cases specified between parentheses: the Admiralty Registrar (Admiralty cases), the Chief Bankruptcy Registrar (bankruptcy cases), the Senior Registrar of the Principal Probate Registry (probate cases and matrimonial causes proceeding in London), the Registrar of a District Registry (matrimonial causes proceeding in the District Registry), the Queen's Remembrancer (revenue cases).

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BERRY v. BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Ormerod, Devlin and Danckwerts, L.JJ.), February 22, 23, 24, June 23, 1961.]

Malicious Prosecution—Damage necessary to support action—Costs of defence and appeal—Actual costs less lump sum costs awarded by quarter sessions —Whether sufficient to support an action.

B

The plaintiff was convicted by a magistrates' court on a charge brought by the defendants of contravening s. 22 of the Regulation of Railways Act, 1868, by pulling the communication cord on a train without reasonable and sufficient cause; but her appeal to quarter sessions against conviction was allowed and she was awarded fifteen guineas costs under s. 5 (1) of the Summary Jurisdiction (Appeals) Act, 1933*. She brought an action against the defendants for damages for malicious prosecution, alleging as special damage the difference between the aggregate of the actual costs of her defence at the magistrates' court and of her appeal and the fifteen guineas costs awarded to her, the amount of the difference being £64 2s. On a preliminary point of law, that the statement of claim disclosed no damage which the plaintiff was entitled to claim in law, and thus disclosed no cause of action,

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Held: the costs awarded by the recorder in the case should not be regarded as compensating the plaintiff; accordingly the special damage alleged was sufficient in law for the purposes of a cause of action for malicious prosecution, and the statement of claim disclosed such a cause of action (p. 69, letter B, p. 78, letter H, and p. 82, letter E, post).

E

Quartz Hill Gold Mining Co. v. *Eyre* ((1883), 11 Q.B.D. 674) considered.

Per DEVLIN, L.J.: the rule of the law of damages that if costs were awarded in hostile civil litigation nothing beyond the taxed amount could be recovered by the successful party from the unsuccessful party rested on the presumption that the award of costs (as between party and party) gave compensation for the cost of the litigation so far as the law allowed, and the reason for the rule was that the law could not permit the question of the amount of costs to be litigated a second time between the same parties in new proceedings (see p. 71, letters A and H, post); it was however a fiction that costs taxed between party and party were the same as costs reasonably incurred and the law should recognise that an assessment of damage and a taxation of party and party costs were two different things (see p. 72, letters F and C, post). The rule should not be extended to criminal cases, because the principles governing the award of costs in civil and criminal cases were not the same; for in criminal cases a successful defendant had no prima facie entitlement to an award of costs, as the prosecution was brought in the public interest (see p. 75, letters G and D, post), and an award of costs need not be directed to quantifying the damage and indemnifying the accused according to a conventional measure (see p. 76, letter F, p. 77, letter B, post).

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Barnett v. *Eccles Corpn.* ([1900] 2 Q.B. 104) and dictum of PHILLIMORE, L.J., in *Wiffen* v. *Bailey and Romford Urban Council* ([1915] 1 K.B. at p. 610) considered and explained.

I

Decision of DIPLOCK, J. ([1960] 3 All E.R. 322) reversed on one point.

[As to what damage must be proved to support an action for malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 360, para. 702; and for cases on the subject, see 33 DIGEST 506-508, *498-531*.

For the Regulation of Railways Act, 1868, s. 22, see 19 HALSBURY'S STATUTES (2nd Edn.) 793.]

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* The terms of s. 5 (1) are printed at p. 68, letter G, post.

Cases referred to: A

Agius v. *Great Western Colliery Co.*, [1899] 1 Q.B. 413; 68 L.J.Q.B. 312; 80 L.T. 140; 17 Digest (Repl.) 137, *412*.

Barnett v. *Eccles Corpn.*, [1900] 2 Q.B. 104; *affd.* C.A., [1900] 2 Q.B. 423; 69 L.J.Q.B. 834; 83 L.T. 66; 64 J.P. 692; 33 Digest 14, *44*.

Bater and Birkenhead Corpn., Re, [1893] 2 Q.B. 77; 62 L.J.M.C. 107; 69 L.T. 220; sub nom. *Bater* v. *Birkenhead Corpn.*, 58 J.P. 7; 25 Digest 109, *331*. B

Baxendale v. *Bennett*, (1878), 3 Q.B.D. 525; 47 L.J.Q.B. 624; 40 L.T. 23; 43 J.P. 204; 36 Digest (Repl.) 36, *175*.

Becker v. *Purchase*, [1950] 2 All E.R. 837; 114 J.P. 550; 2nd Digest Supp.

Campbell (Donald) & Co., Ltd. v. *Pollak*, [1927] All E.R. Rep. 1; [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; Digest (Practice) 788, *3503*. C

Cockburn v. *Edwards*, (1881), 18 Ch.D. 449; 51 L.J.Ch. 46; 45 L.T. 500; Digest (Practice) 899, *4399*.

Cotterell v. *Jones*, (1851), 11 C.B. 713; 21 L.J.C.P. 2; 138 E.R. 655; 33 Digest 507, *505*.

Doe v. *Filliter*, (1844), 13 M. & W. 47; 13 L.J.Ex. 275; 3 L.T.O.S. 184; 153 E.R. 20; 17 Digest (Repl.) 143, *452*. D

Gould v. *Barratt*, (1838), 2 Mood. & R. 171; 174 E.R. 252; 33 Digest 516, *602*.

Grace v. *Morgan*, (1836), 2 Bing. N.C. 534; 5 L.J.C.P. 180; 132 E.R. 208; 33 Digest 515, *601*.

Hathaway v. *Barrow*, (1807), 1 Camp. 151; 170 E.R. 909; 33 Digest 515, *597*.

Loton v. *Devereux*, (1832), 3 B. & Ad. 343; 1 L.J.K.B. 103; 110 E.R. 129; 17 Digest (Repl.) 144, *457*. E

Pritchett v. *Boevey*, (1833), 1 Cr. & M. 775; 149 E.R. 612; 3 Tyr. 949; 2 L.J.Ex. 251; 17 Digest (Repl.) 144, *460*.

Quartz Hill Gold Mining Co. v. *Eyre*, (1883), 11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.T. 249; 33 Digest 468, *21*.

R. v. *Whitchurch*, (1881), 7 Q.B.D. 534; 36 Digest (Repl.) 340, *818*.

Rayson v. *South London Tramway Co.*, [1893] 2 Q.B. 304; 62 L.J.Q.B. 593; 69 L.T. 491; 58 J.P. 20; 33 Digest 470, *36*. F

Ritter v. *Godfrey*, [1918-19] All E.R. Rep. 714; [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; Digest (Practice) 891, *4326*.

Sandback v. *Thomas*, (1816), 1 Stark. 306; 171 E.R. 481; 33 Digest 516, *604*.

Savile v. *Roberts*, (1698), 1 Ld. Raym. 374 (91 E.R. 1147); Carth. 416; 1 Salk. 13 (91 E.R. 14); 3 Salk. 16; 5 Mod. Rep. 394; 12 Mod. Rep. 208; Holt, K.B. 150, 193; sub nom. *Roberts* v. *Savill*, 5 Mod. Rep. 405; Holt, K.B. 8; 33 Digest 507, *510*. G

Smith v. *Buller*, (1875), L.R. 19 Eq. 473; 45 L.J.Ch. 69; 31 L.T. 873; Digest (Practice) 948, *4882*.

Solway Prince, The, (1914), 31 T.L.R. 56; 17 Digest (Repl.) 145, *468*.

Walshaw v. *Brighouse Corpn.*, [1899] 2 Q.B. 286; 68 L.J.Q.B. 828; 81 L.T. 2; 25 Digest 113, *367*. H

Wiffen v. *Bailey and Romford Urban Council*, [1914] 2 K.B. 5; *affd.* C.A., [1915] 1 K.B. 600; 84 L.J.K.B. 688; 112 L.T. 274; 79 J.P. 145; 33 Digest 470, *37*.

Wren v. *Weild*, (1869), L.R. 4 Q.B. 730; 38 L.J.Q.B. 327; 20 L.T. 1007; 34 J.P. 21; 32 Digest 208, *2585*. I

Appeal.

The plaintiff brought an action for damages for malicious prosecution against the defendants in respect of proceedings brought against her in a magistrates' court for unlawfully pulling the communication cord of a train, contrary to s. 22 of the Regulation of Railways Act, 1868. On July 29, 1960, her action was dismissed by DIPLOCK, J., on the hearing of a preliminary issue ([1960] 3 All E.R. 322), on the ground that her claim disclosed no cause of action in

A that there was no such damage as would support an action for malicious prosecution. The plaintiff appealed to the Court of Appeal.

The plaintiff appeared in person.

Neil Lawson, Q.C., and *P. M. O'Connor, Q.C.*, for the defendants.

R. F. G. Ormrod, Q.C., and *T. K. Homer* appeared as amici curiae.

B *Cur. adv. vult.*

June 23. The following judgments were read.

ORMEROD, L.J.: This appeal is against a decision of DIPLOCK, J., given on July 29, 1960, and arises in these circumstances. The plaintiff, Miss Pamela Berry, on Jan. 4, 1959, was travelling on a train between Brighton and Lancing. In the course of her journey she had occasion to pull the communication cord C for reasons which seemed to her reasonable and sufficient, and in consequence the train was stopped. The defendants, in pursuance of s. 22 of the Regulation of Railways Act, 1868, issued a summons against the plaintiff in the Brighton Magistrates' Court and on Feb. 13, 1959, the plaintiff appeared at that court and pleaded not guilty, but was fined and ordered to pay the sum of 20s. and 27s. for costs. On July 6, 1959, the plaintiff appealed against that conviction to the D recorder of the county borough of Brighton and the appeal was allowed and the prosecution wholly determined in favour of the plaintiff, and she received costs, amounting to the sum of fifteen guineas, awarded to her against the defendants by the learned recorder. The plaintiff in consequence on Oct. 26, 1959, issued a writ against the defendants claiming damages for malicious prosecution, and the statement of claim setting out the facts as I have recited them was delivered E on Nov. 7, 1959, and amended and redelivered on Mar. 3, 1960. It is to be noted that the only particulars of special damage given in the statement of claim were the special damages relating to costs and they were calculated on the basis of the amount actually expended by the plaintiff in her defence both at the magistrates' court and before the learned recorder at quarter sessions, credit being given for the amount of costs awarded to her at quarter sessions. F By para. 4, however, of the statement of claim the plaintiff alleges that by reason of the premises she had been injured in reputation and has been held up to ridicule and has suffered pain in mind and has been put to expense in defending herself against the said charge and has suffered loss and damage., The defence was delivered on Dec. 2, 1959, and the only paragraph which is relevant in this appeal is para. 5, included by amendment, which is as follows:

G "The defendants will contend that the statement of claim discloses no damage of which the plaintiff is entitled to complain in law and in the premises the statement of claim discloses no cause of action."

The matter came before Master HARWOOD in chambers on Mar. 3, 1960, when he made an order as to particulars and in para. 7 of the order provided as H follows:

"that the point of law raised by the defendants in para. 5 of their amended defence be set down for hearing as a preliminary issue between the plaintiff and defendants and set down in the special paper list within seven days and disposed of before the trial of issues of fact in this action."

I In consequence of that order the matter came before DIPLOCK, J., on July 29, 1960. The question then to be determined was whether the statement of claim was demurrable or whether it disclosed any cause of action, and two questions fell to be considered. The first question was whether in the circumstances the plaintiff had suffered damage in the injury to her reputation and fair fame, and, secondly, whether she had been put to expense with regard to costs having regard to the fact that the learned recorder had awarded to her the sum of fifteen guineas costs. The learned judge came to the conclusion that the plaintiff's claim disclosed no cause of damage under either head. It is against this

decision that this appeal has come to us, and I should say at this stage that it was the intention of the plaintiff, as, no doubt for proper reasons, she was unable to obtain legal assistance, to appear in person to argue this appeal. As the appeal involved complicated questions of law, Mr. Roger Ormrod and Mr. Homer kindly consented to appear in the case as amici curiae and to argue it on the plaintiff's behalf. I think I am reflecting the views of the other members of the court as well as myself when I say how much we are indebted to them for the very great assistance which they have given to the court during the appeal. It would have been extremely difficult for this court to decide these complicated questions had the case not been properly argued as it has been.

I have had the advantage of reading the judgments about to be delivered by my brethren. I agree with the views which they have expressed as to the damage sustained by the plaintiff in incurring costs in her defence both before the magistrates and before the learned recorder. This question has been discussed exhaustively by DEVLIN, L.J., in his judgment, and it is perhaps unnecessary for me to say anything further. As we are differing from the learned judge, however, on this part of the case, I would like to express shortly my reasons for so doing.

DIPLOCK, J., in his judgment discussed at some length the position in the event of an award of costs in a civil action, and he cited the well-known passage from the judgment of BOWEN, L.J., in *Quartz Hill Gold Mining Co.* v. *Eyre* (1). There can, I think, be no doubt that costs incurred in excess of the sum allowed on taxation cannot be recovered as damages. As BOWEN, L.J. (1), said in the passage cited by DIPLOCK, J.:

> "If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action . . ."

Considerable doubt has been expressed from time to time as to the reality of that view, but it is well established and in any event it is not for this court to disturb it. The learned judge said (2):

> "I do not think that any distinction is to be drawn in law between civil and criminal cases which are tried summarily."

He then goes on to deal with the various provisions whereby in certain cases courts exercising criminal jurisdiction are enabled to award costs. It is with this part of the learned judge's view that I find myself unable to agree. Costs in this case of the sum of fifteen guineas were awarded to the plaintiff by the learned recorder by reason of s. 5 (1) of the Summary Jurisdiction (Appeals) Act, 1933, which is as follows:

> "On any appeal to which this Act applies a court of quarter sessions may, in the exercise of their power to award costs—(i) where they allow the appeal, direct that there shall be included in any costs to be paid by the respondent to the appellant the costs properly incurred by the appellant in the proceedings before the court of summary jurisdiction, or such fixed sum as the court of quarter sessions may consider reasonable in respect of the costs so incurred by him; (ii) in any case, in lieu of directing a taxation of costs, fix the sum to be paid by way of costs by either party to the appeal; and in fixing, for the purposes of this subsection, the amount of any costs to be paid by a party to an appeal shall have regard to his means."

It would seem that the real distinction between the two types of cases is that in a civil action it has been well established that, although the judge has a discretion as to costs, it is a discretion that must be exercised judicially, and in consequence a successful litigant can only be refused an order for costs if there is a good reason for it. This is not the case when costs are awarded in a criminal prosecution. It is provided, for instance, by the section which I have

(1) (1883), 11 Q.B.D. at p. 690. (2) [1960] 3 All E.R. at p. 330.

A set out that "such fixed sum as the court of quarter sessions may consider reasonable in respect of the costs so incurred" may be awarded. It may well be that the costs awarded may have no relation to those incurred, and indeed it is provided that in fixing the amount of any costs to be paid by a party to an appeal under sub-s. (1) (ii) of the above section regard shall be had to his means. The effect of this appears to be that an award of costs in a case of this kind is B not intended by the legislature necessarily to compensate a successful appellant. It is certainly not the practice of the courts that this should be so. It follows, I think, that in the circumstances costs of the nature awarded in this case cannot be treated as similar to costs awarded in a civil action, and if this be so then it cannot be said that the plaintiff has not pleaded that she has suffered special damage so as to bring her within the requirements in an action of this C nature laid down by HOLT, C.J., in *Savile* v. *Roberts* (3) and in numerous other reports.

It follows, therefore, that in my judgment the statement of claim is not demurrable and I would allow the appeal on this ground. This opinion is, I believe, shared by my brethren. It is not necessary, therefore, to discuss the other question, namely, whether there has been any damage to the fair fame of D the plaintiff, and I refrain from doing so beyond stating the opinion that as at present advised I would be inclined to uphold the view expressed by the learned judge. But the question involves the reconciliation of conflicting authorities, and in the circumstances it appears unnecessary to come to a decision on it.

DEVLIN, L.J.: In this appeal we have to consider two difficult points of E law which DIPLOCK, J., decided against the plaintiff in demurrer proceedings. The plaintiff, who has appeared before us in person, has naturally been unable to give us any assistance in the argument. I should like, therefore, to express my indebtedness to Mr. Ormrod and Mr. Homer who have performed a public service by attending before us as amici curiae at our invitation in order to present the argument which, as counsel for the plaintiff before DIPLOCK, J., they F presented to him. I am grateful to them not only because they have saved us labour but also because the points of law that arise are of general importance and it would have been most unsatisfactory if we had had to give a decision on them without hearing full argument from both sides. At the end of the argument I find myself in agreement with DIPLOCK, J., on one point and not on the other.

G The claim is for malicious prosecution and therefore cannot be sustained without proof of damage under one of the three heads enumerated by HOLT, C.J., in *Savile* v. *Roberts* (3). The plaintiff was prosecuted by the defendants, the British Transport Commission, for a breach of the Regulation of Railways Act, 1868, s. 22, and was convicted and fined at petty sessions. She appealed to quarter sessions, where the conviction was quashed by the recorder of Brighton. H In her statement of claim she alleges as special damage that she was put to expense in defending herself against the charge. The particulars of special damage as amended are as follows: Costs of defence at magistrates' court £10 10s. Costs of appeal £69 7s., totalling £79 17s., for which credit is given: "Less costs paid pursuant to the order of the learned recorder £15 15s.", and that leaves a balance of £64 2s. The defendants allege that this sum of £64 2s. I is not recoverable because it is too remote in law.

This allegation is based on an old rule which is stated in MAYNE ON DAMAGES (11th Edn.), at p. 119, in the following terms:

> "It was regarded as a general principle that the right to costs must always be considered as finally settled in the court where the question to which that right was accessory was determined; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the court

(3) (1698), 1 Ld. Raym. 374.

could be recovered; or if costs were expressly withheld in the particular case, none would be recoverable by suit in any other court." A

This principle is part of the general law of damage and is not specifically related to actions for malicious prosecution. It has, however, frequently been applied in this form of action, and counsel for the defendants has particularly relied on *Quartz Hill Gold Mining Co.* v. *Eyre* (4). That was a case in which the defendant presented a petition to wind-up the plaintiff company. It was never served on the company and the defendant gave notice that he was withdrawing it, but the company nevertheless appeared to ask for its dismissal. It was dismissed by a vice-chancellor without costs (5); I have no doubt that DANCKWERTS, L.J., was right when he said in the course of the argument, after looking at the report of the case in the Weekly Notes, that the reason why the plaintiff company was given no costs was because their appearance was considered to be unnecessary. The company brought an action for malicious prosecution and the damage they alleged was the expenditure of costs incurred in opposing the petition which they estimated at £30. The Court of Appeal held that the damage was not recoverable. BRETT, M.R., said (6): B C

"The theory is that the costs which the losing party is bound to pay, are all that were necessarily incurred by the successful party in the litigation, and that it is right to compel him to pay those costs because they have been caused by his unjust litigation; but that those which are called 'extra costs', not being necessarily incurred by the successful party in order to maintain his case, are not incurred by reason of the unjust litigation." D

BOWEN, L.J., said (7): E

"The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action." F

The rule is not easy to apply with justice because it embodies a presumption, which the law finds it convenient and maybe necessary to make; but which it has to, and does in other contexts, admit not to be in accordance with fact. Rule 28 (2) of the Supreme Court Costs Rules, 1959, provides that the ordinary basis on which costs shall be taxed is the party and party basis; and that on a taxation on that basis there shall be allowed all such costs G

"as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed." H

Other bases are provided for special cases. Rule 29 (1) provides that where costs are payable to a solicitor by his own client all costs shall be allowed "except in so far as they are of an unreasonable amount or have been unreasonably incurred". Another similar and perhaps wider basis is under r. 31, where costs are payable to a trustee out of the trust fund. The difference between these standards and that laid down for a party and party taxation puts one in mind roughly of the difference between expenditure under Sch. E and expenditure under Sch. D in income tax law—the difference between what is necessary and what is reasonable. Reasonableness is, of course, the ordinary test that is applied in a damages claim and which would be applied here if the items of expenditure claimed were not incurred in litigation. I

(4) (1883), 11 Q.B.D. 674.
(5) See [1882] W.N. p. 27.
(6) (1883), 11 Q.B.D. at p. 682.
(7) (1883), 11 Q.B.D. at p. 690.

A The reason for the rule is not that the costs incurred in excess of the party and party allowance are deemed to be unreasonable; it is that what is presumed to be the same question cannot be gone into twice. The rule appears to have been first laid down by SIR JAMES MANSFIELD, C.J., in *Hathaway* v. *Barrow* (8) where he put it on the ground that

B "... it would be incongruous to allow a person one sum as costs in one court, and a different sum for the same costs in another court."

If in the earlier case there has been no adjudication on costs (as distinct from an adjudication that there shall be no order as to costs), a party may recover all his costs assessed on the reasonable, and not on the necessary, basis. If a party has failed to apply for costs which he would have got if he had asked for them, a C subsequent claim for damages may be defeated; but that would be because in such a case his loss would be held to be due to his own fault or omission. In any case in which the legal process does not permit an adjudication, the rule does not apply. This appears from a number of cases such as *Pritchett* v. *Boevey* (9), *Doe* v. *Filliter* (10) and *Walshaw* v. *Brighouse Corpn.* (11). In the second of these cases ROLFE, B., said (12):

D "Where, indeed, there has been no taxation, then, ex necessitate, the jury must say what is to be an indemnity."

In this connexion it is worth citing *Re Bater and Birkenhead Corpn.* (13), because two of the judges who decided it in the Court of Appeal were LORD ESHER, M.R., and BOWEN, L.J. In this case the aggrieved party was left without costs, not because the court had refused to award them as in *Quartz Hill Gold Mining Co.* E v. *Eyre* (14), but because the court had no power to award them; and he claimed reimbursement of all the costs reasonably incurred by him in attending before the magistrate. It was put against him that, although the magistrate had no power to deal with costs, that did not give another tribunal power over the costs of the magisterial inquiry. But the claim succeeded, LORD ESHER saying (15):

F "An endeavour is made to avoid this conclusion by giving these expenses a legal name and calling them costs; but they are not the less expenses which the man has had to pay ..."

It follows that if, as the result of a breach of contract (see *Agius* v. *Great Western Colliery Co.* (16)) or a tort (see *The Solway Prince* (17)), a person brings unsuccessfully an action against a third party or loses an action brought by a third G party, he may recover against the wrongdoer who has broken his contract or committed the tort the costs of the suit; and he will get all the costs which he has reasonably expended. The wrongdoer may not argue that the plaintiff is entitled only to party and party costs, notwithstanding that that is all he could or would have got from the third party if he had been successful.

Thus the reason for the rule is that the law cannot permit a double adjudication H on the same point. It would be a rational rule and in accordance with the ordinary principle as to res judicata if in truth it were the same point. But it is not. It may be that, when the rule was first laid down by SIR JAMES MANSFIELD, C.J., in 1807 (18), the two standards of assessment were not so far apart as they are now. By 1844 the distinction had begun to appear in practice if not in theory. In *Doe* v. *Filliter* (19) POLLOCK, C.B., said:

I "The taxed costs are a fair indemnity; and if they are not so, the rules which govern taxation ought to be altered."

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(8) (1807), 1 Camp. at p. 152.
(9) (1833), 1 Cr. & M. 775.
(10) (1844), 13 M. & W. 47.
(11) [1899] 2 Q.B. 286.
(12) (1844), 13 M. & W. at p. 52.
(13) [1893] 2 Q.B. 77.
(14) (1883), 11 Q.B.D. 674.
(15) [1893] 2 Q.B. at p. 79.
(16) [1899] 1 Q.B. 413.
(17) (1914), 31 T.L.R. 56.
(18) In *Hathaway* v. *Barrow*, (1807), 1 Camp. at p. 152.
(19) (1844), 13 M. & W. at p. 51.

ALDERSON, B., said (20):

> "The taxed costs are intended to be a full indemnity to the plaintiff for his expenses in getting back the land. That is the principle; whether it be fully carried out in practice is another matter . . . If the taxed costs are not a full indemnity, they ought to be made so."

But this advice has not been taken and the rules which govern taxation have not been altered. In 1869 BLACKBURN, J., in *Wren* v. *Weild* (21), said that it was "artificial" to say that the party aggrieved had an adequate remedy in his judgment for costs. In *Barnett* v. *Eccles Corpn.* (22), BIGHAM, J., said:

> "The law does not recognise the difference between the sum which it gives as costs, that is, costs taxed as between party and party, and the larger sum which in practice a litigant has to pay . . ."

I find it difficult to see why the law should not now recognise one standard of costs as between litigants and another when those costs form a legitimate item of damage in a separate cause of action flowing from a different and additional wrong. Limitation of liability is a principle that is now well recognised. In the case of damage done by a ship it has been in force for the last two centuries in this country, and for longer in others, and the basis of it is simply that it is not in the public interest that shipowners should be deterred from seafaring by the prospect that they might be crippled by awards of heavy damages. The stringent standards that prevail in a taxation of party and party costs can be justified on the same sort of ground; see, e.g., *Smith* v. *Buller* (23) per MALINS, V.-C. It helps to keep down extravagance in litigation and that is a benefit to all those who have to resort to the law. But the last person who ought to be able to share in that benefit is the man who ex hypothesi is abusing the legal process for his own malicious ends. In cases of malicious process SIR JAMES MANSFIELD'S rule (24) has not always been applied. LORD ELLENBOROUGH refused to apply it in 1816 (*Sandback* v. *Thomas* (25)) and LORD ABINGER in 1838 (*Gould* v. *Barratt* (26)). But the other view has prevailed, though TINDAL, C.J., indicated in *Grace* v. *Morgan* (27) that his opinion might have been different if the matter had been res integra.

If the matter were res integra, I should for myself prefer to see the abandonment of the fiction that taxed costs are the same as costs reasonably incurred and its replacement by a statement of principle that the law for reasons which it considers to be in the public interest requires a litigant to exercise a greater austerity than it exacts in the ordinary way, and which it will not relax unless the litigant can show some additional ground for reimbursement over and above the bare fact that he has been successful. Without a restatement of that sort, there is undoubtedly a practical need for the rule in civil cases. Otherwise, every successful plaintiff might bring a second action against the same defendant in order to recover from him as damages resulting from his original wrongdoing the costs that he had failed to obtain on taxation; this was unsuccessfully attempted by the plaintiff in *Cockburn* v. *Edwards* (28). Or as LORD TENTERDEN, C.J., said in *Loton* v. *Devereux* (29):

> ". . . actions would frequently be brought for costs after the court had refused to allow them."

The rule is thus essential to the administration of justice in civil suits and will continue to be so until the time comes, if it ever does, when the law either allows to a successful litigant all the costs he has reasonably incurred or recognises openly that an assessment of damage and a taxation of costs as between party and party are two different things.

(20) (1844), 13 M. & W. at pp. 51, 52.
(21) (1869), L.R. 4 Q.B. at p. 736.
(22) [1900] 2 Q.B. at p. 109.
(23) (1875), L.R. 19 Eq. at p. 475.
(24) In *Hathaway* v. *Barrow*, (1807), 1 Camp. at p. 152.
(25) (1816), 1 Stark. 306.
(26) (1838), 2 Mood. & R. 171.
(27) (1836), 2 Bing. N.C. at p. 537.
(28) (1881), 18 Ch.D. 449.
(29) (1832), 3 B. & Ad. at p. 345.

A I have inquired into the reason for the rule, not because I think it open to us to reject it, but because we are asked to extend it. The question is whether it should be extended to costs in criminal cases as well as costs in civil cases. It is therefore necessary for us to consider the principle behind the rule in order to see whether it is equally applicable to criminal costs; and we are entitled also to have regard to its utility and value and to ask ourselves whether, if extended to B criminal cases, it could be applied with no greater injustice and no higher degree of unreality than in civil cases.

In inviting us to extend it counsel for the defendants has submitted that the principles which govern the award of civil and criminal costs are fundamentally the same. All awards of costs, whether civil or criminal, are made under statutory powers. In civil cases the general power is now contained in the Supreme C Court of Judicature (Consolidation) Act, 1925, s. 50 (1), which provides that, subject to rules of court,

> "the costs . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

D In criminal cases there are separate groups of statutes applicable to summary offences and indictable offences respectively.

The Summary Jurisdiction Act, 1848, s. 18, gave the justices a discretion to award as between prosecutor and defendant ". . . such costs as to such justice or justices shall seem just and reasonable . . ." and required them to specify the sum awarded, if any, in the order for conviction or acquittal. A similar power E was given to quarter sessions on appeal from the justices in the Quarter Sessions Act, 1849, s. 5, and is now contained in the Summary Jurisdiction Act, 1879, s. 31, as amended by the Summary Jurisdiction (Appeals) Act, 1933. This was the provision under which the recorder of Brighton made his award in this case. Section 5 (1) of the Act of 1933 is as follows:

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> "On any appeal to which this Act applies a court of quarter sessions may, in the exercise of their power to award costs—(i) where they allow the appeal, direct that there shall be included in any costs to be paid by the respondent to the appellant the costs properly incurred by the appellant in the proceedings before the court of summary jurisdiction, or such fixed sum as the court of quarter sessions may consider reasonable in respect of the costs so incurred by him; (ii) in any case, in lieu of directing a taxation of costs, fix the sum G to be paid by way of costs by either party to the appeal; and in fixing, for the purposes of this subsection, the amount of any costs to be paid by a party to an appeal shall have regard to his means."

It will be observed that, whereas petty sessions are obliged to fix a sum, quarter sessions may either fix a sum or make an order for taxation.

H In indictable offences the power to award costs was not given until much later. The Costs in Criminal Cases Act, 1908, contained a very restricted power to allow costs to the defence, and this was amplified first in the Criminal Justice Act, 1948, and now in the Costs in Criminal Cases Act, 1952. It is still only in rare cases that costs can be awarded against a prosecutor, but there is a general power in s. 1 (1) of the Act of 1952 given to the court, if the accused is acquitted, I to order the payment out of local funds of the costs of the defence.

Thus in both classes of cases, civil and criminal, there is a general discretionary power to award costs. The words used differ in the case of each statute but the effect is the same. Counsel for the defendants, in reliance on this, argued that the basis for the rule that "extra costs" are not recoverable is that in the matter of costs the discretion of the court is interposed between the wrongdoer and the consequences of his act. In this respect, he submits, there is no good ground for distinguishing in the application of the rule between civil and criminal costs.

In my judgment this argument puts too much weight on the language of the

statutes which control the award of costs, both civil and criminal, and too little on the differences in the way in which those statutes are construed and administered. In practice the exercise of the discretion is much more restricted in civil cases than it is in criminal. In civil cases a successful party may not without good reason be deprived of any part of his costs. If he does not get his costs, it means either that it was not necessary for him to incur them or that there has been some fault or misconduct for which he is responsible. It is thus possible to say that in a civil case, as BOWEN, L.J., said in *Quartz Hill Gold Mining Co.* v. *Eyre* (30), a successful party gets all the compensation which in the eyes of the law he deserves. This cannot be said in a criminal case, for there the exercise of the discretion is entirely unfettered.

A few citations will serve to show the nature of the distinction. In civil cases the locus classicus is *Donald Campbell & Co., Ltd.* v. *Pollak* (31). The House of Lords approved the dictum of LORD STERNDALE, M.R., in *Ritter* v. *Godfrey* (32) where he said (33):

> ". . . there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised and, therefore, there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial."

VISCOUNT CAVE, L.C., in *Donald Campbell & Co., Ltd.* v. *Pollak* (31), said that he would prefer to say that (34)

> " a successful defendant . . . has . . . in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff."

But he (34) and their Lordships who agreed with him, and LORD ATKINSON expressly (35), approved the dictum of LORD STERNDALE (36); and it is this principle which has recently been embodied in the new Supreme Court Costs Rules, 1959. Rule 3 (2) provides:

> " If the court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the court shall, subject to these rules, order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

Rule 7 deals specifically with costs arising from misconduct or neglect.

In criminal cases it is so generally accepted that a successful defendant has no prima facie entitlement to or expectation of an award of costs in his favour that there is little or no authority on the point. There must be innumerable defendants who have succeeded without costs, but I have never heard of one who has claimed that he is prima facie entitled to them. In *Becker* v. *Purchase* (37) the Divisional Court emphasised that a defendant was not entitled, as of right, to costs whenever the justices allowed his appeal or dismissed an information against him; if they gave no reason, the court could not interfere with the exercise of their discretion. A statement as to how the discretion should be exercised under the Act of 1952 if the accused was acquitted has been made by LORD PARKER, C.J., in the Court of Criminal Appeal (38), which says substantially the same thing. In saying that the mere fact of an acquittal did not carry with it the " expectation " that the discretion would be exercised in favour of the acquitted person, LORD PARKER,

(30) (1883), 11 Q.B.D. at p. 690. (31) [1927] All E.R. Rep. 1; [1927] A.C. 732.
(32) [1918-19] All E.R. Rep. 714; [1920] 2 K.B. 42.
(33) [1918-19] All E.R. Rep. at p. 721; [1920] 2 K.B. at p. 52.
(34) [1927] All E.R. Rep. at p. 41; [1927] A.C. at p. 811.
(35) [1927] All E.R. Rep. at p. 42; [1927] A.C. at p. 814.
(36) In *Ritter* v. *Godfrey*, [1918-19] All E.R. Rep. at p. 721; [1920] 2 K.B. at p. 52.
(37) [1950] 2 All E.R. 837. (38) *Practice Direction*, [1959] 3 All E.R. 471.

A C.J., doubtless had in mind the use of the word "expectation" by VISCOUNT CAVE, L.C., in *Donald Campbell & Co., Ltd.* v. *Pollak* (39).

This difference is not simply a difference in practice. It is a difference in the substance of the law. The court has no power of its own motion to declare how the discretion conferred by a statute shall be exercised or to lay down rules about it. It derives its power from the statute itself according to the con-
B struction which it puts on it—"construction" being a word that embraces not only the interpretation of the words used but also the ascertainment of the true intent of the statute, considered in relation to the branch of the law with which it is dealing. What the court says is implicit in a statute is just as much a part of the law as the interpretation which the court puts on the text. It is the intent of every statute which confers a discretionary power that the power
C should be used justly. It does not follow that a principle on which it is just to make an award of civil costs will be equally just when applied to an award of criminal costs; and that is how the distinction arises. I do not propose to examine all the relevant differences that may be made for this purpose between a civil action and a criminal proceeding. But in relation to an award of costs against the party who initiates the proceedings there is one difference that is
D obvious. A plaintiff brings an action for his own ends and to benefit himself; it is therefore just that if he loses he should pay the costs. A prosecutor brings proceedings in the public interest, and so should be treated more tenderly.

It is for this reason that I cannot agree with the submission of counsel for the defendants that we ought not to have regard to case law. He says that the law is less developed in relation to criminal costs than it is to civil; that we may expect
E authority to amplify the criminal law and that in due course principles will be laid down, which I take it we are invited to anticipate will be the same as in civil cases. I think that we must have regard to the law as it is. There is already quite sufficient authority to show that judicial discretion in the award of criminal costs is not the same thing as it is in civil. There is also some little difference in the text of the statutes. One may note in the section applicable in this case,
F which I have already quoted, the requirement about "means" which introduces a very different notion from those usually governing civil awards. I do not lay too much stress on the express provision in this particular section, because I do not think that the exercise of the discretion in any criminal case would be faulted if it were shown that the court had had regard to the means of the parties. My conclusion is that we are not logically compelled to extend the rule
G that we are considering to costs in criminal cases, and in my judgment there is good reason why we should not do so.

The rule embodies, as I have said, a presumption; and presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable—in the sense that "Estoppels are odious, and the doctrine should never be applied without a necessity for it"; per BRAMWELL,
H L.J., in *Baxendale* v. *Bennett* (40)—because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because, if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own. It may be that, whatever its utility, the rule in its application in civil costs is now too well settled to be disturbed. Certainly it cannot be disturbed in this court. But I have
I given my reasons for thinking that this presumption is not sufficiently valuable to justify its extension, and I am unwilling to extend it when not compelled to do so by authority or in logic.

Moreover, its usefulness, such as it is, is confined to civil cases. Its effect is to set up an artificial or conventional measure of damage when the loss consists of expenditure on litigation. This conventional measure avoids the danger which

(39) [1927] All E.R. Rep. at p. 41; [1927] A.C. at p. 811.
(40) (1878), 3 Q.B.D. at p. 529.

TINDAL, C.J., remarked (41), that a party might otherwise in every sort of case bring a second set of proceedings against the same opponent for his extra costs. But that is not a danger that can arise in relation to criminal costs except in the one case of malicious prosecution. The conventional measure is also useful as one way, though not in my opinion the best way, of keeping down the costs of litigation. I have suggested already that the last person who ought to be allowed to claim the benefit of a rule designed for the comfort of litigants generally is the man who is abusing the legal process for his own malicious ends. Yet, if the presumption is extended to criminal costs, that is the only practical effect that it will have; for malicious prosecution or an action of the same sort is the only action in which a claim for damages that includes criminal costs can be made.

Furthermore, if the presumption is extended to criminal costs, there can be no assurance that the aggrieved party will obtain even such redress as is given by the conventional measure, for the accused has no expectation, let alone a right, to any order for costs at all. If I am right in thinking that a main reason why a prosecutor is in this respect treated more tenderly than a plaintiff is because the prosecutor is taken to be acting in the public interest, it would be a grave injustice for a man, who is maliciously bringing a prosecution in which he does not believe, to obtain by a rule of law the benefit of a principle which assumes his good faith. The rule would then operate not simply to limit his liability, but to relieve him of all liability for the loss caused by his malicious act. It is said that in such circumstances a successful defendant could ask for an award for his taxed costs and might expect to get them in full. That may be a satisfactory answer if the malice appears on the face of the prosecution, but not if it does not; a court cannot try an action for malicious prosecution on an application for costs.

These considerations to my mind destroy the force of the argument of counsel for the defendants that, alike in criminal and in civil cases, a judicial discretion is interposed between the wrongful act and the damage it causes. To be effective as an interposition, there must be a sort of res judicata, a decision in the first case in which costs are awarded on the very point that is in issue in the second case, i.e., the quantification of the damage. In a civil case the judicial discretion is directed to quantifying the damage according to the conventional measure. In a criminal case, it is not: and the decision contained in a criminal award need not represent a decision on quantification at all.

I wish that I could conclude my judgment at this point and say that for the reasons which I have given the rule ought not to be extended to costs in criminal cases. But included in the scanty authority which has to be considered on this point there is a decision of this court in which the rule has been applied to a case which is at least quasi-criminal in character. It may be that that case—*Barnett* v. *Eccles Corpn.* (42), with which I shall deal in detail later—prevents me from holding that the conventional measure is not applicable at all to criminal costs. If so, I should hold that it is applicable only in a case in which an order is made for taxed costs or their equivalent, i.e., for a full indemnity according to the conventional measure.

It must be remembered that what we have to consider in this case is a pure point of law. The statement of claim reveals that the whole of the damage alleged consists of a bill of costs in respect of which an award has been made. From this fact alone, if the costs were civil costs, it can be said as a matter of law that the damage claimed is too remote; to the extent that it has not been satisfied by the award, it consists of "extra costs" which are irrecoverable. Is it possible to make the same statement of law about criminal costs? In my judgment it is not.

The statement involves two propositions: first, that an award of costs means that the party is thereby indemnified against all the costs that he has properly incurred in the proceedings; and, secondly, if he is so indemnified, that he can

(41) *Grace* v. *Morgan*, (1836), 2 Bing. N.C. at p. 537. (42) [1900] 2 Q.B. 423.

A claim nothing extra as damages. The second proposition, i.e., the application of the conventional measure, I am now assuming to be true in relation to criminal as well as to civil costs. The first proposition is true in relation to civil costs but not in relation to criminal costs. It is true in relation to civil costs because an award of costs in a civil case must as a matter of law include all costs actually incurred subject to taxation, i.e., taxed costs, or a sum equivalent thereto, less B any costs improperly incurred and so deducted because of fault or misconduct or some other good cause. It is the duty of the judge to exercise his discretion so as to achieve that end. If he exercises it with any other object in view, his award can be challenged; so, unless it is challenged, the award can be taken, whether it is for taxed costs or for nil, as the legal indemnity. But the proposition is not true in relation to criminal costs because there a judge is under no duty to make C an award that amounts to a complete indemnity in law for costs properly incurred. He may do so, as when he awards taxed costs. But if he does do so, it must be proved as a matter of fact; it cannot be assumed from the mere fact that an award has been made.

In stating the law in relation to civil costs, I have taken it that the award of a fixed sum would be as conclusive as an order for costs to be taxed. Mr. Ormrod D does not accept this. The power to award a fixed sum is now contained in the Supreme Court Costs Rules, 1959, r. 9 (4) (b), but no case of a civil action has been cited in which the rule that an award of costs is a complete indemnity has been considered in relation to such an award. If that rule is limited to an order for taxed costs or for no costs at all, the plaintiff must succeed on this point, since it does not appear from the statement of claim (and was not the fact) that E there was an order for taxed costs or that the fifteen guineas paid were recovered on taxation. But in my opinion a sum fixed in a civil suit must be fixed with the object of providing an indemnity for all costs properly incurred and if it were fixed with some other object it could be challenged. In a criminal case, since there is no prima facie right to any costs at all, a fixed sum need only represent—and in my experience generally does represent—an amount considered by the F court to be a reasonable contribution towards costs properly incurred.

Counsel for the defendants have both agreed that the order for fifteen guineas in this case was unappealable but that, if it had been a civil suit and the judge had awarded fifteen guineas without inquiry and without any apparent reason, his order would have been appealable. Their argument is that, if it is what the court "chooses" to give (to use the word that BOWEN, L.J., uses in the passage G I have quoted from *Quartz Hill Gold Mining Co.* v. *Eyre* (43)), the defendant must accept it as compensation. I do not think that by the word "choose" BOWEN, L.J., had in mind the arbitrary or unregulated exercise of the power; he was speaking of a civil case in which, as he said, the defendant would get what he deserved and he must have been well aware of the settled practice to which LORD STERNDALE, M.R., later referred (44).

H Counsel for the defendants has also argued that the plaintiff could have asked for taxed costs and that, if she failed to do so, she cannot recover them from the defendants. The court so held in *Cotterell* v. *Jones* (45). But in that case the plaintiff was by law entitled to an award of costs if he asked for it, and JERVIS, C.J., said (46) that the court was bound to take notice of that. In the ordinary case the question whether a plaintiff has done what is reasonable in I minimising his damage is one of fact and not of law. If the defendants want to raise it, they must do so at the trial and not on demurrer.

There are two cases to be considered in which the rule as to extra costs has been applied to criminal or quasi-criminal proceedings. In *Barnett* v. *Eccles Corpn.* (47), the plaintiff was the occupier of premises in a borough of which the

(43) (1883), 11 Q.B.D. at p. 690.
(44) In *Ritter* v. *Godfrey*, [1918-19] All E.R. Rep. at p. 721; [1920] 2 K.B. at p. 52.
(45) (1851), 11 C.B. 713. (46) (1851), 11 C.B. at p. 728.
(47) [1900] 2 Q.B. 104, 423.

defendants were the local authority. They served him with a notice under the Public Health Act, 1875, s. 94, requiring him to abate a nuisance; and they then made a complaint to the justices under s. 95. When such a complaint is made, the court has power under s. 96 to make an order on the occupier requiring him to comply with the notice; and it has an additional power by its order to impose a penalty not exceeding £5. Proceedings for non-compliance with an abatement notice have been held to be a " criminal cause or matter " within the Judicature Acts; *R.* v. *Whitchurch* (48). The justices made an order requiring the plaintiff to comply with the notice; but apparently they did not impose any penalty. The plaintiff's expenses in defending himself were claimed to be £50 16s. 8d. He appealed to quarter sessions who dismissed the appeal but stated a case for the Divisional Court, where the plaintiff was successful. The Divisional Court ordered that the plaintiff should have his taxed costs of the appeal both to the Divisional Court and to quarter sessions, but they apparently made no order about the costs before the justices. The plaintiff then claimed from Eccles Corporation his costs before the justices and the extra costs of the appeals, making his claim under s. 308 of the Act of 1875 which provided that, where any person sustained any damage by reason of the exercise of the powers granted by the Act, " full compensation " should be made. On a Special Case stated by an arbitrator under s. 308, it was held both by the Divisional Court and by the Court of Appeal that the plaintiff had received full compensation.

In *Wiffen* v. *Bailey and Romford Urban Council* (49), the plaintiff was also an occupier who was served with a notice under s. 95 of the Public Health Act, 1875. But on complaint being made by the local authority, the justices dismissed the complaint and awarded the plaintiff five guineas costs. The plaintiff brought an action for malicious prosecution against the local authority and included as an item of special damage £5 15s. as extra costs. HORRIDGE, J., dealt with the point very shortly, saying that *Barnett* v. *Eccles Corpn.* (50) was clear authority that extra costs were not recoverable. This was not a case tried on demurrer and it may well have appeared from the evidence or have been conceded that the five guineas fixed by the magistrates was equivalent to the costs recoverable on taxation; as I have pointed out, the magistrates cannot make an order for taxation but are obliged to fix a sum. On this hypothesis I think that HORRIDGE, J., was right in regarding *Barnett* v. *Eccles Corpn.* (50) as indistinguishable; otherwise, I think, with respect, that he was not. The case went to the Court of Appeal where the point was not argued. PHILLIMORE, L.J. (51), agreed with the conclusion of HORRIDGE, J., and counsel for the defendants relies on this as an obiter dictum, but he agrees that on this point *Wiffen* v. *Bailey and Romford Urban Council* (49) is not a decision binding on us.

In the present case the sum of fifteen guineas fixed by the recorder amounts to about one-fifth of the costs claimed. It does not, therefore, seem likely that it was fixed by him as a sum which in his view fairly represented all the costs allowable on taxation. If it appears at the trial that it was so fixed, it may be that the defence will succeed on this point on the authority of *Barnett* v. *Eccles Corpn.* (50). I express no view on that at this stage; it is enough to say that the point fails on demurrer.

Having reached this conclusion, I hold that the statement of claim does disclose a good cause of action. It is therefore unnecessary for me to consider in detail the other point on which the plaintiff has relied. I think that the point fails. If the test is whether a charge that the plaintiff pulled the communication cord without sufficient cause is capable of bringing her into ridicule, I should hold that that was a point that could not properly be decided on demurrer. If the test is whether the charge is necessarily and naturally defamatory of the plaintiff, I agree with DIPLOCK, J., that it is not. This latter test appears to be

(48) (1881), 7 Q.B.D. 534.
(49) [1914] 2 K.B. 5; [1915] 1 K.B. 600.
(50) [1900] 2 Q.B. 104, 423.
(51) [1915] 1 K.B. at p. 610.

A quite a modern introduction into the law of malicious prosecution and not a very satisfactory one; but here again I agree with DIPLOCK, J., that it is clearly laid down as the correct test by this court in *Wiffen* v. *Bailey and Romford Urban Council* (52), an authority by which we are bound.

DANCKWERTS, L.J.: Section 22 of the Regulation of Railways Act, B 1868, requires every railway company to provide and maintain in good working order, in every train worked by it which carries passengers more than twenty miles without stopping, such efficient means of communication between the passengers and the servants of the company in charge of the train as the Board of Trade may approve. The section in the final sentence provides:

> "Any passenger who makes use of the said means of communication C without reasonable and sufficient cause shall be liable for each offence to a penalty not exceeding £5."

No doubt countless passengers have been deterred from pulling the neat and attractive chain which normally represents this means of communication in modern railway carriages by the warning " Penalty for improper use £5 ". But on Jan. 4, 1959, Miss Betty Pamela Berry, the plaintiff, in a train between D Brighton and Lancing pulled the cord. She did this for a reason which appeared to her to be not only reasonable but urgent, and, if the particulars of the statement of claim delivered in this action are true, it would appear that there was both reasonable and sufficient cause for her act. None the less, she was prosecuted by the British Transport Commission, the defendants, at Brighton, and when the case came before the magistrates on Feb. 13, 1959, she was convicted E and fined 20s. and ordered to pay 27s. for costs. The plaintiff appealed against the conviction, and on July 6, 1959, when before the recorder the defendants pursued the prosecution and attempted to sustain the conviction, the appeal was allowed and the plaintiff was awarded the sum of £15 15s. costs.

Having regard to the character of her opponent, it might be thought that the plaintiff would have been wise to have left the matter there. But on Oct. 26, F 1959, she began this action against the defendants for malicious prosecution. Her statement of claim discloses that the expenses to which she was put in respect of the hearing before the magistrates and the appeal before the recorder (after giving credit for the sum of £15 15s. which has been duly paid) amounted to the sum of £64 2s.; and the particulars of the statement of claim delivered on Jan. 6, 1960, contain allegations which suggest that the defendants ought not to G have launched the prosecution.

In para. 5 of the amended defence the defendants have taken the objection that

> " the statement of claim discloses no damage of which the plaintiff is entitled to complain in law and in the premises the statement of claim discloses no cause of action."

H

This point of law was directed to be heard as a preliminary issue between the parties. For this purpose, of course, all the allegations in the statement of claim must be taken to be true, and this includes the allegations in the particulars, which are part of the statement of claim. The issue was tried by DIPLOCK, J., and on July 29, 1960, he decided that the plaintiff's statement of claim disclosed I no cause of action, and the action was dismissed.

The action of malicious prosecution (which lies for wrongful and malicious civil proceedings as well as criminal proceedings) was an action on the case and consequently damage is essential to support it. The necessary conditions for the maintenance of the action were set forth by HOLT, C.J., in *Savile* v. *Roberts* (53) in 1698, which is noteworthy (amongst other things) for being the subject of ten different reports as well as several variants in the spelling of the plaintiff's name. The principal report is in 1 Lord Raymond, at p. 374, but this report has

(52) [1914] 2 K.B. 5; [1915] 1 K.B. 600. (53) (1698), 1 Ld. Raym. 374.

to be supplemented from some of the others. In the report in 1 Salkeld at p. 15, HOLT, C.J., is reported as observing

> ". . . though the action lies, yet it is not to be favoured; . . . it shall lie on the plaintiff's side to prove on express rancour and malice."

Various reasons have been suggested for the unfriendly view of the action taken by the courts in the seventeenth century.

The conditions necessary for the maintenance of the action are given by HOLT, C.J., as follows (54):

> " 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous . . . 2. The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty . . . 3. The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused . . ."

HOLT C.J., adds (55):

> " The common law has made provision, to hinder malicious and frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced, if the claim was false; which judgment the court heretofore always gave, and then a writ issued to the coroners, and they affeered them according to the proportion of the vexation . . . But that method became disused, and then to supply it, the statutes gave costs to the defendants . . . But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action."

It is accepted that by " scandalous " HOLT, C.J., meant slanderous, and it has been suggested that a slander which is actionable per se without proof of special damage is the standard to apply.

It would appear that the action in the time of HOLT, C.J., was in the early stages of its evolution, and what would appear to be sensible or desirable in the seventeenth century is not necessarily reasonable in 1961. In the course of the treatment of the subject in the cases which have been decided in more modern times, there appear to me to have been introduced a number of developments which, with all respect, I do not think ought to have been allowed to occur. For instance, it seems to me to be quite unreasonable that the court should be asked to consider whether a charge in the relevant criminal proceedings could be made without any injury to " the fair fame " and whether the charge " necessarily and naturally " conveys an imputation on the plaintiff, per BUCKLEY, L.J., in *Wiffen* v. *Bailey and Romford Urban Council* (56). In my view, reason demands that the standard should be whether a reasonable man, hearing of the proceedings brought against the plaintiff, would form the view that they were a damaging reflection on the " fair fame " of the plaintiff. The other standard seems to me to be unreasonably exacting. Again the theory that taxed costs are a sufficient compensation for a successful defendant, at any rate in a civil action, seems to me an unreal or perhaps even a cynical view, which ought not to have any place in the conditions of an action for malicious prosecution. Every lawyer, and many laymen, to their cost, know that costs taxed as between party and party, and even in some cases as between solicitor and client, leave a successful party bitterly lamenting the burden of expenses which he is left to bear.

As regards the costs of a civil action, the rule that taxed costs must be treated as the maximum which a litigant can claim for recovery must be treated, for the purposes of this court, as established by *Quartz Hill Gold Mining Co.* v. *Eyre* (57). But I am not satisfied that the matter is concluded in respect of the expenses to which a successful litigant is put in defending himself or herself in the course of

(54) (1698), 1 Ld. Raym. at p. 378.
(55) (1698), 1 Ld. Raym. at p. 380.
(56) [1915] 1 K.B. at p. 608.
(57) (1883), 11 Q.B.D. 674.

A criminal proceedings. In the time of HOLT, C.J., costs could not be obtained in criminal cases, and this was the reason given by him for the allowance of the action for malicious prosecution in such cases. It has been contended that, by reason of the ability of the courts to award costs under modern statutes, this is no longer true, and the rule as to civil proceedings should be applied also to criminal proceedings.

B The position as regards costs in civil proceedings seems to date back to the Supreme Court of Judicature Act, 1890, s. 5, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50, and is now regulated by the Supreme Court Costs Rules, 1959. In the result the court is given a judicial discretion, and, in practice, the costs are taxed, and as a result the costs so ascertained are treated as the maximum proper costs which the party deserves to receive; anything C beyond that is treated as something not recognised by the law. Consequently, if a successful party is, in an exercise of the judicial discretion in any particular case, refused costs, that also is an end of the matter. Likewise, if the successful party failed to ask for costs.

The position of costs in criminal matters is not the same. Under s. 18 of the Summary Jurisdiction Act, 1848, in cases where the justices dismissed the D information or complaint, it was lawful for them, in their discretion, in and by their order of dismissal, to award and order that the prosecutor or complainant respectively should pay to the defendant such costs as to the justices seemed just or reasonable. The amount of the costs had to be fixed by the justices at the time of the hearing.

Under the Quarter Sessions Act, 1849, s. 5, on any appeal to any court of E quarter sessions the court before whom the same should be brought might, if it thought fit, order and direct the party or parties against whom the same should be decided to pay to the other party or parties such costs and charges as might to such court appear just and reasonable. Under s. 31 (vii) of the Summary Jurisdiction Act, 1879, quarter sessions may make such order as to costs to be paid by either party as they think just. There seems to have been a dual power F in this respect under s. 5 of the Act of 1849, and s. 31 of the Act of 1879. The s. 31 which was operative under the Act of 1879 after 1933 was in fact substituted for the original s. 31 by the Summary Jurisdiction (Appeals) Act, 1933.

A further provision was contained in s. 5 (1) of the last mentioned Act which provided as follows:

> "On any appeal to which this Act applies a court of quarter sessions may, G in the exercise of their power to award costs—(i) where they allow the appeal, direct that there shall be included in any costs to be paid by the respondent to the appellant the costs properly incurred by the appellant in the proceedings before the court of summary jurisdiction, or such fixed sum as the court of quarter sessions may consider reasonable in respect of the costs so incurred by him; (ii) in any case, in lieu of directing a taxation of costs, fix H the sum to be paid by way of costs by either party to the appeal; and in fixing, for the purposes of this subsection, the amount of any costs to be paid by a party to an appeal shall have regard to his means."

This last provision, of course, involves, to the extent to which it is applied, an abandonment of any attempt to compensate the victim for his expenses. And I in the exercise of their powers the decision of the court of quarter sessions cannot, it seems, be questioned by a higher court, if they refrain from giving any reasons for the result which they reach.

Under s. 1 of the Costs in Criminal Cases Act, 1952, a court of assize or quarter sessions is empowered, if the accused is acquitted, to order the payment out of local funds of the costs of the defence; and the costs so payable out of local funds are to be such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred in carrying on the defence. Section 2 of the Act provides that, where any person is acquitted on indictment

(in the cases mentioned in the section), the court of assizes or quarter sessions before which he is acquitted may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, including any proceedings before the examining justices. A

It appears, therefore, that the provisions relating to costs in criminal cases differ from the rules which apply in the case of civil actions. But in the administration of the law the practice seems to differ even more strikingly. In a civil action, the successful party is almost always awarded costs. A successful party can only be deprived of his costs by the exercise of a judicial discretion and for good reason. In criminal cases, in practice a person who is acquitted is not necessarily, or, indeed it would appear, usually awarded any costs; and, even if a sum is awarded for costs, it appears to be no real compensation for the expenses to which the party has been put, and even sometimes to be a mere nominal amount. B C

In these circumstances, even if the rule be established beyond recall that the extra costs over and above the amount recovered as taxed costs in a civil action do not constitute expenses sufficient to support an action for malicious prosecution, it would, in my view, be quite wrong to extend the rule to expenses incurred and not recovered in criminal proceedings. Moreover, there does not appear to be any decision which stands in the way of this result. It is true that in *Wiffen* v. *Bailey and Romford Urban Council* (58) the sum of five guineas which was awarded on the dismissal of the criminal proceedings was less than the amount of the expenses incurred in the course of the defence, but this question was not argued in the Court of Appeal. My conclusion, therefore, is that expenses incurred by the plaintiff in the course of her defence in the court of summary jurisdiction and before the recorder, over and above the sum of fifteen guineas awarded to her, are sufficient to support an action for malicious prosecution, and this appeal should be allowed. D E

It is not really necessary to go into the two other possible grounds for supporting the action, viz., whether the proceedings in which the plaintiff became involved were damaging to her "fair fame", or whether criminal proceedings which do not involve imprisonment and can only involve a fine are sufficient to support the action. It is exceedingly difficult to reconcile satisfactorily the decisions of the Court of Appeal in *Wiffen* v. *Bailey and Romford Urban Council* (58) and *Rayson* v. *South London Tramway Co.* (59), on these matters, and I prefer to say no more on these subjects. F

I must pay a tribute to the industry of counsel in this case. They appear to have presented to the court all the relevant cases, and to have pursued the matter with the most thorough research. Like my brother members of the court, I have been greatly assisted by their labours. G

Appeal allowed.

Solicitors: *M. H. B. Gilmour* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(58) [1915] 1 K.B. 600. (59) [1893] 2 Q.B. 304.

A

Re ROYAL VICTORIA PAVILION, RAMSGATE. WHELAN *v.* F.T.S. (GREAT BRITAIN), LTD.

[CHANCERY DIVISION (Pennycuick, J.), June 19, 29, 1961.]

Covenant—Running with land—Sale of theatre and cinema properties—Covenant to "procure" that theatre retained by vendors should not be open save for certain performances—Vendors' interest in retained theatre a leasehold interest—Successors in title not mentioned in covenant—Whether covenant personal or binding land—Whether contrary intention excluding Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 79.

B

In July, 1952, Thanet Theatrical Enterprises, Ltd. was entitled to the residue of a term of years, due to expire on Mar. 25, 1969, in Royal Victoria Pavilion, Ramsgate. By a conveyance dated July 7, 1952, Thanet Theatrical Enterprises, Ltd., conveyed and assigned four other properties in Ramsgate to the defendant company. Clause 4 contained covenants expressed as being made by the purchasers for themselves and their successors in title. Clause 5 of the conveyance provided—"The vendors hereby covenant with the purchasers that they the vendors will procure that until Mar. 25, 1969, the premises known as the Royal Pavilion at Ramsgate shall not (a) Be open to the public between Sept. 30 in each year and the succeeding Whit Saturday . . . except for entertainment by living actors . . . (b) Be used at any other time for the entertainment of the public . . . by any other medium than living actors . . ." This restriction was registered as a land charge under class D (2). Clause 6 was a covenant by the vendors "with the purchasers" for the discharge of certain outgoings and liabilities. By assignment the pavilion became vested in the plaintiff. Thanet Theatrical Enterprises, Ltd. was wound up on June 5, 1957. The plaintiff applied to the court for a declaration that the covenants contained in cl. 5 of the conveyance dated July 7, 1952, were not binding on him as a successor in title of Thanet Theatrical Enterprises, Ltd. The defendant company still retained one of the four properties comprised in the conveyance of July 7, 1952.

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Held: the covenant was not binding on the plaintiff because—

(i) the use of the word "procure" in cl. 5 denoted that the covenant was a personal covenant to ensure that the property would be used in accordance with the covenant, and the word "procure" was not appropriate to a covenant on behalf of a covenantor and his successors in title; moreover the introductory wording of the covenants in cl. 4 and cl. 6 showed by comparison that the covenant in cl. 5 was intended to be personal.

G

(ii) although the conveyance did not expressly exclude s. 79* of the Law of Property Act, 1925, yet a sufficient contrary intention was indicated to exclude that enactment, which accordingly did not render the covenant one made on behalf of the successors in title of Thanet Theatrical Enterprises, Ltd.

H

[As to the burden of tenant's covenants, see 23 HALSBURY'S LAWS (3rd Edn.) 644, para. 1360; and for cases on the subject, see 31 DIGEST (Repl.) 151, 152, *2892-2906*.

For the Law of Property Act, 1925, s. 62, s. 79, s. 84 (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 559, 600, 607.]

I

Cases referred to:

Broomfield v. *Williams*, [1897] 1 Ch. 602; 66 L.J.Ch. 305; 76 L.T. 243; 19 Digest 36, *183*.

Gregg v. *Richards*, [1926] Ch. 521; 95 L.J.Ch. 209; 135 L.T. 75; Digest Supp.

Newton Abbot Co-operative Society, Ltd. v. *Williamson & Treadgold, Ltd.*, [1952] 1 All E.R. 279; [1952] Ch. 286; 40 Digest (Repl.) 353, *2839*.

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* For s. 79 of the Law of Property Act, 1925, see p. 86, letter I, to p. 87, letter B, post.

Adjourned Summons.

This was an application by originating summons dated Mar. 20, 1961, by the plaintiff, Frank Ronald Whelan, who was a leaseholder of the Royal Victoria Pavilion, Ramsgate, for a declaration (i) that the covenants contained in cl. 5 of a conveyance dated July 7, 1952, made between Thanet Theatrical Enterprises, Ltd., and Predominant Film Transport, Ltd., were not binding on him or other the leaseholder for the time being of the property or (ii) alternatively, pursuant to s. 84 (2) of the Law of Property Act, 1925, that the nature and extent of the restrictions (if any) imposed by the covenants contained in cl. 5 of the conveyance might be declared and whether they were now enforceable and, if so, by whom, and (iii) that the entry of the restrictions in the Land Charges Registry might be cancelled. The defendant was F.T.S. (Great Britain), Ltd., which claimed to be entitled to the benefit of the covenants contained in cl. 5 of the conveyance. The facts appear in the judgment.

D. A. Thomas for the plaintiff.

P. R. Oliver for the defendant company.

Cur. adv. vult.

June 29. **PENNYCUICK, J.**: This originating summons raises a question on the effect of a covenant contained in a conveyance dated July 7, 1952, whereby Thanet Theatrical Enterprises, Ltd. conveyed certain properties to the defendant company by its then name of Predominant Film Transport, Ltd. The summons was heard on affidavit evidence, and there is no dispute as to the facts.

By a lease dated Sept. 26, 1936, Ramsgate Corporation demised a property known as the Royal Victoria Pavilion at Ramsgate to Harry Edward Bawn for twenty-one years from Mar. 25, 1934. By an assignment dated Sept. 28, 1936, Mr. Bawn assigned the lease to Balexcro Theatres, Ltd. By a lease dated Apr. 7, 1947, Ramsgate Corporation demised the pavilion to Balexcro Theatres, Ltd., for a further fourteen years from Mar. 25, 1955. On Aug. 28, 1950, Balexcro Theatres, Ltd., changed its name to Thanet Theatrical Enterprises, Ltd.; I will hereafter refer to that company as " Thanet Theatrical ".

The position then at the date of the conveyance dated July 7, 1952, was that Thanet Theatrical had a lease of the pavilion with an unexpired term of seventeen years, i.e., due to expire on Mar. 25, 1969. By a conveyance dated July 7, 1952, Thanet Theatrical conveyed and assigned four other properties in Ramsgate to the defendant company; these were the King's Theatre and the Ramsgate Picture House, which were freehold, the Palace Theatre and Sangers Hotel and Restaurant which were leasehold. The conveyance, after recital of the vendors' seizure of the various properties, proceeds as follows:

> " (7) The vendors have for some time past carried on upon the freehold premises described in the first and second schedules hereto the businesses of theatres and cinematograph theatres and upon the leasehold premises described in the third schedule and Part II of the fourth schedule hereto the business of a theatre and cinema and upon the leasehold premises described in Part I of the fourth schedule hereto the business of a licensed hotel or inn.
>
> " (8) The vendors have agreed with the purchasers for the sale to the purchasers of the said freehold and leasehold premises and the goodwill of the businesses hereinbefore referred to together with the movable plant and equipment hereinafter referred to at the price of £41,500."

The operative part of the conveyance contains first a conveyance of the freehold properties and next an assignment of the leasehold properties; then there is the assignment of the goodwill of the businesses of theatres, cinematograph theatres and a licensed hotel or inn,

> ". . . together with . . . the benefit of and subject to all subsisting contracts and engagements . . . in connexion with the said businesses . . ."

A The next three clauses of the conveyance I will read in full:

"(4) The purchasers for themselves and their successors and assigns hereby covenant with the vendors: (a) that the purchasers will observe and perform the terms and conditions affecting the property described in the second schedule hereto relative to building set out in a conveyance dated Oct. 31, 1919, more particularly referred to in the third schedule hereto and B will keep the vendors indemnified from and against all actions proceedings costs charges claims demands and expenses whatsoever in respect of any breach thereof (b) that the purchasers will duly pay satisfy discharge and fulfil all the liabilities of the vendors and their nominees subsisting at the date hereof in relation to the forward contracts and engagements of the vendors taken over by the purchasers and will indemnify the vendors and any nominee C of the vendors who may be personally liable thereunder from and against all actions proceedings costs charges claims demands and expenses whatsoever in respect of any breach thereof arising after the date hereof (c) that the purchasers will henceforth during the continuance of the terms created by the first and second leases pay the rents thereby reserved and perform and observe the covenants on the lessees part contained therein and will D at all times hereafter keep the vendors indemnified against all proceedings costs claims and expenses whatsoever in respect of the said rents and covenants or in anywise relating thereto.

"5. The vendors hereby covenant with the purchasers that they the vendors will procure that until Mar. 25, 1969, the premises known as the Royal Pavilion at Ramsgate shall not (a) Be open to the public between E Sept. 30 in each year and the succeeding Whit Saturday (both days inclusive) except for entertainment by living actors or performers for one performance in each calendar month save with the express written consent of the purchasers which consent may be given or withheld at their sole discretion. (b) Be used at any other time for the entertainment of the public (whether or not for profit) by any other medium than living actors or performers F and without prejudice to the generality of the foregoing any entertainment by means of cinematograph or other mechanical means of reproduction including rediffusion by television of cinematograph films (as distinct from mechanical entertainment available to 'live' theatres in substitution for 'live' shows) shall be deemed to be specifically precluded.

"6. The vendors hereby covenant with the purchasers that the vendors G will pay satisfy and discharge all the debts outgoings obligations and liabilities of whatsoever nature of the vendors (including all capital expenditure) in respect of the said businesses licences contracts or otherwise subsisting at accrued due on or apportionable to the period up to the date hereof and will indemnify the purchasers against all actions proceedings costs claims and demands in respect thereof."

H It is on the covenant contained in cl. 5 of the conveyance that the present issue arises. The restriction in cl. 5 was registered as a land charge under class D (2). By an assignment dated Jan. 9, 1953, the pavilion was assigned by Thanet Theatrical to Ramsgate Pavilion, Ltd. Thanet Theatrical was wound up on June 5, 1957. Finally by an assignment dated June 12, 1959, the pavilion was assigned by Ramsgate Pavilion, Ltd. to Mr. Frank Ronald Whelan, the plaintiff I in this action. Of the four properties comprised in the conveyance dated July 7, 1952, the defendant company still retains the King's Theatre, which lies one hundred and seventy-five yards to the west of the pavilion. The question raised by the originating summons is in these terms: the plaintiff seeks

"(1) A declaration that the said covenants [that is the covenants in cl. 5 of the conveyance] are not binding upon the plaintiff or other the leaseholder for the time being of the said property. (2) Alternatively, pursuant to s. 84 (2) of the Law of Property Act, 1925, that the nature and extent

of the restrictions (if any) imposed by the covenants contained in cl. 5 of the said conveyance may be declared and whether the same are now enforceable and, if so, by whom. (3) That the entry of the said restrictions in the Land Charges Registry may be cancelled."

In order to answer the question raised by the summons it is necessary in the first place to determine the construction of cl. 5 of the conveyance. By this clause Thanet Theatrical covenants to procure that during a term corresponding to the residue of its leasehold interest, the use of the pavilion shall be restricted as therein mentioned. The word "procure" is defined in the OXFORD ENGLISH DICTIONARY as meaning "obtain by care or effort", and can be more simply paraphrased as "see to it". The obligation undertaken by Thanet Theatrical is to see to it that a certain state of affairs prevails during the specified term. It seems to me that a covenant so expressed is naturally to be regarded as of a purely personal character. The tenant of property is in a position to ensure that during his tenancy the property is not to be used in a specified manner either by himself or by persons claiming under him, whether as licensees underlessees or assignees, and the word "procure" is appropriate to denote a personal obligation so to ensure. So here, the covenant regarded as purely a personal covenant would have been perfectly sensible and workable had Thanet Theatrical remained in existence. On the other hand, it seems to me that a covenant so expressed is not naturally to be regarded as a covenant on behalf of the covenantor and his successors in title so as to run with the land. The causative verb "procure" is not appropriate where successors in title are themselves to be bound. The covenantor under a covenant intended to run with the land would not sensibly be expressed as procuring his successors to abstain from doing whatever is covenanted not to be done.

The view that the covenant in cl. 5 is intended to be of a purely personal character derives much support from the clauses which immediately precede and follow it. Clause 4, which as regards sub-para. (a) and sub-para. (c) at any rate, is plainly intended to run with the land, is introduced by the apt words

"The purchasers for themselves and their successors and assigns hereby covenant with the vendors . . ."

Clause 6, which is plainly intended as a purely personal covenant is introduced only by the words "The vendors hereby covenant with the purchasers . . ." It would be strange draftsmanship to interpose between these two covenants a covenant intended to run with the land, and yet only introduced by the words "The vendors hereby covenant with the purchasers . . ."

It is important in construing the covenant in cl. 5 to bear in mind that the period covered by it is only seventeen years. A restriction for so short a period can readily be achieved by a purely personal obligation, unlike a restriction in perpetuity which can only be fully effective if it runs with the land.

Counsel for the defendant company points out that the covenant, though positive in form, may yet be negative in substance. This is so, and I imagine that here the covenant in cl. 5 would be regarded as negative to this extent, that it imports an obligation on Thanet Theatrical itself not to do any of the prohibited acts but I do not think Thanet Theatrical's positive obligation to procure can, as regards persons claiming under it, be translated into a negative obligation on those parties if on the natural construction of the covenant they are not bound by it at all.

Counsel further relies on s. 79 of the Law of Property Act, 1925. That section is in these terms:

"(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid,

A shall have effect as if such successors and other persons were expressed. This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

"(2) For the purposes of this section in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include B the owners and occupiers for the time being of such land.

"(3) This section applies only to covenants made after the commencement of this Act."

Here it is contended that no contrary intention is expressed in the conveyance dated July 7, 1952, and that therefore the covenant in cl. 5 must be deemed to be made by Thanet Theatrical on behalf of itself and its successors in title. C If the words "unless a contrary intention is expressed" in s. 79 mean: "unless the instrument contains express provision to the contrary," this contention would be unanswerable, but it seems to me that the words "unless a contrary intention is expressed" mean rather: "unless an indication to the contrary is to be found in the instrument", and that such an indication may be sufficiently contained in the wording and context of the instrument even though the instru- D ment contains no provision expressly excluding successors in title from its operation. It can hardly be the intention of the section that a covenant, which on its natural construction is manifestly intended to be personal only, must be construed as running with the land merely because the contrary is not expressly provided.

There appears to be no authority in point under s. 79 itself, but some support E for the view which I have expressed is to be found in the judgment of the Court of Appeal in two cases concerned with similar words in s. 6 (4) of the Conveyancing Act, 1881, now reproduced in s. 62 of the Law of Property Act, 1925, namely *Broomfield* v. *Williams* (1), and *Gregg* v. *Richards* (2). So here, although the conveyance contains no express provision to the effect that it is not made on behalf of successors in title, it does, as it seems to me, contain sufficient F indication to this effect.

The views which I have indicated are sufficient to dispose of this summons in favour of the plaintiff. I must, however, mention shortly one contention advanced by counsel for the plaintiff, namely that the covenant in cl. 5 is for the protection of the defendant company's business and not for the protection of the properties comprised in the conveyance viewed as land, and that for this G reason the burden of the covenant is incapable of running with the pavilion. On the view which I have taken this point does not arise, since Thanet Theatrical's successors in title are not bound on the proper construction of the covenant. If the point did arise it would, in my judgment, be covered by the decision of UPJOHN, J., in *Newton Abbot Co-operative Society, Ltd.* v. *Williamson & Treadgold, Ltd.* (3) and this contention would fail.

H I propose, accordingly, to make a declaration in terms of para. 1 of the originating summons, and a direction in the terms of para. 3 of the originating summons.

Declaration accordingly.

Solicitors: *Isadore Goldman & Son* (for the plaintiff); *Joynson-Hicks & Co.* (for the defendant company).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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(1) [1897] 1 Ch. 602. (2) [1926] Ch. 521.
(3) [1952] 1 All E.R. 279; [1952] Ch. 286.

R. v. QUINN. R. v. BLOOM.

A

[COURT OF CRIMINAL APPEAL (Ashworth, Paull and Howard, JJ.), June 19, 20, 21, 22, 30, 1961.]

Criminal Law—Disorderly house—Definition—Indecent performances and exhibitions—Offence of keeping a disorderly house by giving such performances—Whether essential that persons viewing such performances should participate in acts of indecency—Whether common nuisance an essential element of offence.

B

Criminal Law—Evidence—Film—Reconstruction of crime.

A disorderly house, for the purposes of a charge of the common law offence of keeping a disorderly house in a case where the essence of the charge is the taking place of indecent performances or exhibitions, may be defined as follows, viz.—a house conducted contrary to law and good order in that matters are performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency or (b) tends to corrupt or deprave, or (c) is otherwise calculated to injure the public interest so as to call for condemnation and punishment (see p. 91, letters H and I, post). The alternatives (a), (b) and (c) in this definition are not mutually exclusive (see p. 92, letter A, post).

C

D

Dictum of VISCOUNT SIMONDS in *Shaw* v. *Director of Public Prosecutions* ([1961] 2 All E.R. at p. 452) applied.

A jury should be warned that in applying the definition they should approach the matter as ordinary reasonable citizens, putting aside as far as possible any prejudices that they may have, but each juror's decision is his own subjective decision, so that in effect the morality of the jury determines the guilt or innocence of the accused (see p. 92, letters E to H, post).

E

Dictum of LORD HODSON in *Shaw* v. *Director of Public Prosecutions* ([1961] 2 All E.R. at p. 468) applied.

Two club proprietors were indicted, each for keeping a disorderly house, the substance of the charge in each case arising out of matters alleged to have occurred in the course of " strip-tease " performances at the club before members of the club. There was evidence of police officers, who saw the acts at both premises, which showed that the indecency involved was serious and, in some respects, revolting. It was sought on behalf of the defence in one case to put in evidence a film showing what certain of the performers actually did in the course of their acts, and to support this by evidence that the performances in the film were identical with the performances on the occasions complained of. This film was taken three months after the events complained of and the evidence was not admitted at the trial. In the summing-up at one trial the jury were directed to consider whether what had been portrayed was, among other adjectives, " obscene ", but no reference was made to the definition of that adjective now contained in s. 1 (1) of the Obscene Publications Act, 1959. The accused were convicted at London Sessions before the chairman and a jury, the conviction of one accused being at a re-trial (the jury at the first trial having disagreed) before the same chairman. On appeal against conviction,

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Held: (i) (a) the fact that persons resorting to the premises were mere spectators and committed no acts of indecency did not prevent the premises constituting in law a disorderly house (see p. 91, letter D, post).

I

(b) while a disorderly house might in some instances amount to a common nuisance, the latter element was not a necessary ingredient of the offence in question (see p. 91, letter E, post).

R. v. *Rice and Wilton* ((1866), L.R. 1 C.C.R. 21) followed.

(ii) the film was an alleged reconstruction of the alleged crimes and evidence by its exhibition was properly rejected as inadmissible, for it was not the best evidence (see p. 93, letter A, post).

A Per CURIAM: (a) if a direction in a summing-up uses the adjective "obscene" it is in general desirable to mention the definition of "obscene" contained in s. 1 (1) of the Obscene Publications Act, 1959; and there is danger in multiplying offensive adjectives (see p. 93, letter H, and p. 94, letter D, post).

(b) the re-trial of the accused who was tried twice should have taken place B before a deputy chairman, not before the chairman who had presided at the first trial (see p. 90, letter D, post).

Appeals dismissed.

[As to disorderly houses, see 10 HALSBURY'S LAWS (3rd Edn.) 671, para. 1285 and SUPPLEMENT; ibid. 673, note (u); and for cases on the subject, see 15 C DIGEST (Repl.) 902, *8702*, 904, 905, *8709*, *8714*, *8722*, *8723*, 907-909, *8727-8752*.]

Cases referred to:

R. v. *Berg, Britt, Carré & Lummies*, (1927), 20 Cr. App. Rep. 38; 15 Digest (Repl.) 902, *8702*.

R. v. *Higginson*, (1762), 2 Burr. 1232; 97 E.R. 806; 15 Digest (Repl.) 902, *8704*.

D *R.* v. *Rice and Wilton*, (1866), L.R. 1 C.C.R. 21; 35 L.J.M.C. 93; 13 L.T. 678; 10 Cox C.C. 155; 15 Digest (Repl.) 903, *8707*.

Shaw v. *Director of Public Prosecutions*, [1961] 2 All E.R. 446; [1961] 2 W.L.R. 897.

Appeals.

These were two appeals based on similar points of law. The appellant, E Geoffrey Anthony Quinn, appealed against his conviction and the appellant, Samuel Bloom, appealed against his conviction and sentence. Each case had been tried independently at the County of London Sessions before the chairman and a jury, and both appellants were convicted of keeping a disorderly house and fined. Bloom's case was first tried in January, 1961, when he was charged that on divers days between May 8, 1960, and June 12, 1960, at No. 13, Mason's F Yard, S.W.1, he unlawfully kept a disorderly house there. On Jan. 16, 1961, the jury disagreed and the chairman discharged them without taking a verdict. The case was re-tried on Feb. 9 and 10, 1961, on the same indictment and the jury returned a verdict of guilty. The chairman sentenced Bloom by fining him £2,500 and ordering him to pay 100 guineas costs. Quinn was tried on Apr. 10, 11, 12, 13, 14, 1961, the charge being that he unlawfully kept a dis- G orderly house at the Raymond Revuebar Club, W.1, on divers days between Aug. 31, 1960, and Sept. 16, 1960. His counsel had submitted after calling evidence that the indictment should be quashed on the grounds that the particulars in it were not sufficient to give reasonable information as to the nature of the charge. The chairman ruled against him holding that the indictment in its then form alleged clearly that the offence was keeping a disorderly house unlaw- H fully at those premises. The trial then proceeded and the jury convicted Quinn of the offence charged and the chairman imposed a fine of £5,000 on him and ordered him to pay 500 guineas costs. After Quinn's conviction his counsel obtained a certificate from the chairman that the case was a fit case for appeal under s. 3 (b) of the Criminal Appeal Act, 1907, on two grounds—(i) whether the chairman's direction as to what constituted a disorderly house was good in law*, I and (ii) whether the chairman was right in holding that a film of the alleged acts made three months after the matters the subject of the indictment was inadmissible in evidence. Bloom's main grounds of appeal against conviction were (a) that the chairman wrongly exercised his discretion in re-trying the case himself when there were three deputy chairmen available; (b) that the chairman misdirected himself in law in holding that the evidence presented by the prose-

* The chairman's direction to the jury on what was meant by a disorderly house is set out at p. 93, letter I, to p. 94, letter A, post.

cution amounted to the offence charged in the indictment. He also appealed against his sentence on the ground that it was excessive. A

The statutes and authorities named below* were cited in argument in addition to those quoted in the judgment.

E. Clarke, Q.C., and *Leonard Lewis* for the appellant Quinn.
Christmas Humphreys, Q.C., and *J. C. G. Burge* for the appellant Bloom.
Sebag Shaw for the Crown. B

Cur. adv. vult.

June 30. **ASHWORTH, J.**, read the following judgment of the court: In each of these two appeals the appellant appealed to this court against his conviction and the appellant Bloom also appealed against the penalty imposed on him. C

At the end of the hearing this court intimated that each appeal was dismissed, and that the court would give its reasons later. Each case was tried at the County of London Sessions before the learned chairman, and in each case the charge was the same, namely, that the appellants unlawfully kept a disorderly house. Bloom's case was first heard in January, 1961, when the jury were unable to reach agreement, and was then re-heard in February, 1961. Both D trials took place before the chairman, and this court confirms the opinion, expressed during the hearing of the appeal, that it would have been better if the re-trial had taken place before one of the deputy chairmen. Quinn's case was heard in April, 1961, and after his conviction counsel obtained from the chairman a certificate that the case was a fit case for an appeal on two grounds:—First, whether the chairman's direction as to what constituted a disorderly house was E good in law and, secondly, whether he was right in holding that a film of the alleged acts made three months after the matters the subject of the indictment was admissible in evidence. Quinn's appeal was heard first, and was followed by Bloom's appeal before any decision was given.

In each case the prosecution arose out of matters alleged to have occurred in the course of performances which took place at premises where the respective F appellants carried on business as proprietors of clubs. These performances were what has come to be known as "strip-tease" performances, and it was not disputed that in some of the scenes actresses appeared either completely nude or practically so. In Quinn's case it was alleged that in six and possibly eight out of seventeen acts constituting the programme matters occurred which far exceeded the limits which the law permits in performances of this sort: in Bloom's G case the acts complained of related to five out of a programme comprising fourteen acts. Short descriptions of the matters complained of are to be found in the summing-up in each case, and it is unnecessary to set them out in detail. It is sufficient to say that if the evidence of the police officers was reliable the indecency involved was beyond question serious and, indeed, in some respects revolting. H

Much of the argument before this court was directed to the question of what is meant by a "disorderly house". In so far as the expression has been used

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* Revised Statutes of Canada (1927) Criminal Code, c. 36, 229 (Disorderly houses); Licensing Act, 1953, s. 13.

HAWKINS' PLEAS OF THE CROWN (8th Edn., 1824), Vol. 1, p. 717; CHITTY'S PRACTICAL TREATISE ON CRIMINAL LAW (2nd Edn., 1826), Vol. 2, p. 38; Vol. 3, p. 673; PEARCE AND MESTON, LAW OF NUISANCES (1926), pp. 217 et seq.; STEPHEN'S DIGEST OF THE CRIMINAL LAW (9th Edn., 1950), p. 179, art. 235, p. 181, art. 238; PHIPSON ON EVIDENCE (9th Edn., 1952), ch. 22, p. 285; RUSSELL ON CRIME (11th Edn.), Vol. 2, p. 1650 (Bacon's definition), p. 1651; 10 HALSBURY'S LAWS (3rd Edn.) 671, para. 1285; 678, para. 1299; ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (34th Edn.), para. 3581. I

R. v. *Grey*, (1864), 4 F. & F. 73; *R.* v. *Hicklin*, (1868), L.R. 3 Q.B. 360; 11 Cox, C.C. 19; *R.* v. *Saunders & Hitchcock*, (1875), 1 Q.B.D. 15; 13 Cox, C.C. 116; *R.* v. *Four Chinamen*, (1906), B.C.R. 216; *R.* v. *Manley*, [1933] 1 K.B. 529; 24 Cr. App. Rep. 25; *R.* v. *Newland*, [1953] 2 All E.R. 1067; *R.* v. *Martin Secker Warburg, Ltd.*, [1954] 2 All E.R. 683.

A in Acts of Parliament no statutory definition has been provided. Thus, the Disorderly Houses Act, 1751, s. 2 (so far as relevant) provides,

> ". . . Any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof, without a licence . . . shall be deemed a disorderly house or place . . ."

B Section 5 of the same Act refers to a " bawdy-house, gaming-house, or any other disorderly house ", but provides no definition.

The offence of keeping a disorderly house is an offence at common law, but in none of the reported cases to which our attention was called does there appear a comprehensive definition or statement of what the prosecution has to prove C in order to establish the charge. In some cases a prosecution has been successful as a result of proving that persons resorting to the alleged disorderly house were themselves taking part in illegal practices: see, for example, *R.* v. *Higginson* (1) (" fighting of cocks, boxing, playing at cudgels and misbehaving themselves "), and *R.* v. *Berg, Britt, Carré & Lummies* (2) (" lewd and immoral persons assembled for the purpose of unnatural practices "). It was argued in Quinn's appeal that D the misbehaviour or illegality on the part of persons resorting to the premises was an essential element in the offence of keeping a disorderly house and that as the members of Quinn's club and their guests were respectable persons who were merely spectators at the performances and committed no indecency themselves, the premises could not in law be regarded as a disorderly house. We are quite unable to take so restricted a view of the meaning of the expression E " disorderly house ".

A further argument on behalf of Quinn was that unless the alleged disorderly house amounted also to a common nuisance, the charge must fail. Although the report of *R.* v. *Rice and Wilton* (3) is exceedingly short, the decision itself is contrary to this argument, and counsel for Quinn did not press it. In our opinion, while a disorderly house may in some instances amount to a common F nuisance, the latter element is not an essential ingredient in the offence of keeping a disorderly house, and it is unnecessary to consider the question of common nuisances further.

It is convenient at this stage to refer to the recent decision of the House of Lords in *Shaw* v. *Director of Public Prosecutions* (4). Their Lordships' speeches were not delivered until May 4, 1961, after both the appellants had been tried and convicted, so that the learned chairman did not have the advantage afforded G to us of considering those speeches. In that case the material charge was not that of keeping a disorderly house but of conspiring to corrupt public morals, but in our opinion much of the reasoning of the majority is equally applicable to the present appeals. In reliance partly on the decision in *Shaw* v. *Director of Public Prosecutions* (4) counsel for the Crown submitted a proposition which H deserves to be recorded, particularly as both counsel for Quinn and counsel for Bloom were content to accept it as a correct statement of principle:

> " A disorderly house is a house conducted contrary to law and good order in that matters are performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency or (b) tends to corrupt or deprave or (c) is otherwise calculated to injure the public interest so as to call for condemnation I and punishment."

Subject to two comments, we are of opinion that this statement of principle is correct in law. In the first place in the two appeals now before us the whole essence of the charge against the appellants was that indecent performances had taken place, and it was in relation to such a disorderly house that counsel

(1) (1762), 2 Burr. 1232.
(2) (1927), 20 Cr. App. Rep. 38.
(3) (1866), L.R. 1 C.C.R. 21.
(4) [1961] 2 All E.R. 446.

for the Crown's statement of principle was put forward. A charge of keeping a disorderly house may be preferred on some ground other than indecent performances and, in our opinion, the statement of principle must be regarded as limited to cases in which indecent performances or exhibitions are alleged.

Secondly, the statement contains three phrases expressed as alternatives which, for convenience, we have lettered (a), (b) and (c). In our view, these phrases should not be regarded as mutually exclusive; on the contrary, a case may well fall within all three. In this connexion we refer to the following passage in the speech of VISCOUNT SIMONDS (5):

> "It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another, considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct . . . When LORD MANSFIELD, speaking long after the Star Chamber had been abolished, said (6) that the Court of King's Bench was the custos morum of the people and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare."

Counsel on behalf of Bloom strenuously contended that charges of this sort must be considered objectively and not subjectively. As we understood it, his argument was that a juror should be directed to put on one side his own personal feelings on the matter and approach it objectively. If the word "subjective" and "objective" are introduced into the discussion at all (which for our part we deprecate as they so often lead to confusion), we think that any juror's view must be subjective to him, though he should be warned (as these jurors were) that he must approach the matter as an ordinary reasonable citizen putting on one side as far as possible any particular prejudice he may have. Once again we quote from *Shaw* v. *Director of Public Prosecutions* (7), in which each member of the majority referred to juries, and where LORD HODSON said (8):

> "Since a criminal indictment is followed by the verdict of a jury, it is true that the function of custos morum is, in criminal cases, ultimately performed by the jury by whom on a proper direction each case will be decided. This, I think, is consonant with the course of the development of our law . . . In the field of public morals, it will thus be the morality of the man in the jury box that will determine the fate of the accused but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law."

Before we deal with the summing-up in either case, we should dispose of the second question raised in Quinn's certificate of appeal, which relates to the admissibility in evidence of a film taken three months after the events complained of. There were no doubt cogent reasons why the film could not be taken at an earlier date, but they do not in the least affect the question of admissibility. Counsel for Quinn's first application at the trial was that the jury should be allowed to see the film at the appellant's premises, but the chairman rightly rejected this suggestion, and counsel for Quinn then applied that the film should be exhibited within the precincts of the court. The film was intended to portray what three of the performers actually did in the course of their acts, and evidence was apparently available to the effect that the performances shown in the film were identical with the performances on the occasions complained of. The chairman rejected the evidence on the ground that it was inadmissible, and we

(5) [1961] 2 All E.R. at p. 452.
(6) In *R.* v. *Delaval*, (1763), 3 Burr. at p. 1438.
(7) [1961] 2 All E.R. 446.
(8) [1961] 2 All E.R. at p. 468.

A agree with this. The film was in essence a reconstruction of the alleged crime and, quite apart from the interval of three months, we think that evidence of this type is inadmissible.

It is, of course, true that demonstrations are frequently given by witnesses in the witness-box to show what was done at the material time. For example, the way in which a blow was struck is often demonstrated, but such demonstra-
B tions usually take place in the witness-box, take place in the presence of the jury, and are intended to illustrate one act. In our view, such demonstrations are altogether different in character from a reconstruction of an entire scene, a reconstruction which has been brought into existence in private for the purpose of constituting evidence at a trial. It is obvious that to allow such a reconstruction would be introducing a method of proof which would be most unsatis-
C factory for the reason that it would be almost impossible to analyse motion by motion those slight differences which may in the totality result in a scene of quite a different character than that performed on the night in question. Indeed, in this case, it was admitted that some of the movements in the film (for instance, that of a snake used in one scene) could not be said with any certainty to be the same movements as were made at the material time. In our judgment, this
D objection goes not only to weight, as was argued, but to admissibility: it is not the best evidence.

The learned chairman's summing-up in each case was subjected to considerable criticism. In fairness to him it should be mentioned that no complaint was or, indeed, could be made either as to his direction on the burden of proof or as to his summary of the relevant evidence. The complaints related to his direction
E on the main issue, namely, what is meant in law by keeping a disorderly house.

In Bloom's case there are two passages, one at the start and the other at the end of the summing-up, where the learned chairman was in effect giving a general direction on law. In the first passage he said:

> "If you come to the conclusion on the facts . . . that what was being portrayed here was obscene, lewd, disgusting, lascivious, and so on, then
F that conduct would amount to a public mischief, that is to say, conduct against ordinary decent public ethics. If that were so, it would be a public mischief . . ."

In the later passage he said:

> "Now you have got to make up your minds, as ordinary common-sense
G people, what was going on. Was it lewd, obscene, something which would disgust you as ordinary reasonable citizens? Because if it was then that would be bawdy conduct and . . . that would be a disorderly house."

It is true that in the course of this summing-up the definition of "obscene" now incorporated in the Obscene Publications Act, 1959, s. 1 (1) (having a tendency to deprave and corrupt) was not brought to the notice of the jury, although
H the word itself was used several times. But while in our view as a general rule it is desirable to mention the definition, if the word "obscene" is used, the omission on this occasion was not in our view of any great consequence. In our view, the effect of the passages which we have cited was to present the issue to the jury in a form consistent with the principles to which we have already referred, and we see no reason to suppose that the jury failed to understand their
I task.

In Quinn's case the learned chairman used slightly different language in directing the jury what is meant by a disorderly house. At the start he said:

> "There is a great variety of disorderly houses, but so far as this case is concerned if you come to the conclusion that this place, this club, consisted of premises upon which there were performed acts of a lewd, disgusting, depraving and debauching nature, that would constitute a disorderly house, because those sort of things going on on premises of that sort would

be against public policy, against the common law which is the etiquette of this country. Here the prosecution go further, because they say that not only was this performance disgusting, lewd and lascivious, but it was also obscene. For a performance to be obscene means something which tends to corrupt or deprave . . ." A

In this passage he was drawing a distinction between the phrases which we have lettered (a) and (b) in counsel for the Crown's statement of principle (9), and in our view the earlier part of this passage is consistent with the phrase lettered (a) and possibly with the phrase (c). In any event, we are of opinion that in this passage the issue was presented to the jury with sufficient clearness for them to appreciate what the charge involved. But having drawn this distinction at the start of his summing-up, the learned chairman used the word " obscene " on a number of occasions, and then concluded by saying: B C

" Are you driven to the conclusion that what was taking place night after night in that club was a filthy, obscene, lewd, disgusting, corrupting and depraving show? If it was, then you ought to convict. If there is any reasonable doubt about it, then he ought to be acquitted."

In this passage the learned chairman, in contrast with the earlier passage, made obscenity an essential element and to that extent may be said to have been confusing. But in our view if it was confusing at all, it was confusing in the appellant's favour as the issue left at the end of the summing-up involved a finding of obscenity if the appellant was to be convicted. We venture to emphasise the danger of multiplying offensive adjectives, the result of which may be to expose the summing-up to criticism which it does not really deserve. In our view, as in Bloom's case, the substance of the summing-up was correct, and we can see no reason to set aside the conviction of Quinn. D E

There remains Bloom's appeal against sentence. He was fined £2,500 and ordered to pay 100 guineas costs, the chairman saying to him: " You went into this with your eyes open, I am quite satisfied ". So are we. The brochure issued by Bloom speaks for itself: " We guarantee to members and their guests the spiciest evening of their lives ". It is true that the offending scenes were cut out as soon as the police complained; but in our view the penalty imposed was amply justified, not least as a deterrent to others who may be minded to exploit what is said to be a current craze for strip-tease. F

[Counsel for Quinn then addressed the court and asked leave to appeal to the House of Lords under s. 1 of the Administration of Justice Act, 1960.] G

ASHWORTH, J.: This court has most carefully considered the application for leave to appeal to the House of Lords, but is unable to certify that a point of law of general public importance is involved in the decision. Accordingly, leave to appeal is refused.

Appeals dismissed.

Solicitors: *Stanley S. Levene* (for the appellant Quinn); *Kingsley Napley & Co.* (for the appellant Bloom); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

(9) See p. 91, letters H and I, ante.

A

MAXFIELD v. LLEWELLYN AND OTHERS.

[COURT OF APPEAL (Ormerod, Upjohn and Davies, L.JJ.), June 14, 15, 1961.]

Tort—Joint tortfeasors—Contribution—Assessment in absence of party possibly liable for contributory negligence—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5 *c.* 30), *s.* 6 (2).

B

Where a court finds that several defendants are liable as joint tortfeasors in damages to the plaintiff, and a defendant so found liable applies for contribution, it is the duty of the court, under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2)*, to make an assessment of the contribution which each defendant found liable should make according to his share of blameworthiness; and in making this assessment the court assesses the damage as between those who have been found liable for it, regardless of the possible liability for contributory negligence of a person not a party to the action who has not been found liable.

C

[As to contribution between joint tortfeasors, see 11 HALSBURY'S LAWS (3rd Edn.) 315, para. 511.

D

For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, see 25 HALSBURY'S STATUTES (2nd Edn.) 359.]

Appeal.

A post office van was parked on a country road at a bend in such a position that a cattle truck travelling along the road was forced largely onto its wrong side of the road while rounding the bend. On the bend the truck collided with a motor cycle, which was travelling in the opposite direction and on its correct side of the road. As a result of the collision both the driver of the motor cycle and his pillion passenger died. In an action by the pillion passenger's widow and personal representative, under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1959, against both those responsible for the driving of the cattle truck (the third and fourth defendants) and those responsible for the parking of the post office van (the first defendant being the person in charge of the van and the second defendant being Her Majesty's Postmaster-General) STABLE, J., on June 23, 1960, at Shrewsbury, assessed the widow's damages at £7,538 15s., held that those responsible for the parking of the post office van were not guilty of negligence and that the negligent driving of the cattle truck was a cause of the accident, and, accordingly, gave judgment for the plaintiff against the third and fourth defendants for £7,538 15s., and for the first and second defendants against the plaintiff, and rejected the third and fourth defendants' claim, under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2)*, for contribution against the first and second defendants. Neither the deceased motor cycle driver, nor his personal representatives, were parties to the action, but there was some evidence which suggested that the motor cycle driver might have been going too fast, and so have been partly responsible for the accident.

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The third and fourth defendants now appealed both against the quantum of damages awarded, and against the finding of STABLE, J., that the first and second defendants were not liable in negligence, and against his consequent refusal of contribution against them. The case is reported solely on the point, taken by counsel for the first and second defendants, whether, even if those defendants were liable in damages for negligence to the plaintiff, s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935*, empowered the court to order contribution against them in an action to which one person (namely the motor cyclist or his representatives) whose negligence contributed or might have contributed to the accident, was not a party.

I

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* Section 6 (2) is printed at p. 96, letter F, post.

G. K. Mynett, Q.C., and *P. H. Layton* for the third and fourth defendants, responsible for the driving of the cattle truck. A

A. E. James, Q.C., and *J. R. Arthur* for the plaintiff.

M. A. B. King-Hamilton, Q.C., and *F. W. I. Barnes* for the first and second defendants, responsible for the parking of the post office van.

ORMEROD, L.J., stated the facts, held that the damages awarded, B although large, were not so wholly erroneous as to justify alteration by an appellate court, and further held that in the particular circumstances of this case those responsible for the post office van should have taken precautions to lessen the danger of collision between passing vehicles, and that their negligent failure to do so was a cause of the accident. HIS LORDSHIP then continued: A point, which is made by counsel for those responsible for the post office van C and with which I think that I should deal, is that, if there is blame on those in charge of the van, then although it is the duty of a court to apportion the blame between the parties, yet there cannot be apportionment unless all the parties are before the court or, at any rate, unless the action of all parties is considered. That would mean not only that we would have to consider the position of the person in charge of the van and the driver of the cattle truck but that we would D have to consider also the evidence relating to the driver of the motor cycle and the amount of negligence, if any, for which he should be held to be responsible, and that unless that is done we cannot, according to counsel's submission, attempt to assess the respective responsibilities of the other defendants. It must be borne in mind that the driver of the motor cycle is not before the court; he was killed, but in any event his personal representatives are not E before the court; they were not parties to the action, and in those circumstances neither the driver nor anybody on his behalf has had any opportunity of dealing with the evidence from his point of view and putting forward any arguments which could properly be urged so far as his negligence was concerned, or, indeed, of calling any available evidence which might be of assistance to him. The section of the Law Reform (Married Women and Tortfeasors) Act, 1935, to F which counsel for those defendants responsible for the van draws attention, is s. 6 (2) and the part of the section to which he refers is this:

> "In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage . . ." G

Counsel emphasises the words "having regard to the extent of that person's responsibility for the damage". In counsel's submission the whole of the circumstances must be considered, the liability of anybody who could possibly be liable must be taken into account, and then and only then can a proper assessment be made. I should say here that this submission of counsel on H behalf of those defendants responsible for the van, interesting as it was, was not received with any very great sympathy by the various members of this court, and, indeed, it does appear, if the submission is right, to be a construction of the section which would give rise to very many anomalies. That does not mean that the construction must necessarily be put aside but it cannot be the proper construction of this section. It appears to me that the court must have I regard to a person's responsibility for the damage having regard to the parties who are before the court and whose share of the damage can be taken into account, who have had the opportunity of putting arguments for and against their share of blame and generally of being heard in the action. In those circumstances for my part I would reject counsel's interesting submission and say that it is the duty of the court on finding more than one defendant liable to make an assessment of the contribution which each defendant should make according to his share of blameworthiness.

A We have had to consider the whole of the facts in this case and, having considered those facts, I have come to the conclusion, disregarding entirely any negligence of which the driver of the motor cycle may have been guilty, that the greater blame lies on the driver of the cattle truck and I would therefore apportion the blame as to two-thirds to the driver of the cattle truck and one-third to the second defendant, H.M. Postmaster-General, and the defendant Llewellyn, B who was in charge of the post office van. The effect of that is this. I would dismiss the appeal so far as it related to quantum of damages and leave the damages as they are, but I would allow the appeal so far as the third and fourth defendants are concerned on the issue of contribution and would say that Llewellyn and H.M. Postmaster-General, the first and second defendants, should be liable to the extent of one-third of the damage.

C

UPJOHN, L.J.: I agree with the judgment which has just been delivered and with the apportionment proposed. [HIS LORDSHIP then agreed with the reasons of ORMEROD, L.J., for rejecting the appeal against the quantum of damages, agreed that those responsible for the post office van should, in the circumstances of this case, have taken precautions, gave examples of pre- D cautions which they might have taken, agreed that their negligent failure to take precautions was a cause of the accident, and that as between the van and the truck the van was one-third responsible for the accident. HIS LORDSHIP continued:] On the argument under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, it seems to me that if the argument of counsel for those defendants responsible for the van is correct, the section would be E unworkable. If each pair of defendants was to be found one-third responsible, it would mean that in the absence of the motor cyclist or his representatives, the two pairs of defendants could only recover from each other one-third and then it would be left to chance which of the defendants the plaintiff chose to proceed against who would be responsible for the remaining third attributable to the motor cycle. That makes the section virtually unworkable. Furthermore, F it would involve this, that the court would have to make an assessment of the liability of the driver of the motor cycle, he or his representatives not being present or parties to the action and having no opportunity through his representatives to give any explanation of the accident. It seems fundamentally contrary to the ideas of justice as administered in these courts that this court should have to assess liability for an alleged negligence which has never been alleged against G the party responsible, Furthermore, on looking at the whole section it seems to me clear that what the court has to do is to assess the damage as between those who have been found liable for it and if somebody has not been found liable, surely then he must be excluded from the computation. It seems to me in this case, therefore, that we have to consider first who are found to be liable and we have then to make some apportionment as may be "just and equitable having H regard to the extent of that person's responsibility for the damage". That must mean as between the two of them. That is, I think, reinforced by a consideration of sub-s. (1) because it is quite plain that unless some statute of limitation has run, even now the first and second defendants could bring an action, if they thought it was worth while, asking for contribution against the personal representatives of the deceased motor cyclist. That I think is quite plain from s. 6 I (1) (a), (1) and that seems to me how the section was intended to work.

I therefore agree with the order which has been proposed by ORMEROD, L.J.

DAVIES, L.J., considered the facts, agreed that those responsible for the van should have taken precautions and that their share of responsibility for the accident, as between them and those responsible for the truck, was one-third,

(1) Section 6 (1) (a) provides that judgment against one joint tortfeasor shall not bar action against the other joint tortfeasors; s. 6 (1) (b) provides for damages where more than one action is brought in respect of the same damage; and s. 6 (1) (c) provides that one joint tortfeasor may recover contribution against another.

and continued: So far as concerns the argument under the Law Reform (Married Women and Tortfeasors) Act, 1935, I do not wish to add anything at all save to say this, that I think that when ORMEROD, L.J., referred to the "anomalies" which would be likely to arise if the argument of counsel for those defendants responsible for the van was correct, my Lord was using a very euphemistic expression.

[HIS LORDSHIP then considered the quantum of damages awarded, and agreed that the appeal as to that should be dismissed.]

Third and fourth defendants' appeal as to contribution allowed: first and second defendants declared liable for one-third of the damages: appeal as to quantum of damages dismissed.

Solicitors: *T. J. Robinson & Son*, agents for *E. H. Grove & Co.*, Halesowen, Worcs. (for the third and fourth defendants); *Evan Davies & Co.*, agents for *Crampton, Pym & Lewis*, Oswestry (for the plaintiff); *Solicitor for the Post Office* (for the first and second defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

IVEAGH (EARL) AND OTHERS *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

[QUEEN'S BENCH DIVISION (Megaw, J.), June 22, 23, 30, 1961.]

Town and Country Planning—Building preservation order—Special architectural or historic interest—Whether architectural or historic interest of neighbouring buildings may be taken into account —Whether effect of demolition and replacement of building subject to the order on collation of buildings of which it was one relevant—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 29 (1).

In considering whether a particular building is of "special architectural or historic interest" within s. 29 (1)* of the Town and Country Planning Act, 1947, for the purposes of deciding whether to make a building preservation order, the particular building is not required to be viewed in isolation, but the architectural or historic interest of a number of related buildings, e.g., the buildings forming a terrace or square, may be a factor proper to be taken into account in determining the question as regards any one of their number (see p. 103, letters H and I, and p. 104, letter A, post).

The effect of the destruction of particular buildings on the area surrounding them cannot of itself create in those buildings special architectural interest within the meaning of s. 29 (1) (see p. 105, letter H, post); but where a building derives architectural interest from, or contributes architectural interest to, neighbouring buildings, any adverse effect, architecturally, which the demolition and replacement of the building may produce on the area including the neighbouring buildings is of evidential value in concluding whether the building itself is of special architectural interest, or (probably) of special historic interest, and is therefore a factor which can be taken into account in considering the question of special architectural or historic interest under s. 29 (1) (see p. 106, letters B and F, post).

Observations on the need for the reasons for confirming a local planning authority's order to be so stated as to indicate whether the minister had considered questions of construction and principle involved and to show with reasonable precision what view he had taken thereon (see p. 106, letter I, post).

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* Section 29 (1) is printed at p. 100, letter B, post.

A [For the Town and Country Planning Act, 1947, s. 29 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 534; and for the Town and Country Planning Act, 1959, s. 31, see 39 HALSBURY'S STATUTES (2nd Edn.) 1203.]

Motion.

This was an application by originating notice of motion, made pursuant to s. 31 of the Town and Country Planning Act, 1959, for an order quashing the County of London (Nos. 11 and 12, St. James's Square, Westminster) Building Preservation Order, 1959, made by London County Council, the second respondent, on July 27, 1959, and confirmed by the Minister of Housing and Local Government, the first respondent, on Oct. 14, 1960, and for an order that the costs of the application be paid by the respondents to the applicants. The application was made on the following grounds: (i) The building preservation order was not within the powers of the Town and Country Planning Act, 1947, in that Nos. 11 and 12, St. James's Square (hereafter referred to as "the buildings") had no special architectural or historic interest within s. 29 of the Act of 1947; the minister had not found that the buildings had special architectural or historic interest in themselves; the minister wrongfully took into consideration whether buildings other than the buildings in question should be preserved and wrongfully took into consideration the effect that the demolition of the buildings would have on other buildings not subject to the preservation order; the reasons given by the minister for differing from the views and not accepting the recommendations of the inspector appointed to hear objections to the order were not matters which could properly be considered under s. 29 of the Act of 1947, in deciding whether the buildings had special architectural or historic interest. (ii) The applicants had been substantially prejudiced by failure to comply with the relevant requirements of the Act of 1947 in that the objection made on behalf of the applicants to the confirmation of the preservation order on the grounds that the buildings had no special architectural or historic interest were not considered by the minister in the manner required by law.

The facts and the relevant provisions of the Town and Country Planning Act, 1947, are set out in the judgment.

J. R. Willis, Q.C., W. J. Glover and *J. C. Taylor* for the applicants.

J. R. Cumming-Bruce for the first respondent, the minister.

J. S. Daniel, Q.C., and *A. J. Butcher* for the second respondent, the London County Council.

Cur. adv. vult.

June 30. **MEGAW, J.**, read the following judgment: The applicants, who are the trustees of the Right Honourable Edward Cecil, Earl of Iveagh, K.G., deceased, are the owners of 11 and 12, St. James's Square, in the city of Westminster. These two buildings form part of the western half of the north side of St. James's Square. The north side of the square is pierced centrally by Duke of York Street. The part of the north side of the square running west from Duke of York Street presents an unbroken façade, beginning at Duke of York Street end with Nos. 9 and 10, which, together, are well known as Chatham House, continuing with Nos. 11 and 12, the buildings here in question, and ending, in the north-west corner of the square, with No. 13.

By a notice dated Aug. 27, 1959, London County Council, who are, and hereafter are referred to as, the local planning authority and who are the second respondents to this application, notified the applicants that it had submitted to the Minister of Housing and Local Government, the first respondent, for confirmation, an order making provision for the preservation of 11 and 12, St. James's Square, in accordance with s. 29 of the Town and Country Planning Act, 1947. I shall refer to that Act as "the Act". The statement of the grounds for confirmation of the order by the minister, accompanying the notice, was in the following terms:

"No. 11 St. James's Square, built in 1735-36, and later refaced, shares a uniform frontage with Nos. 9 and 10 (for which a building preservation order has been made) and the front, although now altered, is essentially that designed circa 1775 by the brothers Adam. No. 12 St. James's Square is said to have been built by Thomas Cubitt in 1836-37. Both houses retain internally some of their original features, and their demolition or alteration would be most detrimental to the preservation of the character of St. James's Square."

The relevant portions of s. 29 of the Act are as follows:

"(1) If it appear to a local planning authority that it is expedient to make provision for the preservation of any building of special architectural or historic interest in their area, they may for that purpose make an order (in this Act referred to as a 'building preservation order') restricting the demolition, alteration or extension of the building . . .

"(2) Provision may be made by a building preservation order—(a) for requiring the consent of the local planning authority to be obtained for the execution of works of any description specified in the order . . .

"(3) A building preservation order shall not take effect until it is confirmed by the minister, and the minister may confirm any such order either without modification or subject to such modifications as he considers expedient: Provided that no such order shall be made by the local planning authority, or confirmed by the minister, unless he or they is or are satisfied that the execution of the works specified in the order would seriously affect the character of the building."

"Building" is defined (if "definition" is the right word) in s. 119 (1) of the Act as including "any structure or erection and any part of a building as so defined . . ." No suggestion has been made on this application that there was any irregularity in the inclusion of Nos. 11 and 12 together in one single preservation order.

The effect of para. 1 of the preservation order was that the applicants, as owners of the property, would be debarred, without the consent of the local planning authority from demolishing the buildings or doing any works therein which would affect the structure or any architectural detail of any part of the exterior or of the interior of the buildings. The applicants, who consider the buildings to be unsuitable in present-day conditions, desire to demolish both buildings and to replace them by more up-to-date and convenient office buildings, which they are satisfied, on the advice of a distinguished architect, they could do in a suitable and seemly manner.

As appears from s. 29 (3) of the Act, the preservation order required confirmation by the minister. The applicants, as they were entitled to do, made objection to the order by letter to the minister dated Sept. 23, 1959. In accordance with the procedure laid down in the Town and Country Planning (Building Preservation Order) Regulations, 1948 (S.I. 1948 No. 1766), the minister appointed Mr. M. B. Tetlow to hold a public local inquiry and to report to the minister. The inquiry was held on Jan. 26, 1960, and submissions were made and evidence tendered on behalf of the applicants and the local planning authority, including the evidence of distinguished architects on one side and the other.

On Feb. 1, 1960, Mr. Tetlow submitted his report to the minister. By that report, Mr. Tetlow recommended that the order should not be confirmed. In view of the questions which now arise, I should mention that the applicants, at the inquiry, made submissions as to the construction of s. 29 (1) of the Act. The inspector, Mr. Tetlow, said in his report that he did not consider himself competent to advise on the merits of those submissions, which no doubt raised substantially the same questions of law as those which I shall have to consider hereafter.

The minister, by letter dated Oct. 14, 1960, sent on his authority, notified the applicants that, differing from the recommendation of his inspector, he had decided

A to confirm the building preservation order. The letter is to be treated as the statement of the minister's reasons for his decision, in accordance with the requirements of s. 12 of the Tribunals and Inquiries Act, 1958. The important part of the letter, for present purposes, is the third paragraph from the end, in which the minister's reasons and conclusions are set out. I propose to read it, and in so doing I shall break it up into its component sentences, giving a number B to each sentence for ease of reference hereafter:

First sentence: "The minister has taken note of the inspector's views and recommendation, but he has come to a different conclusion, for the following reasons."

Second sentence: "The buildings are situated in the least spoilt corner of one of the most famous of the historic squares in central London and C form part of a continuous frontage presenting the general appearance of the square as it existed in the late eighteenth and early nineteenth centuries."

Third sentence: "The minister considers that the character of this part of the square should be preserved if at all possible, and that it would be seriously impaired by the destruction of Nos. 11 and 12."

D Fourth sentence: "He is satisfied that in their context these buildings possess a considerable degree of special architectural and historic interest, and he has accordingly decided to confirm the building preservation order."

It is to be noted that the minister's letter nowhere mentioned the submission of law by the applicants which had been referred to in the inspector's report.

E The applicants now, by notice of motion, move this court to quash the minister's decision, under s. 31 (1) (a), (3) (d) and (5) (b) of the Town and Country Planning Act, 1959. It is unnecessary to read the notice of motion (1). The essence of the applicant's contentions is that, taking the minister's reasons by themselves, or read in the light of the inspector's report and the local planning authority's contentions, the minister has exceeded his powers, because it can be shown that F he has taken into account, as reasons for arriving at his decision to confirm the preservation order, matters which he was not entitled to take into account.

First, it is said that, in arriving at his conclusion that 11 and 12, St. James's Square have special architectural interest, the minister has not considered merely the architectural interest, if any, of these buildings themselves; but that he has either based his decision on, or has at least taken into account as a relevant G factor, the architectural interest of the square as a whole, or of the north-west corner of the square, or of other buildings in the north-west corner of the square. That, it is said, he was not entitled to do. The same consideration is urged by the applicants as regards the minister's decision that 11 and 12, St. James's Square have "special historic interest", with, here, the additional factor put forward by the applicants that the local planning authority did not base its case H on "special historic interest" and that there was no suggestion in the inspector's report, or in the evidence tendered to the inspector, of any special historic interest —unless mere age, in one case going back only to 1836—can be regarded as of itself giving rise to "special historic interest".

Secondly, the applicants attack the minister's reasons because, they assert, these reasons show that one factor which at least contributed to his decision that I Nos. 11 and 12 have "special architectural or historic interest" was that their disappearance would "seriously impair the character of this part of square"— that is, presumably, the north-west part of the square. The applicants say that this is a matter which is wholly irrelevant to a decision under s. 29 (1) of the Act in relation to the special architectural or historic interest of the two buildings here in question.

Before I consider these two grounds, there are certain preliminary observations which I should make, which are of general relevance to the determination of the

(1) See p. 99, letters B to F, ante, for the terms of the notice of motion.

issues raised. The first observation is that I am in no way concerned with questions of weight of evidence or merits. It is certainly not for me to review the evidence which was before the inspector or the minister in order to consider whether I should reach the same or a different conclusion as to the special architectural or historic merit of the two buildings. It is no part of my task to consider whether it is or is not desirable that they should be preserved. The court is entitled to interfere with the minister's decision if, and only if, the minister has exceeded his powers (which is what is suggested in this case) or has seriously prejudiced the applicants by failing to comply with statutory or quasi-statutory requirements in reaching his decision.

Next, I should mention that counsel for the applicants sought to call my attention to provisions relating to compensation (2) where such an order is made. He sought to rely on the hardship which he said might arise, as one of the grounds for a submission that I should construe s. 29 (1), as he put it, " strictly "; that is to say, with a bias towards giving it a narrower, rather than a wider, scope. Counsel for the minister, on the other hand, submitted that I ought to give a " benevolent " construction to the section. In my judgment, no question of a strict or of a benevolent construction arises here. The subsection falls to be construed in accordance with the ordinary and natural meaning of the words, which are not susceptible of either strictness or benevolence.

Further, I do not think that any help is to be derived, on the questions of law which arise, from consideration of any such matters as the fact that in 1955 the local planning authority was prepared to give planning consent to the demolition of these buildings, but that it has now changed its view; or the fact that no preservation order has been made in respect of 13, St. James's Square; or the provisions of s. 30 of the Act (3), and the fact that Nos. 11 and 12 were treated as " Grade 3 ", or Supplementary List, buildings (3), in the sense explained by Mr. Bell in his affidavit on behalf of the minister. I shall not, therefore, say more about these matters.

The last preliminary observation which I would make is this: two things are in my view clear. First, the onus is on the applicants to show that the minister did exceed his powers. Secondly, if it should appear, from the terms of the letter conveying the minister's decision and his reasons, that the minister applied a test which was wrong in law, or took into account matters which in law he ought not to have taken into account, then it would be established that the minister had exceeded his powers and the decision should be quashed.

I now come back to the applicant's first ground of attack on the minister's decision, which I have already stated (4). It is clear, and I do not think that it is disputed, that the minister, in arriving at his decision, took into account something more than the mere architectural interest of Nos. 11 and 12, viewed by themselves, in arriving at his conclusion that these buildings had " special architectural interest ". If his conclusion had been that these two buildings, in themselves and by themselves, had special architectural merit, the conclusion would not have been open to challenge. However, when the minister's conclusion is expressed in the fourth sentence of the paragraph of his letter which I have already read, the words used are:

> " He is satisfied that *in their context* these buildings possess a considerable degree of special architectural and historic interest . . ."

(The emphasis on " in their context " is mine.) The words " in their context "

(2) See s. 29 (2) (c) of the Town and Country Planning Act, 1947.

(3) Section 30 of the Town and Country Planning Act, 1947, provides that lists of buildings of special architectural or historic interest shall be compiled or approved by the minister. In compiling a statutory list under s. 30, a provisional list is first drawn up dividing the buildings into three grades. Buildings classified in grade 3 are not included in the statutory list but in a supplementary list and are not therefore subject to s. 30 (6) which prohibits the execution of certain works on buildings included in a statutory list.

(4) See p. 101, letter F, ante.

A must, I think, be interpreted as meaning that the minister was not viewing the buildings, Nos. 11 and 12, merely in relation to their own architectural interest as buildings viewed in isolation. He was viewing them "in their context"; which must, I think, here mean "in relation to their surroundings"; in relation, that is, to the other buildings in the unbroken façade of the north-west part of St. James's Square. The "context" relates back (I shall have to consider B later whether it relates back exclusively) to the second sentence of the paragraph, which I shall read again:

> "The buildings are situated in the least spoilt corner of one of the most famous of the historic squares in central London and form part of a continuous frontage presenting the general appearance of the square as it existed in the late eighteenth and early nineteenth centuries."

C

If the minister had disregarded this "context", it cannot be assumed that he would have arrived at the same conclusion. He does not dissent from the views of his inspector, who appears to have taken the view that, considered by themselves, neither of these two buildings was of special architectural interest; though it is fair to say that there is some indication in the inspector's report that D he took the criterion of architectural merit, rather than architectural interest, as specified by s. 29 (1). Therefore, if the minister was wrong to take account of the "context"—the other buildings—as a factor contributing to the special architectural interest of 11 and 12, St. James's Square, the decision to confirm the preservation order would be based, in part at least, on the wrong test, in law, or on the taking into account of matters not properly to be taken into account; and E the decision would fall to be quashed.

Counsel for the applicants contends that the buildings which are the subject-matter of the preservation order, Nos. 11 and 12, must be looked at alone and by themselves. That, he says, is the fair and proper construction of s. 29 (1) of the Act, reinforced by the provisions of s. 29 (3), with its reference to "the character of the building". "The character", he says, must be the individual character F which it itself possesses by virtue of its own qualities. The minister must consider only whether these buildings themselves, viewed in isolation, have architectural or historic interest which can in his opinion properly be described as "special", by which is meant "outstanding". If, viewed by themselves, they do not have such interest, they cannot acquire it by association with, or in the context of, other buildings or in the general character of the locality.

G I do not think that that argument is right. In my view the architectural interest of a building, in many cases, cannot be divorced from its surroundings, whether they be the surroundings of topography or of other adjacent buildings. An architect who ignored these factors would, I should have thought, have been a bad architect. I am far from saying that in every case a building becomes of architectural interest, or of special architectural interest, because of its relation-H ship or propinquity to other buildings which are of architectural interest or of special architectural interest. I am, however, of opinion that, in considering the architectural interest of a particular building, it would be wrong to say that its architectural interest can in no circumstances be affected, and increased, by reason of neighbouring buildings. Thus, for example, if one considers a terrace of houses of architectural interest, it might well be that one of these houses, if it I were to be artificially considered as though it were standing alone in isolation, would not be considered by the viewer to be of "special architectural interest". Where, however, that self-same house is viewed by the same viewer as it really is—that is, as a part of a terrace—the viewer might reasonably hold the opinion that the house, in that context (to use the minister's word), is of "special architectural interest".

It follows that I hold that this first ground of attack on the minister's decision fails. He has not applied a test which is necessarily wrong, nor has he taken into account a factor which he could not properly take into account, in his conclusion

that in the context of the continuous frontage of the north-west part of St. James's Square, the buildings, Nos. 11 and 12, are of special architectural interest. A

The same considerations, in my opinion, apply as regards the minister's conclusion that Nos. 11 and 12 are of "special historic interest". The minister was entitled to have regard to the historic interest—if he thought it had historic interest—of St. James's Square as a whole, as a ground for attaching special historic interest to these two houses, which might not otherwise have had any, or special, historic interest. Even if, however, I should be wrong in that view, and different considerations should apply, as regards historic interest by association, from those considerations which, in my judgment, apply as regards architectural interest by association, it would not provide a ground for quashing the preservation order. The minister has given two grounds: special architectural interest and special historic interest. They are alternative grounds under s. 29 (1). If one is bad, but the other is good, the order stands. B C

I now come to the second ground of attack on the minister's decision. The applicants refer to the third sentence of the paragraph containing the minister's reasons. I read it again.

> "The minister considers that the character of this part of the square should be preserved if at all possible, and that it would be seriously impaired by the destruction of Nos. 11 and 12." D

Then follows the fourth sentence giving the minister's conclusions, and beginning—"He is satisfied that in their context these buildings possess a considerable degree of special architectural and historic interest". The applicants say that this shows that in reaching his decision the minister took into account, as a relevant factor, the serious impairment of the character of the north-west part of the square which he visualised would follow if these two buildings were to be destroyed. E

The applicants say that this is a factor which is not relevant, and which could not properly be taken into account by the minister in arriving at his conclusion as to the special architectural or historic interest of these two buildings, with which alone he was properly concerned. It was, they say, simply and exclusively the reasons given in this sentence which led the minister to differ from his inspector, who had expressed the view in his report that he would expect a competent architect to be capable of designing a substitute for Nos. 11 and 12 which would fit in with the picture presented by the buildings in the north-west part of the square. No other reason is given in the minister's decision, according to the applicants, which does not fit in with the inspector's conclusions. Hence, it must be assumed that this reason, given in the third sentence, was a determinant factor in moving the minister to arrive at the conclusion at which he did arrive. It was an irrelevant factor, because the special architectural interest of the two buildings cannot be determined by reference to what would be the effect on neighbouring property, or on a particular area, if they were to be demolished. Counsel for the applicants submits that that has nothing to do with the special architectural interest of these two buildings. Parliament could readily have provided, if it had been so minded, that the effect on a neighbouring area is a relevant factor. It has not, so the argument runs, done so, since the words of s. 29 (1) are not capable of being read as bringing into consideration anything other than the architectural interest possessed (it may be "in the context") by the buildings themselves. F G H I

The same argument applied as regards special historic interest, but I shall deal with it first separately as regards special architectural interest.

Counsel for the minister conceded, as I understand it, that the preservation order could not be supported, in respect of a building which did not have special architectural interest, merely because the preservation of the building was desirable in order to preserve the architectural, or other, character of the neighbourhood. That is to say, the reason given in the third sentence of the paragraph

A would not be enough to justify confirmation of the order. Counsel went on to contend, however, that the content of the third sentence was not, and should not be construed as being, a factor which affected the minister's decision. It was, he submitted, a perfectly true and valid statement. Just as a building may derive architectural interest from its surroundings, so a building may contribute architectural interest to its surroundings. Thus, the destruction of a building B may result in the lessening of the architectural interest in the area in which it stood. The minister, according to the construction put forward by counsel for the minister, not unnaturally referred to that fact; but he did not found his decision on it, in whole or in part. That construction, he submitted, was shown to be right by the words in the following, fourth, sentence "in their context"; because those words show that the minister, when he expressed his conclusion, was C referring back to what he had said in the second sentence.

Counsel for the local planning authority while prepared, if necessary, as an alternative argument to adopt the submission of counsel for the minister that the third sentence did not form part of the minister's reasons for confirming the preservation order, put forward as his primary submission on this part of the case, that the minister, in the circumstances, was properly entitled to take into account, D and did take into account, the matter referred to in the third sentence—the consequential serious impairment of this part of the square. Consider, he said, this group of buildings which has one unbroken façade, though with considerable variations as between the individual buildings in it. If, when two buildings are removed from that group, it is found that the group as a whole has a substantially less architectural interest than it possessed when the two buildings formed E part of it, the necessary conclusion is that what has been lost—namely, a degree of architectural interest—has been lost because it was formerly constituted by the two houses as a part of the group.

I do not regard this question as by any means easy or free from doubt, particularly as to the interpretation of the letter giving the minister's reasons. On balance, although for reasons which I shall give, it does not affect my ultimate F decision, I do not accept the submission of counsel for the minister as to the meaning and effect of the minister's letter. In my view, the minister, in arriving at the conclusion which he expressed in the fourth sentence, *was* founding himself, in part, on the factor to which he had referred in the immediately preceding sentence. I do not regard the words "in their context" in the fourth sentence as sufficiently clear or precise to warrant their being treated as an indication that G the minister was ignoring the factor to which he had immediately previously referred: namely, that the character of the north-west part of St. James's Square, or of St. James's Square as a whole, would be seriously impaired by the destruction of Nos. 11 and 12. I take the view that, on the true construction of the letter, the minister did have that matter in mind as one factor in arriving at his decision.

H I accept the view that, if the minister's decision had been founded wholly on the effect which the destruction of these two buildings would have had on the north-west part of the square, or of the square as a whole, the decision could not have stood. This factor cannot create a special architectural interest in the buildings, where no architectural interest in them otherwise exists. On the other hand, if there be otherwise an architectural interest in the buildings themselves I (including their "context"), any adverse effect, architecturally, which the demolition and replacement of those buildings might be expected to produce on the area in which they had stood—on the collation of buildings of which they once formed part—constitutes, in my judgment, some evidence which can properly be taken into account as to the degree of architectural interest which these buildings themselves possess. For that which will be lost will be lost by reason of the disappearance of these buildings. What will be lost is architectural interest. Therefore it is a fair conclusion that the amount of the loss which will follow is

at least some evidence of the measure of the architectural interest which the buildings themselves, in their context, now possess. A

When the minister, in the third sentence of the paragraph setting out his reasons, says: "the character of this part of the square . . . would be seriously impaired", I construe his words as including impairment in respect of architectural interest. Accordingly, in my opinion, the sentence in question does not indicate that the minister applied a wrong test or took into account a matter which he could not properly take into account. In that sentence he refers to a factor which was of some evidential value in arriving at a conclusion whether these two buildings were of special architectural interest. B

I take the same view as regards historic interest, though with more hesitation; more hesitation, because it may be said that there was before the minister no evidence of historic interest in relation to these two buildings themselves, and that a mere impairment of the general historic interest of the square as a whole, to which the minister referred, could not be a proper factor in leading to the conclusion that the buildings in question had a special historic interest. Again, however, if the conclusion as to special architectural interest cannot be successfully challenged, that fact is sufficient to support the preservation order. C

On that view of the matter, then, this attack also on the minister's decision fails. It is not for this court to consider the weight which ought to have been attached to that part of the evidence or to speculate whether or not the minister gave undue weight to it. Once the position is reached that it was a matter properly to be taken into consideration, then the minister's decision cannot be successfully attacked merely because he did take it into consideration, as in my view he must be assumed to have done. D

The two grounds of attack on the minister's decision in this case therefore fail: the first because the minister was not wrong in principle when, in considering the question of special architectural or historic interest of these buildings, he did so in the context of neighbouring buildings; and the second, because the effect of the demolition of these buildings on the character of the square, or part of the square, could properly be considered by the minister as being relevant to the degree of architectural, and probably also the degree of historic, interest of these buildings themselves. E F

There is one aspect of the case which, because of its general importance, I ought to mention. No one should, of course, underestimate the difficulties of expressing reasons for arriving at a conclusion which must often be largely a matter of opinion, perhaps a matter of aesthetic taste or sense of historical values. But in this particular case it was not merely a matter of opinion or taste or sense of historical value. The applicants had indicated in the inquiry before the inspector questions of principle as to the true construction of s. 29 (1) of the Act: that is, as to the matters which could properly as a matter of law be taken into account in arriving at a conclusion as to the special architectural or historic interest of these two buildings. I think that it was apparent what the general nature of these questions was. If it was not apparent, there was sufficient indication in the inspector's report to have enabled the minister readily to ascertain what the questions of principle were. G H

In these circumstances, it would have been desirable, and fairly to be expected, that the minister's letter, giving reasons for his decision, should indicate that he had directed his mind specifically towards those questions of construction and principle, and should show with reasonable precision what view he had taken on these matters in arriving at his decision; and that it should not leave scope for serious argument whether he had or had not taken into account such matters as the effect of the demolition on the character of a neighbouring area. Bearing in mind the argument put forward in this court on behalf of the minister, that the sentence in the minister's letter which immediately preceded his statement of his conclusion should not be taken as being one of the reasons for that conclusion, and bearing in mind the legitimate scope of argument as to the I

A meaning and effect of other parts of the same paragraph, I hardly think that this statement of the minister's reasons can be regarded as having achieved the desirable standard of clarity and precision.

The reasons are given in pursuance of a statutory duty imposed by s. 12 of the Tribunals and Inquiries Act, 1958, in order that an aggrieved party may know, and, if necessary, a court may decide, whether the minister's decision has or has B not been reached as a result of the application of correct principles of law and correct construction of the relevant enactment. The onus is on the applicant to show, if he can, that the principle applied or the construction adopted is wrong. If the reasons are not clearly stated, so as to show with precision what principle has been applied or what construction has been adopted (at least where it is known that there is an issue on these matters), the purpose of Parlia- C ment in enacting s. 12 of the Tribunals and Inquiries Act, 1958, may be thwarted, and an aggrieved party—possibly with much at stake—may in effect be fighting with one hand tied behind his back, because the onus is on him to show an error of principle. Difficulty of interpretation or obscurity of the stated reasons may effectively conceal or disguise an error of principle.

In the result I have found my task in this case difficult: not so much in the D construction of s. 29 (1) of the Act as in the interpretation of the minister's stated reasons. Nevertheless, for the reasons which I sought to indicate the applicants have failed to establish to my satisfaction in this case that the minister has applied a wrong principle or has acted in excess of his powers in reaching his decision.

The application to quash the preservation order accordingly must be dismissed. E *Motion dismissed.*

[Counsel for the local planning authority said that in this type of case it was the practice to order the unsuccessful applicant to pay only one set of costs, and in the circumstances of this case counsel asked that the authority should have their costs. Counsel for the minister submitted that where it was unnecessary for both the minister and the local planning authority to be represented at the F hearing (5), the costs were in practice awarded to the minister.

HIS LORDSHIP said that he would have thought, where there was no conflict of interest, that the minister and the local planning authority could be represented by the same counsel. In the circumstances of the present case HIS LORDSHIP would order the applicants to pay the costs of the local planning authority and would make no order as to costs in respect to the minister.]

Solicitors: *Travers Smith, Braithwaite & Co.* (for the applicants); *Solicitor, Ministry of Housing and Local Government* (for the first respondent); *Solicitor, London County Council* (for the second respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(5) Under R.S.C., Ord. 55B, r. 74 (1) (iii), a notice of motion taken out under s. 31 of the Town and Country Planning Act, 1959, must be served on both the minister and the authority directly concerned.

CURRAN *v.* WILLIAM NEILL & SON (ST. HELENS), LTD.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), June 1, 2, 5, 6, 1961.]

Building—Building regulations—Scaffolding—Gutter under construction—Part of permanent building—Hook holding support of gutter defective—Latent defect—Accident not foreseeable—Working place—No guard-rail—Absence of guard-rail not cause of accident—Whether gutter a "gangway"—Whether work could "safely be done" (reg. 5)—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *regs.* 3 (2), 5, 7 (1) (4), 8 (1), 12 (2), 24 (1).

The plaintiff was employed by the defendants, a firm of steel erectors, in constructing a gutter between two of the twelve bays in the roof of a factory building. The gutter consisted of ten-feet lengths each of which had an overlay intended to be bolted to the adjoining length. Owing to a demarcation dispute between the workmen, the lengths were merely put in position and not bolted together, but were secured by hook bolts which were bolted to steel straps which ran laterally across the gap between the two bays, three such straps supporting each length. The plaintiff walked along a length of guttering, which had been fixed to the lateral straps, in order to lay the next length into its place. A hook bolt broke, and the length of gutter pivoted, causing the plaintiff to fall twenty-three feet to the ground, and he was injured. The bolt was defective, but its breaking could not have been foreseen, and the court found that the defendants were not negligent. The plaintiff claimed damages for breach of statutory duty seeking to rely on the Building (Safety, Health and Welfare) Regulations, 1948, regs. 5, 7, 8, 12 and 24*.

Held: the plaintiff could not recover damages by reason of any breach of statutory duty under the Regulations of 1948 for the following reasons—

(i) although the defendants were in breach of reg. 24 (1), because the gutter was a working place from which a person was liable to fall more than six feet six inches and no guard-rail had been provided, yet, on the facts, the breach, viz., the absence of a guard-rail, did not cause the accident.

(ii) the test whether work could "safely be done" within reg. 5 was whether, on all the facts known or which ought to have been known, the doing of the work involved foreseeable risk; in the present case the doing of the work from the gutter did not involve such risk and there was, therefore, no breach of reg. 5 in that scaffolds were not provided.

(iii) (a) (per HOLROYD PEARCE and PEARSON, L.JJ.), the duty imposed on employers by regs. 7, 8, and 12 (2) was absolute and was not a duty which had to be performed merely within the limits of knowledge and foresight; but the defendants were not in breach of reg. 7, reg. 8 or reg. 12 (2) because the gutter, although not disqualified by its permanence from being a working platform or gangway within reg. 3 and thus a scaffold, was not, in the normal sense of words, a "working platform or gangway" within the definition of scaffold in reg. 3 (2), and, accordingly, neither reg. 7 nor reg. 8 (which related only to scaffolds) nor reg. 12 (2) (which applies also to "working platforms, gangways or runs") applied to the gutter.

(b) (per WILLMER, L.J.), the term "scaffold" in reg. 3 (2), reg. 7 and reg. 8 did not extend to structures that were not temporary and thus these regulations did not extend to the gutter in the present case, and, though reg. 12 (2) extended to structures that were not temporary, yet it also did not extend to the gutter because the gutter was not a "gangway" within reg. 12 (2).

Appeal dismissed.

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* The relevant terms of these regulations are printed respectively at pp. 111, 112, 110, post.

A [As to the statutory obligations concerning scaffolds and working places, etc., see 17 HALSBURY'S LAWS (3rd Edn.) 126, para. 206.

For the Building (Safety, Health and Welfare) Regulations, 1948, regs. 3, 5, 7, 8, 12 and 24, see 8 HALSBURY'S STATUTORY INSTRUMENTS 211, 213, 215, 220.]

Cases referred to:

B *Bath* v. *British Transport Commission*, [1954] 2 All E.R. 542; [1954] 1 W.L.R. 1013; 24 Digest (Repl.) 1063, *257*.

Bonnington Castings, Ltd. v. *Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613; [1956] 2 W.L.R. 707; 3rd Digest Supp.

Burns v. *Joseph Terry & Sons, Ltd.*, [1950] 2 All E.R. 987; [1951] 1 K.B. 454; 114 J.P. 613; 24 Digest (Repl.) 1056, *222*.

C *Hamilton* v. *National Coal Board*, [1960] 1 All E.R. 76; [1960] A.C. 633; 124 J.P. 141; [1960] 2 W.L.R. 313.

Smith v. *Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 24 Digest (Repl.) 1087, *396*.

Tasmania (Ship Owners & Freight Owners) v. *Smith, etc., City of Corinth (Owners), The Tasmania*, (1890), 15 App. Cas. 223; 63 L.T. 1; 6 Asp. M.L.C. 517; 41 Digest 708, *5446*.

D **Appeal.**

This was an appeal by the plaintiff from an order of ARTHIAN DAVIES, J., dated May 10, 1960, dismissing the plaintiff's action for personal injury caused by the defendants' alleged negligence and breach of statutory duty. The learned judge found that there was no negligence on the part of the defendants, that there E was a breach of reg. 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, but that that breach did not cause the accident. The plaintiff appealed only on the ground of breach of statutory duty and asked the Court of Appeal for leave to amend the statement of claim to enable him to rely on regs. 7 (1) (4), 8 (1) and 12 (2) of the Regulations of 1948.

F. W. Beney, Q.C., and *P. Curtis* for the plaintiff.

F *R. H. Forrest, Q.C.*, and *R. Murray* for the defendants.

June 6. The following judgments were read.

HOLROYD PEARCE, L.J.: The plaintiff appeals from an order of ARTHIAN DAVIES, J., who dismissed his claim for damages for common law negligence and breach of statutory duty. There is hardly any dispute on the facts. G The plaintiff, while at work, fell twenty-three feet on to a concrete floor and was badly injured. He was an experienced steel erector, thirty-eight years of age, employed by the defendants, and it is not suggested that he was in any way at fault. The accident was due to the failure of a defective hook bolt bought from an independent supplier whom the plaintiff, no doubt for good reasons, has not sued. The defendants were sub-contractors for steelwork on a factory that was H being erected. Work was in progress on a large shop one hundred feet long, with twelve bays. The framework had been put up, but the roofing had not been put on, nor had the windows been put in. Each bay was to have a gently sloping roof of corrugated iron on one side of the ridge and a steeply sloping row of windows on the other. There were eleven valley gutters between the bays, and the workmen had completed the majority of them. The valleys were constructed thus. The I purlin at the eave of the roof which had windows was two feet three inches away from the purlin at the eave of the adjoining bay. To bridge this gap of two feet three inches, hook bolts were suspended from the eave purlins on either side of it. The hook bolts were bolted to steel straps which ran laterally across the gap at intervals. On these straps were laid ten-feet lengths of guttering, weighing 2½ cwt. each, three straps supporting each length. The lengths were roughly U-shaped troughs with one six-inch vertical side and one seven-inch sloping side, and the flat bottom of the trough was nineteen inches wide. Each length of gutter had an overlay destined to be bolted to the adjoining length to prevent leakage

of water between the lengths. But at this time the lengths were merely fitted in position and not bolted together by the overlay, since there was a trade demarcation dispute whether plumbers or steel erectors were entitled to bolt them together. Thus the heavy guttering depended on the hooks attached to the purlins to keep it in position. If they broke, the guttering would fall to the ground twenty-three feet below. The hook bolt which caused this accident was made of mild steel, with a hook end. It was said that the hook should have been turned when hot, but that it was in fact turned when cold. Whatever the cause, the hook bolt was faulty and failed to bear the strain.

The plaintiff, with another erector Holmes and a foreman Plevin, was putting the gutter in position. They had already fixed the hooks and attached to them the transverse steel straps. A crane hoisted the first length of gutter to its position on the steel straps. When that was laid, the crane deposited the second length of gutter on it. Two of the men then carried the second length. The third man went along a catwalk on the inside of the unglazed windows and put rollers across the purlins as supports on which the others could rest the gutter while placing it correctly. One of the men stood in front straddling the purlins and let down the length of gutter in its exact position when the roller was withdrawn. They put down seven lengths, taking turns as to the various tasks. In dealing with the eighth, Plevin went along the catwalk. The plaintiff walked along the guttering already laid, with his hands behind him, holding the front end of the eighth length of gutter. Holmes took the rear end and walked along the gutter holding it in front of him. As the plaintiff trod on the nearest end of the seventh length, one bolt snapped beneath him, the other bolt could not take the strain, and the supporting strap gave way. The seventh length of gutter pivoted on the central strap and let the plaintiff down. The plaintiff and both lengths of gutter crashed on to the floor.

The plaintiff claimed in negligence, but the judge found that the defendants could not foresee the failure of the bolt and that there was no negligence at common law. Against that finding there is no appeal. The plaintiff also claimed, unsuccessfully, that the accident had been caused by the defendants' breaches of various building regulations, and he contends in this court that he should have succeeded.

The judge held that there had been a breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 24 (1), of which the relevant words are,

> ". . . every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided with a suitable guard-rail or guard-rails of adequate strength, to a height of at least three feet above the platform or place and above any raised standing place on the platform . . ."

He held that the gutter from which the men were working was a working place and that the failure to provide a guard-rail was therefore a breach of reg. 24 (1). But he held that that breach was not the cause of the accident, since a guard-rail would not have prevented it. He said this:

> "The plaintiff said in his evidence that if a guard-rail had been there he might have had a chance to grip it and let go the gutter when he felt himself go. He tried to grip the purlins just about his ankle. It is difficult to see how if, as he went down, he failed to grip the purlins, he had any chance at all of grasping something three feet above, allowing for the time lag in human reaction. One would imagine that by that time he would be well below and out of reach of such a guard-rail. I do not think it is possible to say that if there had been a guard-rail here it might have prevented the accident, or rather that the absence of a guard-rail was the cause of this accident. It has been said that the court ought not to be astute to find that an accident was due to some other cause. With very great regret, therefore,

A I have come to the conclusion that the plaintiff has failed to make out his case."

I share the same view and feel the same regret. I agree that one should not be astute to find that the breach did not cause the accident; but that only means that one approaches with benevolence and sympathy the argument put forward by the plaintiff. That approach may well have an influence in a matter that B depends, as this does, not on cold logic, but on imaginative reconstruction of events. Nevertheless there is an onus on the plaintiff to show that his injury was caused by the breach of regulation (see *Bonnington Castings, Ltd.* v. *Wardlaw* (1)). However benevolently one approaches the plaintiff's argument that he could have succeeded in grasping a guard-rail though he failed to grasp the two parallel purlins beside him, I, like the learned judge, am unable to accept it. C When the plaintiff started to fall he had both hands heavily weighted behind him, and I cannot believe that his reactions could be quick enough to enable him as he fell to let go the length of gutter and raise his hands to reach any rail above the purlins.

The other regulations relied on were reg. 5 and reg. 27 (2). Regulation 5 provides:

D "Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work." E

It was argued that the work here in question could not safely be done from the gutter and that therefore a scaffold should have been provided. The judge held that it was not impossible to fix a scaffold, although it might have been "extremely expensive" to do so and "quite out of ordinary practice". He held that the work could safely be done from the gutter, which in his view was part of the build- F ing. Therefore there was no obligation to erect scaffolding. He rejected the argument that the test whether work can be safely done is objective and that work cannot be safely done if, though safe on any reasonable prognosis, it turns out to be unsafe through some unforeseeable occurrence. I agree with the learned judge. In deciding the question whether machinery is dangerous under s. 14 of the Factories Act, 1937, the question is whether on all the facts which were G known or ought to be known it could be said to involve any foreseeable risks (see *Burns* v. *Joseph Terry & Sons, Ltd.* (2)). So too, in deciding whether work can be safely done, one must judge by what is known or ought to be known and what could be foreseen, not by that which cannot be known or foreseen.

Regulation 27 (2) does not help the plaintiff. It deals with the provision of guard-rails (and toe-boards); but the judge held in regard to reg. 24 (1) that the H provision of guard-rails could not have prevented the accident.

The main strength of the plaintiff's argument on this appeal depends on regulations that were not relied on in the court below. Counsel for the plaintiff asks leave to amend in order that he may now rely on them; and he gave notice of his intention to do so by letter two months before the appeal came on for hearing. He concedes that if the defendants would have called other evidence at the trial I had the amendment been originally pleaded, it is now too late for us to give leave to amend (see *Tasmania* (*Ship Owners & Freight Owners*) v. *Smith, etc., City of Corinth* (*Owners*), *The Tasmania* (3)). He contends that no other evidence could or would have been led by the defendants and that the court has before it all the relevant facts. In such circumstances, he urges that it would be wrong for this court to deprive the plaintiff of the judgment to which, on incontrovertible

(1) [1956] 1 All E.R. 615; [1956] A.C. 613.
(2) [1950] 2 All E.R. 987; [1951] 1 K.B. 454.
(3) (1890), 15 App. Cas. 223; 6 Asp. M.L.C. 517.

facts, he is entitled, merely because at first instance he relied on the wrong regulations and omitted to rely on the right ones. A

To decide that difficult question one has to consider the case now sought to be advanced. The amendment desired is:

> "Further or alternatively the said working platform was also a gangway and constituted a scaffold and such defects of the hook bolt were defects of construction, quality, condition and material, contrary to regs. 7 (1), 7 (4), 8 (1) and 12 (2) of the said regulations." B

The argument before us proceeds, not on the basis adopted in the court below, that a scaffold should have been provided, but on the basis that the gutter from which the plaintiff worked was itself a "scaffold" within the meaning of the regulations. By the definition in reg. 3 (2), C

> "'Scaffold' means any temporary structure on or from which persons perform work in connexion with an operation to which these regulations apply, and any temporary structure which enables persons to obtain access to or which enables materials to be taken to any place at which such work is performed, and includes any working platform, gangway, run, ladder or step-ladder (other than an independent ladder or step-ladder which does not form part of such a structure) together with any guard-rail, toe-board or other safeguards and all fixings, but does not include a lifting appliance or a structure used merely to support such an appliance or to support other machinery or plant." D

Regulation 7 (1) provides: E

> "Every scaffold and every part thereof shall be of good construction, of suitable and sound material and of adequate strength for the purpose for which it is used."

Regulation 7 (4) provides:

> "Metal parts used for scaffolds shall be of suitable quality and be in good condition and free from corrosion or other patent defect likely to affect their strength materially." F

Regulation 8 (1) provides:

> "No defective material or part which cannot be satisfactorily repaired shall be used for a scaffold . . ."

G

Regulation 12 (2) provides:

> "All structures and appliances used as supports for scaffolds, working platforms, gangways or runs shall be of sound construction, have a firm footing or be firmly supported, and shall where necessary be sufficiently and properly strutted or braced to ensure stability."

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Thus, reg. 7 and reg. 8 apply only to scaffolds, and their application to this gutter depends on whether it comes within the definition of "scaffold" in reg. 3 (2). Regulation 12 (2), however, applies not only to scaffolds but also to working platforms, gangways or runs. In respect of all three regulations there is the further question whether the duty on the defendants is an objective absolute duty to provide hook bolts of sound construction, quality, condition and material, or whether it is a subjective duty which has to be performed only within the limits of knowledge and foresight. If the latter, the plaintiff is in the same difficulty as that in which he was in relying on reg. 5, since the dangerous defect in the present case was latent and unforeseeable. I

In construing the regulations one starts with the assumption that all three must be intended to have a similar intention in this respect, since there is no logical reason why the quality of the employer's responsibility should vary in respect of his duties under one or other of them. If his duty under them is not

A absolute, the regulations are more or less a particularisation of his duty at common law. It is not impossible that the regulations are so intended, since many regulations do no more. Nevertheless the impression created by the particularity of the regulations and by the iteration of the word "shall" is rather that of an absolute obligation than a duty to be performed by a person within the limits of personal knowledge and prescience. It is true that the words "free from corro-
B sion or other patent defect" tend in the contrary direction. Yet in my judgment the three regulations were intended to impose an absolute obligation in respect of the matters to which they refer. According to their literal meaning, the obligation is broken when the material of the scaffold or other things is unsound or faulty. I can find no justification for implying words that limit the breach to cases where the defect should have been known to the employer. This view is
C confirmed by *Hamilton* v. *National Coal Board* (4), in which similar words, with regard to maintenance under the Mines and Quarries Act, 1954, were held to impose an absolute obligation. VISCOUNT SIMONDS referred to *Smith* v. *Cammell Laird & Co., Ltd.* (5), where the obligation to maintain under reg. 11 (b) of the Shipbuilding Regulations, 1931, was held to impose an absolute obligation. He continued (6):

D

> "The word 'absolute' in this connexion has become part of the dictionary of the law. Sometimes the word 'continuing' is substituted for it. Either word means that, in effect, the employer warrants that the machine or other equipment which he is obliged to maintain will never be out of order."

In my judgment, the obligation under the three regulations in question is absolute;
E and since the failure of the hook shows that it was not of suitable or sound construction there would be a breach of duty if any of those regulations applied to the gutter in the present case.

The question whether these regulations apply at all to the gutter is more formidable. This gutter was an incomplete part of the building, but it was certainly not temporary, since it was intended to remain in the building when completed.
F It was not a scaffold in the ordinary meaning of the word, but that meaning was extended by reg. 3 (2). The extension, however, would relate only to temporary structures were it not for the words "and includes any working platform, gangway, run, ladder or step-ladder (other than an independent ladder or step-ladder which does not form part of such a structure)". The wording of the regulation is not easy to construe, and there are two possible views as to its
G proper construction. The first view is this. The general intention of the definition appears to be directed to temporary structures, and the words "and includes any working platform, gangway, run, ladder or step-ladder" intend to refer only to such working platforms (etc.) as are temporary. Admittedly the words would then be otiose, since temporary working platforms (etc.) have been already covered by the earlier part of the definition, viz.,

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> "any temporary structure on or from which persons perform work . . . and any temporary structure which enables persons to obtain access . . ."

But the otiose words, it is said, are inserted ex abundanti cautela, and the words in brackets, "(other than an independent ladder or step-ladder which does not form part of such a structure)", by referring back to a temporary structure show that the whole of the definition is concerned with such structures. This view
I would make the whole definition more or less accord with the natural meaning of "scaffold". It may be argued that it derives some support from reg. 5, but it clearly does produce an inconsistency with reg. 22 and reg. 26.

The second possible view is this. Although the definition in general concerns itself with temporary structures, it deliberately includes something else. The words "and includes any working platform, gangway . . ." mean what they say,

(4) [1960] 1 All E.R. 76; [1960] A.C. 633.
(5) [1939] 4 All E.R. 381; [1940] A.C. 242.
(6) [1960] 1 All E.R. at p. 78; [1960] A.C. at p. 639.

and include working platforms, gangways, etc., whether temporary or permanent. That construction would give meaning to the words which would otherwise be otiose. Regulation 22 shows that the words "a working platform" cover something which is part of the permanent fixed equipment of a building. The relevant words of reg. 22 are:

> "Every working platform . . . shall be—(a) closely boarded . . . Provided that . . . (ii) requirement (a) of this regulation shall not apply to a platform which is part of the permanent fixed equipment of a building . . ."

Regulation 26 in similar fashion makes it clear that the words "gangway or run" cover a gangway or run which is part of the permanent fixed equipment of a building. This construction would seem to indicate that the regulations are deliberately including in the definition of "scaffold" (which would otherwise mean only temporary structures) all working platforms, gangways or runs that are part of the permanent equipment of a building, so that scaffolding precautions may apply to them. It may well have been thought that there was no reason why a workman doing a task within the regulations on a permanent working platform or gangway should have less protection than those who were working on a temporary working platform or gangway.

I prefer this latter construction to the former, since it seems to me to be more in accord with general rules of construction and also tends to a more coherent policy in the rules. The permanence of the gutter, therefore, does not disqualify it from being a working platform or gangway; but before the plaintiff can succeed he must show that the gutter was within the normal sense of the words "a working platform or gangway".

This was a growing gutter which at the time of the accident had become about seventy feet long. It was a trough nineteen inches broad. Though it was itself being used by the workmen to pass over as they extended it length by length, it was not, in my judgment, a working platform. Indeed if it had been, its use would have constituted a breach of reg. 22, since a working platform used for the deposit of material must be at least thirty-four inches wide. If it was a working platform used as a footing only, it must be at least twenty-five inches wide. Nor, in my judgment, was it a gangway. There was no evidence that it was intended to be used as such in the future. It was simply a rainwater gutter which was part of a building. Counsel for the plaintiff argues attractively that it was being used as a gangway by the men; but something that is used as a gangway may not in fact be a gangway. It is true that two men would have passed over the seventh length for instance (had it been secure) three times going and three times returning, as they constructed and lengthened the rest of the gutter by adding the three remaining lengths. They would later have passed along it once or twice as they bolted the overlays. But that does not in itself make a gutter into a gangway, even in the context of the Regulations of 1948. SOMERVELL, L.J., in *Bath* v. *British Transport Commission* (7) said:

> "Where words are, as the words of s. 25 (3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case. I cannot myself regard this dry dock into which the deceased fell as an opening in a floor."

Similarly, though I have every sympathy with the plaintiff, I cannot regard this gutter as a gangway.

For these reasons, even if the plaintiff was allowed to amend he could not succeed. An amendment would have a very strong claim on our discretion, even at this late stage, if it could be shown that on the evidence the plaintiff was clearly entitled to succeed under a regulation on which he had omitted to rely. But in this case an amendment would serve no purpose. I would therefore refuse the amendment and dismiss the appeal.

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(7) [1954] 2 All E.R. at p. 543.

A **WILLMER, L.J.:** I have reached the same conclusion, although in doing so I have not followed quite the same path as my brethren have followed.

The plaintiff's case, as it was pleaded, and as it was presented in the court below, was that there was no scaffold in circumstances when there ought to have been. Evidence was given that there was no scaffolding. Proceeding on the basis that no scaffolding was provided, the learned judge nevertheless decided that there B was no breach of reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, because he found on the evidence that the work could safely be done from the gutters already laid. In reaching this conclusion he considered, and rejected, an argument put forward on behalf of the plaintiff that the fact of the accident happening proved that in the event the work could not safely be done from the gutters, notwithstanding what anybody may reasonably have thought. Taking C the view, as he did, that reg. 5 did not apply, he further held that there was no breach of reg. 97 in failing to supply safety nets. On this part of the case it is sufficient for me to say that I wholly agree with the reasoning and conclusions of the learned judge.

The learned judge did, however, find that the defendants were in breach of reg. 24 (1). For he held that the gutter from which the plaintiff fell was a working D place, which should have been provided with suitable guard-rails of adequate strength. No cross-notice has been given by the defendants, and the contrary has not been argued before us. But the learned judge, having found the defendants in breach of reg. 24 (1), came to the conclusion, for reasons with which I wholly agree, that this was not a cause of the accident. Beyond expressing my agreement I do not find it necessary to say anything further on this aspect of the E case.

The greater part of the argument on this appeal has arisen from the attempt made on behalf of the plaintiff to set up an entirely new case. So far from there being no scaffolding when there ought to have been, it is now contended that the gutter on which the plaintiff was working was itself a scaffold. It is alleged, however, that it was not a suitable or sufficient scaffold, and in particular breaches F are alleged of regs. 7 (1) and (4), reg. 8 (1) and reg. 12 (2). In order to set up this case, leave is sought to amend the statement of claim, so as to allege breaches of these regulations. It is objected on behalf of the defendants that to allow such an amendment at the present stage would be an injustice to them. For it is claimed that, had the case against them been so framed at the trial, they might have desired to adduce further evidence. I am not persuaded that this is so. This is a G case in which there was no material issue of fact. The question is whether, having regard to the known facts, the regulations in question on their true construction have any application. If I thought that on the known facts it was clear that there had been a breach of any or all of the regulations now in question, I should be disposed, even at this stage, to allow the amendment, subject of course to proper safeguards with regard to the costs thrown away. But, for reasons which I will H attempt to state as briefly as possible, I am far from satisfied that any such clear breach of the relevant regulations has been shown.

I entertain no doubt that the gutter on which the plaintiff was working was part of the permanent structure of the building. Nor do I think that it was any the less so because the process of bolting the several lengths of gutter together had not been completed. By reg. 3 (2) a scaffold is defined as meaning a " tem- I porary structure ". I do not think, for my part, that the subsequent words, whereby a scaffold is made to include " any working platform, gangway, run, ladder or step-ladder ", have the effect of extending the meaning of " scaffold " to anything other than temporary structures. It seems to me that their effect is merely to show that a temporary structure, in order to be a scaffold, may take one of several forms. That this is the true construction of the definition in reg. 3 (2) is, I think, made abundantly clear by the wording of reg. 5, which requires that scaffolds must be provided for work that cannot safely be done from part of the building

or from part of a permanent structure. This, as it seems to me, would be a nonsensical requirement if the part of the building could itself be held to amount to a scaffold. With all respect to what HOLROYD PEARCE, L.J., has said, I do not think that reg. 22 and reg. 26 militate against this view. Those regulations deal respectively with working platforms and gangways. They do not deal specifically with scaffolds. For reasons which will presently appear, I think that there may well be working platforms and gangways which are not scaffolds. I do not think, therefore, that consideration of reg. 22 and reg. 26 helps in determining what is a scaffold. In these circumstances, I am not satisfied that the gutter on which the plaintiff was working, being itself a part of the permanent structure of the building, can be held to be a scaffold within the definition clause. This being so, there can be no question of any breach of reg. 7 or reg. 8, since those regulations apply only to the construction of scaffolds and the material used in connexion therewith.

I have felt rather more difficulty with regard to reg. 12 (2). This regulation applies in terms not only to scaffolds, but also to working platforms, gangways or runs. It is true that working platforms, gangways and runs are among the things included in the definition of " scaffold " in reg. 3 (2). I have already said that in that context the words relate, in my view, only to working platforms, gangways and runs which have the quality of being temporary structures so as to amount to scaffolds. The addition of these words in reg. 12 (2) would, therefore, be unnecessary, unless they are intended to embrace working platforms, gangways and runs which are not scaffolds. I think it is difficult to resist the conclusion that under reg. 12 (2) there can be working platforms, gangways and runs which are other than temporary structures, and I see no reason why something which is part of the permanent structure of the building may not be a working platform or gangway within the meaning of that regulation. If this gutter can properly be held to be a working platform or gangway within reg. 12 (2), there could, I think, be no doubt that the defendants were in breach of their obligations. For it is clear, having regard to the defective hook bolt, that the gutter was not of sound construction; nor was it firmly supported.

The question which arises is, therefore, whether this gutter can fairly be said to constitute a working platform or a gangway, notwithstanding that it was not such a working platform or gangway as would amount to a scaffold. It has not been seriously argued that it was a run, and I do not, therefore, pause to consider what may be the precise meaning of that word. The regulations contain no separate definition of " working platform " or " gangway ". In the absence of any definition, I think that the question whether part of a building constitutes a working platform or a gangway must be decided as a matter of common sense. It seems to me that there is more to be said for this gutter amounting to a gangway than a working platform. The word " gangway " suggests a place where men may pass and re-pass in the course of their work, whereas a working platform suggests something more static. The former is no doubt more apt to describe this gutter than the latter. There was, however, no evidence to show that this gutter was intended to be used as a passage, though one may speculate that from time to time it might be used as a matter of convenience by men engaged on painting or repairing the roof. But I do not think that this is sufficient to make the gutter a gangway in the ordinary, accepted sense of that word. Viewing the question as a matter of common sense, I think that this was a gutter and nothing but a gutter, and I find it impossible to say that it amounted to a gangway, so as to be caught by reg. 12 (2).

In these circumstances I am not persuaded that the proposed amendment of the statement of claim sets up any clear case of breach of any of the regulations on the part of the defendants. I agree, therefore, that the amendment should not be allowed; and it follows that in my judgment the appeal should be dismissed.

PEARSON, L.J.: I agree with the conclusions and in general I agree with the judgments which have been delivered, but I have to give my reasons for

A agreeing with HOLROYD PEARCE, L.J., on the point of construction on which there is disagreement, viz., as to the effect of the definition of "scaffold" in reg. 3 (2) of the Building (Safety, Health and Welfare) Regulations, 1948. The first part of that definition can conveniently be divided into three divisions. First there are the words

B "any temporary structure on or from which persons perform work in connexion with an operation to which these regulations apply . . ."

Those words cover any working platform which is or forms part of a temporary structure. Secondly, there are the words

C "and any temporary structure which enables persons to obtain access to or which enables materials to be taken to any place at which such work is performed . . ."

Those words cover any gangway or run which is or forms part of a temporary structure. Thirdly, there are the words "and includes any working platform, gangway, run . . ." According to the ordinary principles of construction, those words ought to add something to what has gone before, and ought to bear their D natural and ordinary meaning in their setting in the Regulations of 1948, and ought not to have any forced or artificial meaning ascribed to them. Accordingly, in my opinion, they apply to any working platform, gangway or run, whether or not it is or forms part of a temporary structure, but do not go beyond a working platform, gangway or run as ordinarily understood in relation to building operations. It would be wrong to say that because workmen are standing on a E part of a building to do some building work, therefore, necessarily that part of the building is a working platform. Similarly, it would be wrong to say that, because workmen are going themselves and transporting materials to the working place by a certain route across parts of a building, therefore that route is necessarily a gangway or run.

F In my view, the latter part of the definition of "scaffold" in reg. 3 (2) does not give any clear illumination of the earlier part; and reg. 5 does not imply that a permanent structure from which work can be done is not a scaffold. The regulations concerning scaffolds do primarily have in mind temporary structures, but not so as to exclude in all cases permanent structures. The second proviso in reg. 22 and the second proviso in reg. 26 (1), show that for the purposes of those G regulations a working platform or gangway or run may be part of the permanent fixed equipment of a building. Those provisos refer to something which is permanent and which is also a specific piece of equipment rather than a part of a building which may sometimes be used as a working place or as a route to a working place. I see no reason why the words "working platform, gangway or run" should not have the same ambit in the definition of "scaffold" in reg. 3 (2) H as they have in reg. 22 and reg. 26. In my view the word "scaffold" in reg. 7 includes any working platform, gangway or run; and if the piece of guttering and its straps and hook bolt were or formed part of a working platform, gangway or run, there would be an infringement of reg. 7 (1) and (4).

There is also reg. 12 (2). It is remarkable that although "scaffold" has been defined in reg. 3 (2) as including any working platform, gangway or run, reg. 12 I (2) refers to "scaffolds, working platforms, gangways or runs". Manifestly there is inexact drafting somewhere. In my opinion, in reg. 12 (2) the words "working platforms, gangways or runs" were inserted by way of abundant caution and should be rejected as surplusage. However, the same question of fact in any case arises, viz., whether the piece of guttering constituted or formed part of a working platform, gangway or run. It is far from obvious, and there is no evidence or finding, that it did, and accordingly in my view there is no adequate basis for holding that it did.

The plaintiff would not be entitled to succeed if the amendment were allowed, and therefore the amendment should not be allowed, I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *W. H. Thompson* (for the plaintiff); *Geoffrey Coombs & Co.*, agents for *Laces & Co.*, Liverpool (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

KINGSTON-UPON-HULL CORPORATION *v.* CLAYTON (VALUATION OFFICER).

[HOUSE OF LORDS (Lord Reid, Lord Tucker, Lord Keith of Avonholm, Lord Hodson and Lord Guest), June 13, 14, July 13, 1961.]

Rates—Rateable occupation—Art gallery—Trust of gallery for enjoyment by the public in perpetuity—Gallery vested in local authority—Whether the trusts allowed any potentiality of beneficial occupation by the local authority.

The appellant corporation held a hereditament described as an art gallery and premises on trusts declared by deed, namely, "Upon trust to permit the same to be used and enjoyed by the citizens of the said city . . . and the public generally as an art gallery for the exhibition of works of art in perpetuity". The galleries were open to the public free of charge during certain hours in the day-time, organised parties being permitted to enter in the evenings by arrangement and facilities being provided for meetings, lectures and conducted visits. The remainder of the building was used as offices, storerooms, etc., normally appropriate to the use of a building as an art gallery. There were no bye-laws or written regulations in respect of the galleries but the attendants were orally instructed to take care of the works of art and ensure due decorum on the part of the public. On the question of rateability,

Held: the trust deed did not confer such rights of user on the public as exhausted all possibility of value to the appellant corporation, who were de facto in beneficial occupation of the art gallery, and, therefore, the hereditament should not be entered in the rating valuation list as "exempt".

Lambeth Overseers v. *London County Council* ([1897] A.C. 625) explained and distinguished.

Hare v. *Putney Overseers* ((1881), 7 Q.B.D. 223) and *Burnell* v. *Downham Market U.D.C.* ([1952] 1 All E.R. 601) considered.

Decision of the COURT OF APPEAL (sub nom. *Clayton* (*Valuation Officer*) v. *Kingston-upon-Hull Corpn.*) ([1960] 3 All E.R. 840) affirmed.

[As to occupation for the use of the public, see 32 HALSBURY'S LAWS (3rd Edn.) 21, para. 25; and for cases on the subject, see 36 DIGEST (Repl.) 351-354, *12-25.*]

Cases referred to:

Burnell v. *Downham Market U.D.C.*, [1952] 1 All E.R. 601; [1952] 2 Q.B. 55; 116 J.P. 168; 36 Digest (Repl.) 352, *17.*

Carnegie Dunfermline Trustees v. *Dunfermline Assessor*, 1909 S.C. 678; 46 Sc. L.R. 451; 1 S.L.T. 286; 38 Digest (Repl.) 684, *1021.*

Hare v. *Putney Overseers*, (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 38 Digest (Repl.) 480, *38.*

Lambeth Overseers v. *London County Council*, [1895] 2 Q.B. 511; *revsd.* C.A. [1896] 2 Q.B. 25; *affd.* H.L., [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; sub nom. *St. Mary, Lambeth* (*Churchwardens & Overseers*) v. *London County Council*, 61 J.P. 580; 36 Digest (Repl.) 351, *13.*

A *London County Council* v. *Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee, etc.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 38 Digest (Repl.) 481, *47*.

Soane's Museum (Sir John) Trustees v. *St. Giles-in-the-Fields and St. George's Bloomsbury Joint Vestry*, (1900), 83 L.T. 248; Ryde & K. Rat. App. 235; 38 Digest (Repl.) 492, *115*.

B **Appeal.**

Appeal by Kingston-upon-Hull Corporation from an order of the Court of Appeal (LORD EVERSHED, M.R., HARMAN and DONOVAN, L.JJ.), dated Nov. 10, 1960, and reported sub nom. *Clayton (Valuation Officer)* v. *Kingston-upon-Hull Corpn.*, [1960] 3 All E.R. 840, allowing an appeal by the respondent valuation officer by way of Case Stated against a decision by the Lands Tribunal C (ERSKINE SIMES, Esq., Q.C.), given on Sept. 21, 1959, and reported (1959), 5 R.R.C. 309. The appellant corporation were the owners of a hereditament described as the Ferens Art Gallery and premises, Queen Victoria Square, Kingston-upon-Hull, assessed at £4,700 gross value, £3,913 rateable value in the valuation list for Kingston-upon-Hull City. The hereditament was the subject of a trust deed requiring the corporation to permit it to be used and D enjoyed by the citizens of the city and the public generally as an art gallery in perpetuity. The Lands Tribunal held that the hereditament was not in rateable occupation. The facts are set out in the opinion of LORD TUCKER below.

Peter Rawlinson, Q.C., and *J. P. Harris* for the appellant corporation.

E *W. L. Roots, Q.C.*, and *J. R. Phillips* for the respondent valuation officer.

Their Lordships took time for consideration.

July 13. The following opinions were read.

LORD REID: My Lords, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend, LORD TUCKER. I agree F with it and cannot usefully add anything. I would, therefore, dismiss this appeal.

LORD TUCKER: My Lords, this is an appeal from a decision of the Court of Appeal reversing by a majority a decision of the Lands Tribunal which had directed that a hereditament shown in the valuation list for the rating area of Kingston-upon-Hull Borough as "The Ferens Art Gallery and premises, Queen G Victoria Square" should be entered in the said list as "exempt".

The hereditament in question stands on a site which was conveyed to the appellants by The Right Honourable Thomas Robinson Ferens by indenture of Dec. 9, 1919, on and subject to trusts contained in a deed of the same date and made between the same parties. The deed required the corporation to erect on the site out of funds provided by Mr. Ferens a suitable building and, by cl. 5 thereof, H directed:

> "The corporation shall hold the said piece of land conveyed by and comprised in the principal indenture and the said building or buildings (all of which are hereinafter included in the expression 'The Art Gallery') Upon trust to permit the same to be used and enjoyed by the citizens of the said city and county of Kingston-upon-Hull and the public generally as an I art gallery for the exhibition of works of art in perpetuity."

The building and art gallery was, after some delay, completed in 1928. It is not necessary to describe the building in detail. There are galleries on two floors, two offices for the curator, a café, and storage rooms for works of art and their restoration in the basement. The galleries are open to the public free of charge from 10.0 a.m. to 6.0 p.m. on weekdays and from 2.30 p.m. to 4.30 p.m. on Sundays. Organised parties are permitted to enter after 6.0 p.m. by arrangement and facilities are provided for meetings, lectures and conducted visits. The staff

consists of a director, an assistant director, three attendants, a boiler attendant, a joiner and a waitress. There are no bye-laws or written regulations in respect of the galleries, but the attendants are orally instructed to take care of the works of art and ensure due decorum on the part of the public. The hereditament was entered in the valuation list as exempt until it was entered in the first new valuation list made under the Local Government Act, 1948, at gross value £4,700 and rateable value £3,913. On Feb. 12, 1957, the corporation made a proposal that the hereditament should be entered as exempt. Objection was lodged by the respondent and, on appeal, the local valuation court allowed the appeal and directed that the hereditament be entered as exempt. The Lands Tribunal, on Sept. 21, 1959, upheld the decision of the local valuation court, but its decision was reversed by a majority in the Court of Appeal on Nov. 10, 1960.

Counsel for the appellants on appeal to this House rested his case fairly and squarely on two authorities, one binding on your Lordships and one a recent decision of the Court of Appeal. He did not seek to contend that, if he could not bring this case within the four corners of these decisions, he could succeed. The first of the two authorities is the decision of this House in *Lambeth Overseers* v. *London County Council* (1) (generally referred to as the *Brockwell Park* case), but, as that case followed and was said to be indistinguishable from an earlier case of *Hare* v. *Putney Overseers* (2) (generally referred to as the *Putney Bridge* case), it will be convenient to refer to the latter case first. It was a decision on a Case Stated by the Surrey justices on the hearing of a summons and complaint against the Fulham Bridge Co. for non-payment of certain rates in respect of Putney Bridge which had been duly made before June 25, 1880, for periods beyond June 26, and which at that date and since had remained undischarged and for which the Bridge Co., who were at all material times up to and including June 25 in occupation of the bridge, had been assessed. On June 26 the bridge was thrown open to the public free of tolls and possession taken under the provisions of the Metropolis Toll Bridges Act, 1877, by the Metropolitan Board of Works who had thereafter remained in control thereof. The Bridge Co. contended that, under s. 16 of the Poor Rate Assessment and Collection Act, 1869, they were not liable for the proportion of rates subsequent to the date of transfer to the board. In order to make good this contention, it was necessary for them to satisfy the court that, as from June 26, the board were the occupiers of the bridge. If the board's possession and control did not constitute beneficial occupation for rating purposes, the Bridge Co. remained liable for the whole period of the rates. By s. 16 of the Metropolis Toll Bridges Act, 1877, it was provided that, after the board had obtained absolute control of any bridge, tolls and charges should no longer be levied thereon and the bridge should be open free to the public. The Court of Appeal held that there was no rateable occupation by the board and, accordingly, the decision of the justices that a distress warrant should issue against the Bridge Co. for the whole of the rates was correct. BRAMWELL, L.J., thought (3) there was no beneficial occupation by the board. BRETT, L.J., said (4):

> "They are no more occupiers of the bridge than the owner of a street is the occupier of a street after it has been dedicated to the public."

COTTON, L.J., said (5):

> "They are possessed of it as owners for the benefit of the public, and if the case turned upon it I should say that they were not occupiers, but owners only as custodians for the public. There is certainly no beneficial occupation of the bridge. The property is by Act of Parliament kept and appropriated to a special and particular purpose, and as long as that lasts it is impossible to say that any profit may be derived from it—that it could

(1) [1897] A.C. 625. (2) (1881), 7 Q.B.D. 223. (3) (1881), 7 Q.B.D. at p. 232.
(4) (1881), 7 Q.B.D. at p. 233. (5) (1881), 7 Q.B.D. at p. 237.

A ever be possibly let for any sum to anyone, taking into consideration the use to which, by Act of Parliament, it must be applied, and the necessity of keeping it useful for that purpose. It is impossible, therefore, to say that it has any potentiality of a beneficial occupation."

There were two features of this case which distinguished it from some others. It concerned a highway and the free and unrestricted user by the public was B derived from an Act of Parliament. The words "dedicated to the public", which are to be found in some later cases in contexts in which they appear somewhat out of place, are appropriate and lead to results which are understandable in connexion with a bridge or highway.

Turning now to the *Brockwell Park* case, a Divisional Court consisting of POLLOCK, B., and WRIGHT, J. (6), held that the London County Council were C rateable in respect of land acquired and held by them for the use of the public under the London Council (General Powers) Act, 1890. The hereditaments in question, known as Brockwell Park, were acquired by the council pursuant to s. 4 of the above-mentioned Act, which conferred on them power to purchase the land and provided that, after acquisition, they should hold the same as a park, and should lay out, maintain and preserve the same for the perpetual use D thereof by the public for exercise and recreation, and exercise all necessary powers for the maintenance and preservation of the same as a park. The land so acquired was laid out and opened to the public at large as a park and recreation ground during the day-time, but at night-time the gates were locked and the public not admitted. Bye-laws were made for the proper conduct of the public and making it an offence for any person to remain in the park after closing time E if previously requested to leave. Lawn tennis grounds and cricket pitches were laid out and maintained for use by the public. It is not stated whether any charge was made for their use. There were certain buildings on the land to which it is not necessary to refer in detail as they were held to be ancillary and incidental to the use of the land as a park and recreation ground. The Court of Appeal (7) reversed the decision of the Divisional Court, A. L. SMITH, L.J., saying that there F was no finding that the county council, considered as the hypothetical tenant, would have been willing to pay a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent as required by the Parochial Assessment Act, 1836, and that, consequently, there was no beneficial occupation. It was also a material element that the county council were under G no statutory duty to provide the amenities which this park afforded. It is to be observed that it was not contended by counsel or held in either of the judgments that the council were not in fact in occupation; the only issue was whether their occupation was in law beneficial. When the case reached this House (8), counsel for the respondents relied on the absence of beneficial occupation, but further submitted that there was in fact no occupation at all. He said "the county coun- H cil are caretakers at night, and the public in occupation by day". The appeal was dismissed. LORD HALSBURY, L.C., said (9):

"I do not think there is here a rateable occupation by anybody. The 'public' is not a rateable occupier; and I think that one sentence disposes of the case . . . I think the *Putney Bridge* case (10) was rightly decided, and I think it is strictly in point in this case."

I He went on to express his agreement with the decision of the Court of Appeal to the effect that the nature of the occupation was such that it could not be regarded in law as beneficial. LORD HERSCHELL (11) agreed that there was no beneficial occupation, it being well settled that, in considering what rent a tenant might reasonably be expected to pay, regard must be had to any restrictions the legislature has imposed on the user of the hereditaments and that, in

(6) [1895] 2 Q.B. 511. (7) [1896] 2 Q.B. 25. (8) [1897] A.C. 625.
(9) [1897] A.C. at p. 629. (10) (1881), 7 Q.B.D. 223. (11) [1897] A.C. at p. 631.

considering the county council as possible hypothetical tenants, the case was distinguishable from *London County Council* v. *Erith Parish* (*Churchwardens, etc.*) *& Dartford Union Assessment Committee, etc.* (12), where the council had a statutory duty to dispose of the sewage and, consequently, had to be taken into account as possible tenants. He went on, however, to say that he was not satisfied that the council were occupiers of the park for rating purposes. He considered the case indistinguishable from the *Putney Bridge* case (13), and said (14): "They [the county council] seem to me to be merely custodians or trustees to hold it and manage it for the use of the public".

My Lords, this case, which is binding on your Lordships, has given rise to considerable difficulty and speculations as to its precise ratio decidendi, and, although the word "dedication" does not appear in the speeches, the reliance on the *Putney Bridge* case (13) as decisive has given rise to the view that, for rating purposes, the consequences which follow the dedication of a highway necessarily result where land or buildings are acquired for the purpose of free and unrestricted user by the public in perpetuity. Moreover, it is not easy to determine whether the basic decision was that no one was in occupation or, as it has sometimes been stated, that the public were in occupation, or whether any distinction was intended between the words "rateable occupation" and "beneficial occupation". I confess I find it difficult to understand how it could be held that the county council were not de facto in occupation, and I incline to the view expressed by CHANNELL, J., in *Trustees of Sir John Soane's Museum* v. *St. Giles-in-the-Fields and St. George's Bloomsbury Joint Vestry* (15), where he said:

> "I think that there is nothing in the Act of Parliament . . . which renders the property incapable of beneficial occupation, and I understand that that was the principal ground on which the *Brockwell Park* case (16) proceeded. There the public have the right to wander over the park and to exhaust any possibility of value to the occupying tenant. Consequently he would not give any rent for it."

I pass to the recent case of *Burnell* v. *Downham Market U.D.C.* (17). Here the *Brockwell Park* decision (16) was applied to the case of a seven-acre field which was purchased by public subscription and conveyed to an urban district council

> "upon trust for the perpetual use thereof by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906."

It was held, following and applying the *Brockwell Park* case (16), that, judged solely by the legal effect of the statutory restrictions imposed on the field by the Act of 1906, the real occupiers were the public, and the sole interest of the local authority was as custodians and trustees for the public, and, consequently, the local authority was not in rateable occupation. A submission that the *Brockwell Park* case (16) was distinguishable, on the ground that the Act there in question imposed a duty on the council to hold the park for the perpetual use by the public for exercise and recreation, whereas in the *Downham Market* case (17) the trusts created were not statutory, but arose out of and only out of the deed of the parties to it, was rejected, the Court of Appeal finding themselves unable to follow the decision of the Court of Session in *Carnegie Dunfermline Trustees* v. *Dunfermline Assessor* (18).

My Lords, it will be seen from the above that a principle derived from the case of a bridge which was treated as analogous to a street, and in respect of which there was a statutory duty imposed on the owners, has now been extended to a public park voluntarily conveyed to a local authority on trust to be dealt with under the Open Spaces Act, 1906. The present appeal seeks to extend it still further to an art gallery conveyed to a local authority for the use of the public

(12) [1893] A.C. 562. (13) (1881), 7 Q.B.D. 223. (14) [1897] A.C. at p. 632.
(15) (1900), 83 L.T. at p. 251. (16) [1897] A.C. 625.
(17) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55. (18) 1909 S.C. 678.

A under trusts imposed by the deed of conveyance without reference to any statutory provisions. Assuming that the extensions up to and including the *Downham Market* case (19) were justified in law, as to which I do not find it necessary to express a concluded opinion, I think that the majority of the Court of Appeal arrived at the right conclusion after a careful examination of the provisions of the trust deed in the present case in deciding that it did not confer such rights of user B on the public as to exhaust any possibility of value to the appellants who were de facto in occupation of the gallery. In this connexion, I would respectfully adopt the language of HARMAN, L.J., in the Court of Appeal as follows (20):

> "As I have already said, I cannot think that this can be treated as an unoccupied building. It is in fact actively used and occupied every day of the week. It is vested in possession in the corporation, who are therefore C prima facie the occupiers—see RYDE ON RATING (10th Edn.) at p. 20 and cases there cited. Unless therefore they occupy merely as custodians, or in other words unless the rights of the public are such as to exclude all possibility of beneficial occupation by the trustees, then the occupation on the part of the owners will be treated as beneficial for rating purposes. The answer to this last question must rest on the document of trust. The trusts are D declared with a remarkable lack of particularity: '. . . to permit the same [i.e., the building] to be used and enjoyed by the citizens of . . . Hull and the public generally as an art gallery for the exhibition of works of art in perpetuity '. . . There is nothing in the trust about the public enjoying free and unrestricted access. The public is entitled to enjoy the property ' as an art gallery '. What does this mean? It must mean in my judgment that the E corporation are to conduct on the property an art gallery in the usual way of such resorts. I see no reason why the public should not be charged at any rate such a sum as will supplement the inadequate upkeep fund, even if not sums which will augment the fund for the purchase of works of art. I see no reason why the art gallery may not be closed, say on Thursdays, for the use of art students. Indeed I see no reason why the corporation should not let or F lend the gallery or specific parts of it for the exhibition of works of art on loan whether by some body like the Arts Council or by a wealthy patron or indeed an impresario wishing to make a profit."

For these reasons, I would dismiss this appeal.

My noble and learned friend, LORD KEITH OF AVONHOLM, who is unable to be present today, desires me to say that he agrees with the opinion which I have just G delivered.

LORD HODSON: My Lords, I agree.

LORD GUEST: My Lords, in *Lambeth Overseers* v. *London County Council* (the *Brockwell Park* case) (21), a public park dedicated by statute to the perpetual H use of the public for exercise and recreation, was held exempt from rating. The precise ratio of the decision has given rise to discussion. Both the Lord Chancellor (LORD HALSBURY) and LORD HERSCHELL seem to base their decision on the twin grounds that the London County Council were not occupiers of the park and that there was no beneficial occupation. But when their speeches are examined, I think it is reasonably clear that the real basis of the decision was that I there was no beneficial occupation because the park was dedicated for the perpetual use of the public and could not, therefore, be used for any profitable purpose. This is illustrated by the fact that the analogy given by the Lord Chancellor and LORD HERSCHELL is *Hare* v. *Putney Overseers* (the *Putney Bridge* case) (22), where the Metropolitan Board of Works were held not to be in beneficial occupation of Putney Bridge. It is also important to notice that BRAMWELL, L.J., in his

(19) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55.
(20) [1960] 3 All E.R. at p. 845; [1961] 1 Q.B. at p. 360.
(21) [1896] 2 Q.B. 25; [1897] A.C. 625.
(22) (1881), 7 Q.B.D. 223.

judgment (23), referred to the case of sewers which at that date were held not to be rateable. Subsequently, in *London County Council* v. *Erith Parish* (*Churchwardens, etc.*) & *Dartford Union Assessment Committee, etc.* (24), they were held rateable.

The appellants sought to bring the present case of an art gallery within the ratio of the *Brockwell Park* case (25). There might be some analogy between a bridge and a public park. But, as subjects for rating purposes, an art gallery and a park are entirely dissimilar. Unless it can be shown that, wherever a subject, whether land or building, is dedicated in perpetuity for the use of the public either by statute or by deed, the subject is exempt from rating, this appeal must fail. As I have already indicated, the *Brockwell Park* case (25) cannot be taken as deciding this point favourably to the appellants. If the question of beneficial occupation is considered, it is plain that the art gallery is capable of beneficial occupation. The appellants are not bound to allow the public free and unrestricted access to the gallery, they can make a charge for admission, they can and do shut the gallery for certain hours, and they would, in my opinion, not be in breach of the deed of trust if they let or lent the gallery to other persons for the display of works of art provided the public were admitted. Whether a profit could be made from these uses is beside the point. The test for beneficial occupation is not whether a profit could be made, but whether the occupation is of value (*London County Council* v. *Erith Parish* (*Churchwardens, etc.*) (24)). So regarded, I have no doubt that the art gallery is capable of beneficial occupation. The matter could not, in my view, have been better expressed than in the judgment of HARMAN, L.J., when he said (26):

> "Unless therefore they occupy merely as custodians, or in other words unless the rights of the public are such as to exclude all possibility of beneficial occupation by the trustees, then the occupation on the part of the owners will be treated as beneficial for rating purposes."

I am entirely satisfied with the judgments of the majority of the Court of Appeal, and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellant corporation); *Solicitor of Inland Revenue* (for the respondent valuation officer).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

(23) (1881), 7 Q.B.D. at p. 232. (24) [1893] A.C. 562. (25) [1897] A.C. 625.
(26) [1960] 3 All E.R. at p. 845; [1961] 1 Q.B. at p. 360.

A

R. v. BLAKE.

[COURT OF CRIMINAL APPEAL (Hilbery, Ashworth and Paull, JJ.), June 19, July 3, 1961.]

Criminal Law—Sentence—Consecutive sentences—Discretion to impose—Whether maximum sentences imposed on several convictions each for a separate like offence can be directed to run consecutively—Official Secrets Act, 1911 (1 *&* 2 *Geo.* 5 *c.* 28), *s.* 1 (1) (*c*)—*Official Secrets Act,* 1920 (10 *&* 11 *Geo.* 5 *c.* 75), *s.* 8 (1).

B

Criminal Law—Sentence—Remission—Regard not had to the earning of remission when awarding sentence.

The applicant pleaded guilty to five counts of an indictment charging him in each count with a separate offence under s. 1 (1) (c)* of the Official Secrets Act, 1911. He was sentenced on each count to fourteen years' imprisonment, the maximum term under s. 8 (1)† of the Official Secrets Act, 1920. The sentences on counts 1 to 3 were directed to run consecutively, and those on counts 4 and 5 to run concurrently, so that the total term of imprisonment awarded was forty-two years. On application for leave to appeal against sentence,

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Held: where each of several offences charged was separate and distinct, the trial judge had a discretion whether the sentences imposed on conviction should be consecutive or concurrent, and his discretion was not limited so as to prevent him awarding consecutive sentences which would be longer in the aggregate than the maximum permitted for any one of the offences taken by itself (see p. 126, letter F, post); in the circumstances the application would be dismissed.

E

Per CURIAM: in passing sentence a court should not have regard to the fact that the prisoner may earn remission by good conduct (see p. 127, letter B, post).

[As to punishment of offences in respect of official secrets, see 10 HALSBURY'S LAWS (3rd Edn.) 610, para. 1141.

F

As to the principles to be applied when imposing concurrent and consecutive sentences, see ibid., 492, para. 898; and for cases on the subject, see 14 DIGEST (Repl.) 550, *5362* and Supplement; 565, *5645.*

For the Official Secrets Act, 1911, s. 1, see 5 HALSBURY'S STATUTES (2nd Edn.) 971; and for the Official Secrets Act, 1920, s. 8 (1), see ibid., 1051.]

G

Case referred to:

R. v. *Fuchs,* "The Times", Mar. 2, 1950, p. 2.

Application.

This was an application by George Blake for leave to appeal against sentences of forty-two years' imprisonment imposed on him at the Central Criminal Court on May 3, 1961, by LORD PARKER, C.J. The applicant had pleaded guilty to five counts on an indictment, which alleged as follows—(count 1) that in November, 1951; (count 2) that between Sept. 1, 1953, and Apr. 13, 1955; (count 3) that between Apr. 14, 1955, and Apr. 3, 1959; (count 4) that between May 4, 1959, and June 14, 1959; and (count 5) between June 15, 1959, and Sept. 17, 1959, for a purpose prejudicial to the safety of the state the applicant had communicated to another person information which might have been directly or indirectly useful to an enemy, contrary to s. 1 (1) (c) of the Official Secrets

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* Section 1 (1), so far as material, reads: "If any person for any purpose prejudicial to the safety . . . of the state . . . (c) obtains . . . or communicates to any other person . . . any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; he shall be guilty of felony . . ."

† Section 8 (1) reads: "Any person who is guilty of a felony under the principal Act [i.e., the Act of 1911] or this Act shall be liable to [imprisonment] for a term of not less than three years and not exceeding fourteen years."

Act, 1911. He was sentenced to fourteen years' imprisonment, the maximum on each count and the sentences on counts 1 to 3 were directed to run consecutively. The statutes, report and case cited below* were cited in argument in addition to those in the judgment. On June 19, 1961, the court intimated that it dismissed the application and would give its reason in writing at a later date.

J. N. Hutchinson, Q.C., and *W. McL. Howard* for the applicant.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), and *J. M. G. Griffith-Jones* for the Crown.

Cur. adv. vult.

July 3. **HILBERY, J.**, read the following judgment of the court: This was an application for leave to appeal against sentence, and the only ground put forward in the notice of application was that the sentence was too severe. The accused pleaded guilty at the Old Bailey to each of the five counts in an indictment charging him in each count with an offence under the Official Secrets Act, 1911. Each count alleged a specific and separate offence committed at some particular time during the period between 1951 and 1959. LORD PARKER, C.J., passed sentences of fourteen years on each of the first three counts and fourteen years on counts 4 and 5, making the first three sentences of fourteen years consecutive and the sentences on the last two counts concurrent with the sentences on the first three. The total sentence was, therefore, one of forty-two years. It is that sentence of which the applicant complains that it is too severe.

On his behalf it was expressly stated by counsel that his application for leave to appeal against that sentence was not based on any point of law, and the application did not, therefore, involve a question of law. His contention was that the sentence was wrong in principle and, furthermore, in the particular circumstances of this case, was manifestly excessive. In support of the argument that the sentence was wrong in principle his contention in the first place was that the Official Secrets Act, 1920, s. 8 (1), provided a maximum sentence of fourteen years for an offence against the Act such as was alleged in each of the counts in this indictment, and that to pass consecutive sentences of fourteen years was to evade the limit in the Act. The answer to this is that there is no settled principle that a judge may not pass consecutive sentences in respect of a number of offences for any one of which the maximum sentence is fourteen years where each offence charged in each count is separate and distinct. Whether the sentences shall be concurrent in such circumstances or consecutive is a matter for the judge to determine in the exercise of his discretion. This discretion is not limited so as to prevent the judge awarding consecutive sentences which will total more than the maximum permitted for any one of the offences taken by itself.

Counsel for the applicant pressed on us evidence given by the Home Office before the Royal Commission on Capital Punishment (1), which showed that where a life sentence is now passed it is usual for the Home Office, indeed he put it as high as the normal practice of the Home Office, in the exercise of the powers given to the Home Secretary under s. 27 (1) of the Prison Act, 1952, to release on licence any prisoner on whom is passed a sentence of life imprisonment after ten years, and that as that was so no court ought by making sentences consecutive to pass a sentence which would be longer than the one which he would in practice serve if sentenced to life imprisonment. One answer to this is that where, as in the case of non-capital murder, the statute (2) enacts that the

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* Explosive Substances Act, 1883, s. 2, s. 3; Official Secrets Act, 1889, s. 2; Official Secrets Act, 1939; Homicide Act, 1957; JUSTICE—Report on Legal Penalties, 1959, p. 5, where at (b) it was stated that the purpose of fixing maxima was to put some limit on the judicial discretion; *R.* v. *Morris*, [1950] 2 All E.R. 965.

(1) Cmd. 8932, 1953. The Report covers the years 1949-53 and the paragraphs considered in argument were paras. 644-656, especially paras. 644, 646.

(2) I.e., Homicide Act, 1957, s. 9 (1).

A sentence shall be one of life imprisonment, this court passes that sentence giving the words of the statute their natural and ordinary meaning, and that sentence remains the sentence on the man, the Home Secretary having no power to alter it. The only power, under s. 27 of the Prison Act, 1952, which the Home Secretary has is power to release the prisoner on licence with power, however, to recall him at any time to serve the rest of his sentence. The sentence remains what it is, B one for life. Furthermore, this court in passing such a sentence has no regard to the possibilities of the exercise by the Home Secretary of his power to let a prisoner out on licence. It has been laid down by this court (3) that in passing sentence a court should not pay any regard to the fact that nowadays a prisoner serving his sentence by good conduct may earn remission so that he may in practice be confined to prison for a much shorter time than the length of sentence C passed on him, and there is no logical distinction between taking into consideration the possibility of remission for good conduct and the possibility of remission through the Home Secretary exercising his discretion to allow out on licence and so to shorten the period of a prisoner's confinement.

Counsel for the applicant also pressed on us *R.* v. *Fuchs* (4), but the circumstances in that case, so far as one can judge from the report, were entirely D different from those in the case we have under consideration. It is true that in that case LORD GODDARD, C.J., who was passing sentence, made it fourteen years on each count concurrent, himself remarking, however, that for a man of high education and ability punishment as such did not mean a great deal. It has been said, rightly, that in passing sentence a judge has to consider the offence and the offender, but he has also to consider the interest of society. E When this prisoner and his conduct and the particular circumstances of this case as they have been revealed to us are considered, *R.* v. *Fuchs* (5) is clearly not comparable to this one.

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(3) I.e., in *R.* v. *McGuire*, *R.* v. *Enos*, (1956), 40 Cr. App. Rep. 92: a court should pass sentence which it thinks the gravity of the offence deserves and should not, in fixing the length of the sentence, take any question of remission of sentence into account.

F (4) Central Criminal Court, Mar. 1, 1950, before LORD GODDARD, C.J., reported in "The Times", Mar. 2, 1950, p. 2. Fuchs had pleaded guilty to four counts on an indictment under the Official Secrets Act, 1911—(i) that on a day in 1943 in Birmingham for a purpose prejudicial to the safety and interests of the state he communicated to a person unknown information relating to atomic research which was calculated to be, or might have been, or intended to be directly or indirectly useful to an enemy; (ii) on a day unknown between Dec. 31, 1943, and Aug. 1, 1944, he, being a British subject, G in New York City, U.S.A., committed a similar offence; (iii) that on a day in February, 1945, he, a British subject at Boston, Massachusetts, U.S.A., committed a similar offence; and (iv) on a day in 1947 in Berkshire committed a similar offence. LORD GODDARD, C.J., in passing sentence, said that Fuchs in 1933, when fleeing from political persecution in Germany, took advantage of the right and privilege of asylum always extended to persons persecuted in their own country for political opinions. He had betrayed the hospitality given to him with the grossest treachery. He was given British nationality in 1942 on account of his scientific ability and, regardless of his oath, H he started to betray secrets of vital importance for the purpose of furthering a political creed held in abhorrence by the vast majority of people in this country. By so doing he imperilled the right of asylum which this country had hitherto extended—he not only betrayed the products of his own brain for which this country paid him, enabling him to live in comfort in return for his promise of secrecy; but also he betrayed the secrets of other workers in this field of science both in this country and in the U.S.A. He might thereby have caused the gravest suspicion to fall on those who he had falsely I treated as friends and who were misled into trusting him. He might have imperilled the good relations between this country and the United States—he had done irreparable harm to both countries and did it merely for the purpose of furthering his political creed. His crime was only thinly differentiated from high treason. LORD GODDARD, C.J., concluded: "I have now to assess the penalty which it is right I should impose upon you . . . how can I be sure that a man of your mentality, as shown in the statement you have made, may not at any other minute allow some curious working in your mind to lead you further to betray secrets of the greatest possible value and importance to this country. The maximum sentence that Parliament has ordained is fourteen years and that is the sentence that I pass upon you."

(5) "The Times", Mar. 2, 1950, p. 2.

It was further argued that sentences totalling forty-two years could not be administered, in that no person is capable of serving so long a sentence or, indeed, any sentence in excess of twenty years. We are quite unable to accept the premise on which this argument is based, nor can we accept the further contention that there is no suitable prison where the applicant can serve his sentence. The age of the applicant and his capacity to serve the sentences imposed on him were doubtless considered by LORD PARKER, C.J., and we see no reason to interfere with his conclusion on these matters.

Disinclined as we are to act otherwise than in public, we thought it right, more especially as the second ground on which the application was based was that, in the particular circumstances of this case the sentence was manifestly excessive, to hear part of this application in camera, because there were matters included in the defendant's statement to which his counsel wished to allude but which we were satisfied it would be prejudicial to the interests of the state to have mentioned in public. This course could not in any way prejudice the accused. These matters could be put before this court just as well in closed as in open court, and it is this court and not the public that the applicant has to satisfy that the sentence passed on him should be reduced.

We listened very carefully to all that was said on behalf of the applicant. Amongst other things, it was pointed out that LORD PARKER, C.J., accepted, as we do, that Blake took no money for the traitorous services which he rendered, that when a prisoner in Communist hands the only books provided for him and his fellow-prisoners were the works of Karl Marx, Engels, Lenin and Stalin, and that so great was the boredom of captivity that he read them and other Russian literature devoted to disparaging the way of life of this country and the West and preaching salvation by Communism until at last he succumbed and decided to dedicate his life to the cause of Communism. When he returned to this country he did not, as one would have expected if he had a shred of honesty, resign from the service and pay of this country. So poisoning to him was the doctrine he had accepted that he decided to remain in the pay and service of this country and by every means in his power to betray it and by that method to help the cause which he had secretly espoused. From then onwards for nine years, not once, but on every occasion when he had it in his power to do harm to this country and his fellow citizens he did it by betraying secret information of great importance. In his own words, " There was not an official document of any importance to which I had access which was not passed to my Soviet contact ".

We repeat, because it accurately represents our view, the words of LORD PARKER, C.J., when he said: " Your case is one of the worst that can be envisaged in times of peace ".

It is of the highest importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held by all ordinary men and women in utter abhorrence but also should receive when brought to justice the severest possible punishment. This sentence had a threefold purpose. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country.

Application dismissed.

Solicitors: *Claude Hornby & Cox* (for the applicant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

A

BROWN v. BULLOCK (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), June 23, 26, 1961.]

Income Tax—Deduction in computing profits—"Expenses incurred wholly, exclusively and necessarily in the performance of . . . duties"—Bank manager—Subscription to club—Membership practically requisite for employment as manager—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *Rules applicable to Sch. E, Sch.* 9, *r.* 7.

B

On appointment to the branch in Pall Mall, Westminster, a bank manager was instructed to "foster local contacts and . . . join the club or clubs best suited for that purpose". Refusal to join a club would not be accepted without very good reason though it would not necessarily involve loss of the appointment, and club membership was virtually a condition or requisite of managerial appointment, which would be unlikely in the event of such refusal. The manager joined the Devonshire Club, and used it for returning hospitality received from bank customers and for lunching there to keep in touch with members, some of whom were bank customers. He also belonged to the Royal Automobile Club which entitled him to use its country club where he played golf. He was reimbursed by the bank for the whole subscription to the Devonshire Club and half of that to the Royal Automobile Club (the part not referable to the country club), the sums being treated as part of his emoluments for income tax purposes.

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Held: the subscriptions were not deductible from the emoluments of the taxpayer's office for income tax purposes under Sch. E to the Income Tax Act, 1952, since the subscriptions were not paid in performing his duties as bank manager but as something that in the opinion of the taxpayer's employers it was desirable for their manager to do socially; the subscriptions were not, therefore, money expended "wholly, exclusively and necessarily in the performance of [his] duties" within r. 7 of Sch. 9 to the Act.

E

Decision of DANCKWERTS, J. ([1961] 1 All E.R. 206) affirmed.

F

[As to deductible expenses of an office or employment under Sch. E to the Income Tax Act, 1952, see 20 HALSBURY'S LAWS (3rd Edn.) 328, para. 602; and for cases on the subject, see 28 DIGEST (Repl.) 242-247, *1059-1099*.

For the Income Tax Act, 1952, Sch. 9, r. 7 of the Rules applicable to Sch. E, see 31 HALSBURY'S STATUTES (2nd Edn.) 524.]

G

Cases referred to:

Griffiths v. *Mockler*, [1953] 2 All E.R. 805; 35 Tax Cas. 135; [1953] 1 W.L.R. 1123; 28 Digest (Repl.) 245, *1082*.

Lomax v. *Newton*, [1953] 2 All E.R. 801; 34 Tax Cas. 558; [1953] 1 W.L.R. 1123; 28 Digest (Repl.) 245, *1083*.

Ricketts v. *Colquhoun*, [1926] A.C. 1; 95 L.J.K.B. 82; 134 L.T. 106; 90 J.P. 9; 10 Tax Cas. 118; 28 Digest (Repl.) 242, *1059*.

H

Appeal.

The taxpayer appealed to the General Commissioners of Income Tax for St. James, Westminster, against an additional assessment of £27 to income tax under Sch. E to the Income Tax Act, 1952, made on him for 1954-55 in respect of his emoluments as manager of the Pall Mall branch of the Midland Bank, Ltd., in the city of Westminster. The sum of £27 represented that part of the total annual subscriptions in respect of the taxpayer's membership of the Royal Automobile Club and the Devonshire Club which was paid by the bank. It was not disputed that the £27 formed part of the emoluments of the taxpayer's office or employment. The sole question for decision was whether, in arriving at the amount of the emoluments to be assessed under Sch. E, a deduction of the £27 was allowable under r. 7 of Sch. 9 to the Income Tax Act, 1952. The commissioners held that the expenditure was not wholly, exclusively and

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necessarily made in the performance of the taxpayer's duties as bank manager as there was some element of personal benefit to the taxpayer, and they confirmed the additional assessment. The taxpayer appealed by way of Case Stated to the High Court.

On Nov. 15, 1960, DANCKWERTS, J., dismissed the taxpayer's appeal, reported [1961] 1 All E.R. 206, holding that the subscription to the Royal Automobile Club was partly for the taxpayer's enjoyment and so was not money expended "wholly, exclusively and necessarily in the performance of" his duties within Sch. 9, r. 7; and that when taking lunch and entertaining customers at the Devonshire Club the taxpayer was not acting in the performance of his duties as bank manager within r. 7. The taxpayer appealed to the Court of Appeal.

Hubert H. Monroe, Q.C., and *M. P. Nolan* for the taxpayer.
C. F. Fletcher-Cooke, Q.C., and *A. S. Orr* for the Crown.

LORD EVERSHED, M.R.: The question in this appeal calls for a decision on the application to the facts in question of para. 7 of Sch. 9 to the Income Tax Act, 1952. The words of the paragraph are:

> "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

The appellant in this court, the taxpayer, was appointed in 1949 as manager of the branch of the Midland Bank, Ltd., in Pall Mall in Westminster. According to the findings of the General Commissioners, he was instructed (and I will now quote from para. 3 of the Case),

> "that he must foster local contacts and that he should join the club or clubs best suited for that purpose."

The Case goes on to say, it might be thought somewhat derogatorily of the powers of selection on the part of the clubs,

> "Membership of such clubs is in almost every case passed from the manager to the succeeding manager as a matter of course."

The paragraph proceeds:

> "If a prospective manager refused to join a club his refusal would not be accepted without very good reason but would not necessarily mean that he would lose the appointment. Club membership is virtually a condition or requisite of managerial appointment and it would be unlikely that a manager would be appointed who would refuse to join the appropriate club or clubs."

Later, the Case states that the taxpayer in fact used the Devonshire Club, which is one of the clubs with which we are concerned,

> "for returning hospitality received by him from customers of the bank. In addition he lunched there fairly frequently so that he might keep in touch with members of the club some of whom were customers of the bank. He used it rarely for any other purpose."

I shall say something on that last sentence presently because counsel for the taxpayer said that in truth there was no evidence that the taxpayer had used the club at all for any purpose other than those which I earlier read.

Finally it is stated in the Case:

> "The [taxpayer] was not a 'clubman' and would be resigning his membership of the Devonshire Club as soon as he retired but he hoped to retain membership of the Royal Automobile Club country club."

A That last sentence introduces two well known clubs. In fact, it seems that the taxpayer had been for some time, at any rate, before his appointment as manager of the Pall Mall branch of the Midland Bank, a member of the Royal Automobile Club, the membership which he enjoyed being one which entitled him also to use the country club. That was a matter of personal amenity to himself because the taxpayer is in fact one who enjoys a game of golf, and he made use of his member-
B ship of the Royal Automobile Club to play golf at the club's country course. His subscription in respect of the Royal Automobile Club was at all relevant dates twelve guineas. We were informed this morning that now in fact he has ceased to be a member of the club, save only a country member for which privilege the subscription is half, six guineas. The other club, the Devonshire Club in St. James's Street, is one of which the subscription at the relevant dates was £21
C per annum. It seems that the bank paid in fact the full amount of the Devonshire Club's subscription and half the Royal Automobile Club subscription (i.e., such part of the subscription as was not referable to the country club), and it is not in doubt in this court that those payments should be treated as part of the taxpayer's emoluments as manager on behalf of the Midland Bank.

The question is whether he can invoke the language of para. 7 of Sch. 9 to
D the Act and treat the subscriptions as an expense *necessarily* incurred *in the performance* of his duties as bank manager. It is the words which I have emphasised in the last sentence on which the whole matter hangs. On the facts as found, is it true to say that the subscriptions (i.e., the annual subscription to the Devonshire Club and half the subscription to the Royal Automobile Club) were expenses necessarily incurred in the performance of the taxpayer's duties as bank manager?
E For the purposes of this appeal I think it unnecessary to make any distinction between the two clubs and I confine myself hereafter to the taxpayer's membership of the Devonshire Club. The General Commissioners who heard the case concluded that the taxpayer had not made good his claim for exemption. They said

> "that although the [taxpayer] was necessarily obliged to incur the
F expense of the club subscriptions such expenditure was not wholly exclusively and necessarily made in the performance of his duties as a bank manager."

On appeal to DANCKWERTS, J., the same conclusion was reached. The learned judge expressed some sympathy for the taxpayer in the circumstances, but felt the answer was inevitable and certainly not less so because of the decisions of
G VAISEY, J., in two cases, *Lomax* v. *Newton* (1) and *Griffiths* v. *Mockler* (2). Those cases related, among other things, to mess subscriptions defrayed by military or territorial officers. The officers claimed that as officers they were, in the same way as the taxpayer here was, obliged for practical purposes to join the mess and that therefore the subscriptions fell within the ambit of the language I have read. The learned judge, VAISEY, J., in those cases rejected that view. He said that no doubt an officer would for practical purposes have to belong to a mess,
H but it could not be said of his mess membership that it was necessarily in performance of his duty as an officer.

Those cases of VAISEY, J., are not binding on us, but I see no ground for casting any doubt on their validity. As VAISEY, J., pointed out, the relevant language in the Schedule is of a somewhat rigid character. The adverb "necessarily" added to the phrase "performance of the duties" clearly narrows very
I much the scope of any expenditure which can fairly be deductible.

Counsel for the Crown indeed indicated that there was a distinction, a sharp distinction, on which he largely founded himself, between a Sch. D case and a Sch. E case. Under Sch. D, where "wholly and exclusively" are as in a Sch. E case required as characteristics, the word "necessarily" is absent, and in Sch. D the object of the expenditure is stated as being "for the purposes of" a man's

(1) [1953] 2 All E.R. 801; 34 Tax Cas. 558.
(2) [1953] 2 All E.R. 805; 35 Tax Cas. 135.

work, whereas in Sch. E it must be " in the performance " of his work. I would myself prefer to express no view whether, if this were a Sch. D case, the taxpayer would be successful. But I would point once again to the distinction between the two Schedules, which I regard as somewhat regrettable, as something which tends to bring the law into a measure of disrepute, and to make the income tax obligations of the taxpayer a game of ingenuity divorced from principle or ethical or other common-sense considerations.

I confine myself in dealing with this case to the question whether the taxpayer's subscriptions fall fairly within the paragraph quoted, and like the learned judge I feel compelled as a matter of the ordinary sense of language to answer that question in the negative. It is not suggested—certainly the taxpayer, I am quite sure, would never suggest—that while he was in the Devonshire Club he felt it his duty to try to get business for the bank, to " tout " for customers. Nor, in my judgment, could he be said while exercising his rights and privileges as a member of the club in other respects to be performing his duties as manager. The phrase which is used in the Case, " to foster local contacts ", is a vague phrase, not capable of precise significance. No doubt it is like many such phrases, a useful formula so long as it has not to be further expounded. The natural intention on the part of the taxpayer's superior officers was no doubt that, if he belonged to clubs of this standing in this part of London, it gave him a certain status. It would be obvious that, if he was a member of these clubs, he was the sort of man who would be acceptable in that sort of social circle, and that no doubt would be useful to him and to the bank, because he would thereby meet people who, as a result of meeting him and liking him, might tend to have business relations with him or with the bank.

It seems to me that it is impossible, as it were, to cut up the uses a man may make of a club like the Devonshire Club, to say that on a particular occasion when he is having lunch with a particular person he is in fact using the club as bank manager, while on other occasions he is just having lunch because it is his lunch-time and he has nowhere else to go. The fact is that he acquires the status of a member of the Devonshire Club and he has the amenities of the club of which he may or may not take advantage as occasions may arise. If it were possible so to analyse the uses a man in the taxpayer's position might make of a club, the result would appear to be—as counsel for the taxpayer conceded—that failure to prove that he had never used the club except directly in connexion with the bank's business would be fatal to the claim for exemption—a result which would be impracticable in application as well as capricious in its consequences.

As Mr. Monroe pointed out at the end of his very forceful contentions on the taxpayer's behalf, the matter in the end falls within a very small compass. It is a question of applying the ordinary sense of a few simple English words. A man becomes, and I assume he applies to become, a member of a club because those who employ him say that they think their managers ought to be in that sort of social position. Having become a member of the club, he then is entitled to use the club's premises and any amenities that it has. But it seems to me that to the short question, " When he pays his subscription, is the sum paid necessarily incurred in the performance of his duties as a bank manager? " the answer is, " No ". What his employers may think it desirable for him to do, socially, is one thing. Performance of the duties of manager of their branch is something else. I cannot myself find any good ground for saying that the sense of the words I have quoted could be so applied as to produce the result for which the taxpayer contends. For those reasons I conclude that this appeal fails and must be dismissed.

HARMAN, L.J.: I confess to having found the arguments or some of the arguments addressed to us on this subject extremely distasteful. I think

A it better to say no more about it except that I agree that the appeal should be dismissed.

DONOVAN, L.J.: Under r. 7 of the Rules applicable to Sch. E to the Income Tax Act, 1952, the taxpayer must show that any expense he wishes to be deducted in arriving at his assessable emoluments was inter alia necessarily B incurred in the performance of the duties of the office or employment. For the taxpayer here it is contended that the fact is proved by showing that the employer prescribed some duty for his own employee which involved the relevant expense. This contention in my view is not correct. The test is not whether the employer imposes the expense, but whether the duties do, in the sense that, irrespective of what the employer may prescribe, the duties cannot be performed without C incurring the particular outlay. This result follows in my opinion from the decision of the House of Lords in *Ricketts* v. *Colquhoun* (3).

Counsel for the taxpayer has conceded that, even if the Midland Bank did not request and expect the taxpayer to join a club like the Devonshire Club, he could still perform his duties as bank manager; and that, if the test is the strictly objective one which I have stated, he must fail. I think that is the test under the D Schedule and I therefore agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Preston & Naylor* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

E

S. *v.* S. (O. otherwise P. (by her Guardian) intervening) B. Cited.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), June 2, 5, 6, 7, 8, 9, 1961.]

F *Divorce—Adultery—Insanity—Whether ignorance that act was wrong was a defence.*

The wife petitioned for divorce on the ground of the husband's adultery with the intervener. The husband admitted the adultery. The intervener, however, was a mental patient and denied adultery and the medical evidence called on her behalf (which was accepted by the court) showed that she G "would not have known that promiscuous sexual intercourse was wrong".

Held: the wife would be granted a decree on the ground of the husband's adultery with the intervener, but the intervener would be dismissed from the suit since, being ignorant that her act was wrongful, she was not guilty of adultery.

M'Naghten's Case ((1843), 10 Cl. & Fin. 200), *Swan* v. *Swan* ([1953] 2 H All E.R. 854) and *Palmer* v. *Palmer* ([1954] 3 All E.R. 494) applied.

[As to insanity as a defence to a charge of adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 237, para. 444, note (b); and for cases on the subject of insanity, see 27 DIGEST (Repl.) 374, *3085-3087.*]

Cases referred to:

I *Hanbury* v. *Hanbury*, [1892] P. 222; 61 L.J.P. 115; *affd.* C.A., (1892), 8 T.L.R. 559; 27 Digest (Repl.) 374, *3086.*

Long v. *Long and Johnson*, (1890), 15 P.D. 218; 60 L.J.P. 27; 27 Digest (Repl.) 312, *2600.*

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 14 Digest (Repl.) 60, *246.*

Palmer v. *Palmer*, [1954] 3 All E.R. 494; [1955] P. 4; [1954] 3 W.L.R. 756; 3rd Digest Supp.

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(3) [1926] A.C. 1; 10 Tax Cas. 118.

Swan v. *Swan*, [1953] 2 All E.R. 854; [1953] P. 258; 117 J.P. 519; [1953] 3 W.L.R. 591; 3rd Digest Supp. A

Yarrow v. *Yarrow*, [1892] P. 92; 61 L.J.P. 69; 66 L.T. 383; 27 Digest (Repl.) 374, *3087*.

Petition.

The wife petitioned for divorce on the ground of the husband's adultery with the intervener. The husband, by his answer, admitted the adultery alleged but pleaded that the wife connived at and by her misconduct conduced to the adultery; and the husband cross-prayed for a divorce on the ground of the wife's adultery with the party cited. The wife denied that she had connived at or conduced to the husband's adultery and both she and the party cited denied adultery. The intervener was a mental patient and denied adultery. At the hearing of the suit, the judge found that the husband had failed to establish his charge of adultery. The case is reported on the question whether or not the intervener had been guilty of adultery. B C

M. B. Smith for the wife.

H. M. Self for the husband.

L. I. Stranger-Jones for the Official Solicitor as guardian ad litem for the intervener. D

R. D. Ranking for the party cited.

Cur. adv. vult.

June 9. **MR. COMMISSIONER LATEY, Q.C.,** in the course of his judgment said: Counsel for the intervener has submitted in a careful review of the law that in the circumstances of the present case the intervener cannot be found guilty of adultery. He accepts the definition of adultery (1) as E

> "willing sexual intercourse between a married person and one of the opposite sex whilst the marriage subsists",

but he urges that the intervener, who was a single person, comes within the exceptional category of the second limb of the M'Naghten rules (2). Those rules were formulated by TINDAL, C.J., as follows (3): F

> "... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." G

Those rules as we are all aware have been applied ever since in the criminal courts and in recent years the Court of Appeal has decided that both propositions apply to a defence of insanity against charges of cruelty in the Divorce Division. I shall refer to those authorities later.

Counsel for the intervener submits that the second proposition or limb of the rules applies to the intervener in the present case. She is a spinster of mature age and as a mental patient, a schizophrenic, formerly under certification, she is represented by the Official Solicitor. She was admitted as a certified patient into a mental hospital in 1944 and was transferred to Banstead Mental Hospital in July, 1945, and she was there as a certified patient until May, 1959, when she was discharged as relieved and re-admitted as a voluntary patient. In November, 1960, she was re-classified as an informal patient under the Mental Health Act, 1959, and she still continues as such. In February, 1958, she ceased to be treated in a closed ward and was allowed a certain measure of freedom. The husband, then a porter at the hospital, took advantage of this and as a result she became pregnant. On medical advice the pregnancy was H I

(1) LATEY ON DIVORCE (14th Edn.), p. 74, para. 143. (2) (1843), 10 Cl. & Fin. 200. (3) (1843), 10 Cl. & Fin. at p. 210.

A officially terminated in June, 1958, and in his affidavit the deputy physician superintendent and consultant psychiatrist at Banstead Mental Hospital said:

> "In my opinion in the early months of 1958 the mental condition of the intervener was such as to preclude her from a full understanding of the nature and consequence of her actions. I am of the opinion that at the time she had sexual relations which eventually resulted in her pregnancy, B she would have known that she was in fact in the process of sexual intercourse, but she would have been incapable by reason of her mental illness of a full understanding of her actions; she would not have considered whether such conduct was unlawful or morally wrong. Her mental condition was such that she was incapable of exercising fully those aspects of judgment and understanding of the quality of her acts as a normal person C would. She would not have known that promiscuous sexual intercourse was wrong."

The court is not obliged to take the opinion of the psychiatrist as gospel, but in the present case I accept that opinion in full. Thus, the husband was convicted at Surrey Assizes in November, 1958, of having carnal knowledge of the intervener, as it was an offence under the Lunacy Act, 1890, s. 324.

D Counsel for the intervener submitted that in *Swan* v. *Swan* (4) the court decided that the first limb of the M'Naghten rules applied to cruelty in matrimonial cases just as much as in criminal courts. He also pointed out that the Court of Appeal in the later case of *Palmer* v. *Palmer* (5), decided that the second limb applied in the same way. He then submitted that equally the second limb was applicable in the circumstances concerning the intervener and could be E applied to the issue of adultery, just as much as to the issue of cruelty. He pointed out that in the older case of *Hanbury* v. *Hanbury* (6) Sir Charles Butt, P., instanced in his charge to the jury that both in cruelty and adultery it was for them to consider whether the accused person was capable of understanding the nature and consequences of his acts. The fact that in that particular case the jury held that the person concerned was capable of understanding F does not alter the legal principle that had they found otherwise it would have made a good defence. Counsel for the intervener also cited *Long* v. *Long and Johnson* (7), and *Yarrow* v. *Yarrow* (8). In the latter case the defence of insanity failed, but in the present case I accept the submission that the intervener did not know that her act was wrongful and, therefore, she was not guilty of adultery. I dismiss her from the suit.

G [The commissioner considered the facts and concluded:] I reject the husband's plea of connivance and conduct conducing to the adultery with the intervener, and as for connivance, it does not even arise in this case. Therefore, I find that the husband's case fails in regard both to his charges of adultery and to his pleas of connivance and conduct conducing. I find, as he has admitted, that he committed adultery with the intervener. I have already dismissed her H from the suit, and I pronounce a decree nisi of divorce in favour of the wife on the ground of the husband's adultery with the intervener.

Decree nisi.

Solicitors: *W. H. Matthews & Co.* (for the wife); *J. I. Humphreys & Co.* (for the husband); *Official Solicitor* (as guardian ad litem for the intervener); *F. W. P. Lupton* (for the party cited).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

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(4) [1953] 2 All E.R. 854; [1953] P. 258. (5) [1954] 3 All E.R. 494; [1955] P. 4.
(6) [1892] P. 222. (7) (1890), 15 P.D. 218. (8) [1892] P. 92.

Re SEALE'S MARRIAGE SETTLEMENT.

A

[CHANCERY DIVISION (Buckley, J.), March 7, June 22, 1961.]

Trust and Trustee—Variation of trusts by the court—Jurisdiction—English marriage settlement to be replaced by trust abroad—Husband and wife emigrated to Canada and became domiciled there—Approval sought for proposed arrangement involving appointment of Canadian trustee in place of English trustee and resettlement of trust funds on trusts of new Canadian settlement—Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 53), *s.* 1.

B

A marriage settlement was executed in England by a man and a woman who at the date of their marriage were living and domiciled in the United Kingdom, but who later emigrated to the Province of Quebec, Canada, where they were living and domiciled at the time of the present application. An English trustee company was trustee of the marriage settlement. The beneficial trusts were first a life interest for the wife, then protective trusts for the husband for life, then a power of appointment among children and issue of the marriage, with a trust in default of appointment for the children of the marriage at twenty-one. The husband and wife had three children, one of whom had attained twenty-one, the two others being still infants. The family intended to continue to live in Canada, and the children had been brought up as Canadians. An application was made to the court under s. 1 of the Variation of Trusts Act, 1958*, for the approval of an arrangement whereby, in effect, the settlement trusts would be replaced by similar trusts of a Canadian settlement and a Canadian trust corporation would become trustee and would hold the settled fund on the trusts of the Canadian settlement freed and discharged from the trusts of the original marriage settlement. The proposed new settlement, drafted by a Canadian lawyer, did not exactly replace the husband's protective life interest, as the law of Quebec did not recognise protective trusts, but the settlement would confer on the husband a life interest and it also included a clause (cl. 7†) preventing anticipation, assignment and seizure by creditors of the interests of all beneficiaries.

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Held: (i) the court had jurisdiction under s. 1 of the Variation of Trusts Act, 1958, to approve an arrangement such as that proposed, which involved the substitution for an English settlement of a settlement to be administered by foreign law, since the enactment conferred jurisdiction to approve an arrangement which involved the revocation of all the trusts of an English settlement (see p. 139, letter G, post); moreover, although the court would be unwilling to appoint a foreign trustee of an English trust, more particularly if the trust property were to be taken out of the jurisdiction, that was not asked in the present case as the foreign trustee would be trustee of a foreign settlement governed by the law of the country where the trustee was (see p. 140, letter E, post).

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Re Liddiard ((1880), 14 Ch.D. 310) considered.

(ii) it would be for the general advantage of the beneficiaries in the present case to approve the proposed arrangement and, accordingly, the court would approve the arrangement in principle, but the provisions of cl. 7 of the proposed Canadian settlement would be referred for further consideration with a view either to drafting a clause which would correspond more nearly with the protective trust imposed by the English settlement only on the husband's life interest than did the draft cl. 7, which apparently restricted also the interests of those who might ultimately become entitled to capital, or to satisfying the court that the proposed cl. 7

I

* The relevant terms of s. 1 are "(1) Where property . . . is held on trusts arising . . . under any . . . settlement . . . the court may if it thinks fit by order approve . . . any arrangement . . . varying or revoking all or any of the trusts . . ."

† The terms of cl. 7 are set out at p. 138, letter G, post.

A would really be advantageous to those interested in capital (see p. 140, letter G, and p. 139, letter I, to p. 140, letter B, post).

SEMBLE: if the application had been merely to vary the trusts of an English settlement, there would not be jurisdiction so to vary them that they would fall to be administered by some other law (see p. 139, letter F, post).

B [As to appointment of person residing outside jurisdiction as trustee, see 33 HALSBURY'S LAWS (2nd Edn.) 182, para. 321; and for cases on the subject, see 43 DIGEST 687, *1186-1192*.

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Case referred to:

C *Liddiard, Re*, (1880), 14 Ch.D. 310; 49 L.J.Ch. 373; 42 L.T. 621; 43 Digest 687, *1192*.

Adjourned Summons.

This was an application by originating summons dated Jan. 26, 1960, by Walter Murray, Mildred Margaret Boutflower Murray and Jill Elizabeth Murray who were beneficially interested under the trusts of a marriage settlement dated D Mar. 6, 1931, made between Mildred Margaret Boutflower Seale and Walter Murray and the Midland Bank Executor and Trustee Co., Ltd. The application was for an arrangement to be approved by the court pursuant to s. 1 of the Variation of Trusts Act, 1958, on behalf of the infant respondents and any unborn person who might become interested under the trusts and any person in respect of any discretionary interest of his under protective trusts which might E affect the life interest under the settlement of Walter Murray. The proposed terms of the arrangement were (a) that the Chartered Trust Co. (a Canadian corporation) might be appointed trustee of the settlement in place of the Midland Bank Executor and Trustee Co., Ltd., and (b) that as from such appointment and subject as thereinafter provided the trustees of the settlement might transfer the funds comprised in the settlement (or the proceeds of sale thereof) to the F trustees of a new settlement to be constituted for that purpose under the law of the Province of Quebec to be held on the trusts of the new settlement freed and discharged from the trusts of the existing settlement, provided that (i) the trustees of the new settlement should be the Chartered Trust Co. or such other person as might be agreed by the applicants; (ii) the new settlement should substantially be in the form of a draft settlement which had been prepared and G was exhibited to an affidavit in the proceedings. The respondents were Deborah Susan Murray and John Alexander Robert Murray, infants, both of whom were beneficially interested under the settlement, and the Midland Bank Executor and Trustee Co., Ltd., trustee of the settlement. The facts appear in the judgment.

J. W. Brunyate for the applicants.

H *J. A. Brightman, Q.C.*, for the trustee.

P. G. Clough for the infant respondents.

BUCKLEY, J.: This is an application made under the Variation of Trusts Act, 1958, and the Trustee Act, 1925, in the matter of the marriage settlement of a lady and gentleman who at the date of their marriage in 1931 were living and domiciled in this country but who have since emigrated to the Province of I Quebec in Canada, where they are now living and have their domicil. They have three children, one of whom has attained twenty-one years of age and two of whom are still infants. The beneficial trusts of the settlement stated shortly are that the trust fund is held on trust for the wife during her life and after her death on protective trusts for the husband during the remainder of his life and after the death of the survivor of them in trust for those of the children and the remoter issue of the marriage as the husband and the wife jointly appoint and in default and subject to any such appointment for such of the children and issue

of the marriage as the survivor of the husband and wife appoints by deed or will and in default and subject to any appointment on trust for the children of the marriage who being male attain the age of twenty-one or being female attain that age or marry if more than one in equal shares subject to the usual hotchpot provisions. One child has already attained twenty-one years of age so I need not consider anything beyond the trusts that I have mentioned. A

The evidence discloses that the present state of affairs gives rise to various practical difficulties and financial disadvantages for those interested under the settlement. The income which the wife derives under the settlement from some Canadian investments has for some years suffered double taxation. The fact that the trustee is English has prevented double taxation relief being available. The parties are advised that on the wife's death English death duties will be payable not only on settled property which may then be in England but also on Canadian investments, whereas English death duties would not be payable on Canadian investments if the settlement were Canadian. It is said that other disadvantages due to double taxation and exchange control restrictions may arise in the future so long as the settlement is English and that variations in exchange rates might make it unfortunate that some of the property is invested in England. It is said that it would be more convenient that the trustees should be in Canada so that the beneficiaries may have easy access to them. B C D

In those circumstances, a Canadian lawyer has been asked to prepare a draft of a settlement in terms appropriate to the law of Quebec bearing the closest possible similarity to the trusts of the original settlement. That has been done and such a draft is in evidence before me. The Quebec lawyer who prepared the draft deposes to the fact that before doing so he was supplied with a copy of the English settlement and that his instructions were so to draft the Canadian settlement that it would not alter the beneficial interests of the persons interested unless the law of Quebec should make such alterations necessary. He says that the draft carries out those instructions to the best of his ability and the settlement which he has prepared will not alter the beneficial interests except in the following respects. The law of Quebec does not recognise protective trusts and it has therefore been necessary to substitute a straightforward life interest in favour of the husband in reversion expectant on the death of his wife for the protected life interest which he is given by the English settlement; but the Canadian settlement contains a clause in the following terms: E F

> "7. That all and any sums received, paid or to be paid herein or hereunder, whether in capital or revenue, shall be and remain the private and separate property of the beneficiaries under this trust agreement and shall not fall into any community of property or be subject to any of the matrimonial rights of the consorts of such beneficiaries and shall not be liable for obligations of any such consorts or community. All sums received, paid or to be paid herein or hereunder are also intended as an alimentary pension for such beneficiaries and shall not be subject to seizure for payment of any debts of the said beneficiaries or their representatives. Any sums to be paid under this trust agreement to the husband shall not be capable of being anticipated or assigned without the consent of the party of the second part, trustee. The foregoing provisions are not intended to affect the right hereinabove granted to the party of the second part, trustee to hypothecate, pledge or otherwise affect voluntarily any of the trust assets, nor to affect the rights of the beneficiaries herein after delivery to them of their share in the trust assets of hypothecating, pledging or otherwise affecting voluntarily their said shares of such trust assets."

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The Canadian lawyer says, with regard to that clause, that the interest of the husband as well as the interests of the other persons should be subject to the provisions of that clause which prevent, inter alia, seizure of such interests by creditors. He says the clause in question is usually included in settlements

A under the law of Quebec and that in his opinion it is desirable in the interests of the beneficiaries to include it in the Canadian settlement. The Canadian settlement is drawn on the footing that the Chartered Trust Co., which is a corporate body incorporated according to the law of the Province of Ontario, will become or be the trustee of the Canadian settlement and that company has accorded its consent in writing to be trustee of the English settlement and has indicated what B fees it will require to be paid in its capacity as trustee of the Canadian settlement. It is proposed by the originating summons that the court should approve the arrangement set out in the schedule to the summons which arrangement provides first of all that the Chartered Trust Co. be appointed trustee of the English settlement in place of the Midland Bank Executor and Trustee Co., Ltd., the present trustee of that settlement. The arrangement then provides that as from C such appointment and subject as thereinafter provided the trustees of the settlement may transfer the funds in the settlement or the proceeds of sale thereof to be held on the trusts of a new settlement to be constituted under the law of the Province of Quebec free and discharged from the trusts of the existing settlement and it provides that the new settlement shall be in substantially the form of the draft settlement which I have mentioned. The summons asks further that the D Chartered Trust Co. may be appointed trustee of the English settlement and that it shall then be authorised to treat the settled property as held by itself, not as trustee of the English settlement, but as trustee of the new Canadian settlement. The arrangement does suggest that the trustees of the English settlement may transfer the funds in the settlement to the trustees of the new settlement so the language there may require some alteration. The substance of the scheme is E clear. Under s. 1 of the Variation of Trusts Act, 1958, the court has jurisdiction where property is held on trust under any will or settlement or other disposition to approve on behalf of the various classes of persons mentioned in the section any arrangement varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trust. So far as I am aware this is the first case in which that jurisdiction F has been invoked for the purpose of converting an English trust into a trust governed by some other system of law. If it were merely a question of varying the trusts, it seems to me that there might be difficulty in saying that this court could properly vary the trusts under the settlement by substituting trusts of a kind which would fall to be administered by some other law; but, having regard to the fact that the court can approve an arrangement which revokes all the G trusts of the settlement, it seems to be clear that the court must have jurisdiction to approve an arrangement which in effect does revoke all the trusts of the English settlement in the event of the trust property becoming subject to the trusts of a settlement which would be recognised and enforced in some other jurisdiction. It seems to me that I have jurisdiction to approve a scheme on the lines of the scheme I am asked to approve in the present case.

H The evidence establishes to my satisfaction that the husband and the wife intend to continue to live in Canada, that their children who are living in Canada and have been brought up as Canadians are likely to continue to live in Canada and that it will be for the general advantage of all the beneficiaries that the administrative difficulties and the difficulties of other kinds to which I have referred, which result from the fact that it is an English settlement and the I beneficiaries all reside in Canada, should be brought to an end; and I am satisfied that the arrangement is one of a kind which is sensible and advantageous for all concerned.

The only aspect about which I feel some doubt is whether it is right for me to approve the transfer of this fund into Canadian trusts which contain quite such stringent provisions against anticipation as are contained in cl. 7 of the draft Canadian settlement which I have read, because whereas under the English settlement any child or remoter issue of the husband and wife who became entitled to a vested interest in reversion in any part of the capital could assign

or deal with that interest in any way in which he thought fit, it appears from cl. 7 of the Canadian draft as though by that clause he would be deprived of that right unless he obtained the consent of the trustees, and before I finally part with the matter I would like to be satisfied that that is a provision which, under Canadian law, will really be advantageous to persons who may ultimately become entitled to the capital of this trust or whether the clause may not be modified in some way which will maintain the comparison between the protective trust which is imposed on the husband by the English settlement without restricting the interests of the persons who may ultimately become entitled to capital.

I have been referred to a number of authorities, all decided long before the Variation of Trusts Act, 1958, was thought of, dealing with the question whether it is right, and if so in what circumstances, to appoint foreign trustees of an English trust. I find some comfort for the course I am proposing to adopt in a case dealt with by MALINS, V.-C.: *Re Liddiard* (1). That was a case under the will of an English testator and the residue of his estate was divisible among his children and issue, some of whom were infants. All of them were resident in Australia and an application was made to the court to appoint two persons as trustees who were resident in Australia and who would sell the English investments and invest the money in Australia. MALINS, V.-C., thought that was a proper order to make and he made it. The facts of that case were not unlike the present. It is easier for me to make the present order than it was for MALINS, V.-C., to make the order in *Re Liddiard* (1) because the trust in that case remained an English one. It was an English trust of which the trustees and all the assets were proposed to be situate outside the jurisdiction and it is, in general, the attitude of this court that, in the case of an English trust, the court is unwilling to appoint trustees in such a way that all the trustees will be out of the jurisdiction, more particularly if the property is likely to be taken out of the jurisdiction. In the present case I am asked to do something which will not result in that rather unsatisfactory state of affairs because if the arrangement is carried into effect the English trusts will cease to have any operative effect, because all the funds will become free from the trusts of that settlement and will be caught by the trusts of the Canadian settlement. The assets will, presumably, be transferred to Canada, the trustee will be in Canada and the proper court for enforcing the trust will be the competent court in Quebec, so there will not be that divorce of the assets and the trustees from the jurisdiction to enforce the trusts which would have resulted from what was done in *Re Liddiard* (1). I am therefore prepared in principle to approve the arrangement subject to further investigation about cl. 7 in the proposed Canadian settlement and I shall have to ask the parties to come back and mention the matter to me again when they have discussed it further with their Canadian advisers. Any order that I make will have to be postdated but I am prepared to appoint the Chartered Trust Co. trustee of the English settlement.

[The arrangement as approved by the court provided (apart from the variation (2) of cl. 7 which is not included in the following extract) as follows:

" The term of the said settlement shall be varied by adding thereto the following provision—

" The Chartered Trust Company as trustee of the settlement may withdraw from the settlement the funds comprised therein and re-settle such funds or the proceeds of sale thereof upon the trust of a new settlement to be constituted

(1) (1880), 14 Ch.D. 310.

(2) The draft of cl. 7 (see p. 138, letter G, ante) was modified, prior to approval of the minutes of the order on this application, by substituting for the words " Any sums to be paid under this trust agreement, in capital or revenue shall not be capable of being anticipated or assigned without the consent of the party of the second part trustee ", the words, " Any sums to be paid under this trust agreement to the husband shall not be capable of being anticipated or assigned without the consent of the party of the second part trustee."

A for that purpose under the law of the Province of Quebec to the intent that the same shall be held on the trust of the new settlement freed and discharged from the trusts of the existing settlement, such new settlement being a settlement of which the Chartered Trust Company shall be trustee and being in the form of a draft . . . [which was identified] . . . with the following alterations, namely . . . (ii) such alterations as may be requisite by reason of the fact that the Char-
B tered Trust Company and not the Midland Bank Executor & Trustee Company Limited will be the trustee of the original settlement at the date of the constitution of the new settlement."

The order contained an appointment by the court of the Chartered Trust Co. as new trustee of the original marriage settlement in substitution for the Midland Bank Executor and Trustee Co., Ltd.]

C *Order accordingly.*

Solicitors: *Merrimans*, agents for *Barton, Thompson & Hitchens*, Bournemouth (for all parties).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

D

EDGWARE TRUST, LTD. *v.* LAWRENCE.

[QUEEN'S BENCH DIVISION (Diplock, J.), May 30, 31, June 1, 1961.]

Moneylender—Memorandum—Omitted terms—Reference therein to promissory note which contained the omitted words—Not permissible to look at promissory note unless copy thereof delivered or sent to borrower—Moneylenders Act,
E 1927 (17 *&* 18 *Geo.* 5 *c.* 21), *s.* 6 (2).

The memorandum of a moneylenders' contract, having referred to the promissory note given by the borrower in favour of the moneylenders, purported to set out the terms of a default clause in the promissory note. The terms of the default clause as printed in the promissory note were clear but as printed in the memorandum were unintelligible because certain
F words were omitted. Accordingly the court found that the memorandum did not therefore contain all the terms of the contract as required by s. 6 (2)* of the Moneylenders Act, 1927. The borrower was given a copy of the memorandum in accordance with the Act of 1927 but was not given a copy of the promissory note. In an action by the moneylenders on the promissory note the borrower relied on the failure to comply with s. 6 (2) of
G the Act of 1927.

Held: where a memorandum did not itself contain all the terms of the moneylenders' contract but referred to another document it was not permissible to ascertain omitted terms by looking at the other document unless a copy of that document was left with the borrower; accordingly, in the present case, the promissory note could not be looked at to ascertain the
H terms of the default clause and the defence under s. 6 (2) succeeded.

Dictum of DU PARCQ, L.J., in *Mills Conduit Investments, Ltd.* v. *Tattersall* ([1940] 1 All E.R. at p. 283) applied.

Dicta of GREER, L.J., in *Reading Trust, Ltd.* v. *Spero* ([1929] All E.R. Rep. at p. 411) considered.

[As to the necessity for a note or memorandum of a moneylenders' contract
I and as to the form of the note or memorandum, see 27 HALSBURY'S LAWS (3rd Edn.) 31-33, paras. 49, 50; and for cases on the subject, see DIGEST Supplements.

For the Moneylenders Act, 1927, s. 6, see 16 HALSBURY'S STATUTES (2nd Edn.) 386.]

Cases referred to:

Dunn Trust, Ltd. v. *Feetham*, [1935] All E.R. Rep. 280; [1936] 1 K.B. 22; 105 L.J.K.B. 52; 154 L.T. 53; Digest Supp.

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* For the relevant terms of s. 6, see footnote (1), p. 142, post.

Kent Trust, Ltd. v. *Cohen*, [1946] 2 All E.R. 273; [1946] K.B. 584; [1947] L.J.R. 106; 175 L.T. 129; 2nd Digest Supp. A

Mills Conduit Investments, Ltd. v. *Tattersall*, [1940] 1 All E.R. 281; 162 L.T. 381; 2nd Digest Supp.

Reading Trust, Ltd. v. *Spero*, [1929] All E.R. Rep. 405; [1930] 1 K.B. 492; 99 L.J.K.B. 186; 142 L.T. 361; Digest Supp.

Action. B

This was a claim by moneylenders, the plaintiffs, on three promissory notes signed by the defendant, for £2,000 with interest at sixty per cent. per annum on Dec. 3, 1958, for £900 at sixty per cent. per annum on May 4, 1959, and for £1,250 at sixty per cent. per annum on July 6, 1959. The defendant pleaded that the contracts were unenforceable on the ground that the plaintiffs were in breach of s. 6 of the Moneylenders Act, 1927, in failing to include in the notes or memoranda of the contracts all the terms of the contracts, in particular, the terms of a default clause and, by way of counterclaim, sought a declaration that the rate of interest charged was excessive and the transactions were harsh and unconscionable and asked for an order to re-open the three transactions sued on and also six earlier transactions. By their reply the plaintiffs denied that the interest charged on any of the contracts was excessive or that any of the transactions was harsh or unconscionable. This report deals solely with the defence raised under s. 6 of the Act of 1927. The terms of the promissory notes and of the memoranda thereof are set out in the judgment. The material provisions of s. 6 of the Moneylenders Act, 1927, are printed in footnote (1) infra. C D

M. A. B. King-Hamilton, Q.C., and *A. L. Figgis* for the plaintiffs. E
Desmond Ackner, Q.C., for the defendant.

DIPLOCK, J., stated the facts and continued: I deal first with the defence under s. 6 of the Moneylenders Act, 1927 (1). I find this point as difficult as it is unattractive. The promissory note was in the following terms—and they were all in the same form, so I will take the promissory note for £2,000 of Dec. 3, 1958: F

> " I, Terence Patrick Lawrence of [the address given] promise to pay the Edgware Trust, Ltd. at No. 35 South Audley Street, W.1 or at such other place as you may direct the sum of £2,000 together with interest at the rate of sixty per cent. per annum by nine consecutive monthly instalments of £100 each the first of such instalments commencing on Jan. 15, 1959 and the balance on the tenth month." G

Then comes an important default clause:

> " and in the event of default in payment of any instalment or part thereof then the Edgware Trust, Ltd. shall be at liberty at their option to demand payment of the whole of the balance with interest as aforesaid to the date of such demand thereupon the whole of the said balance with interest as aforesaid shall immediately become due and payable and such balance of the said sum and interest so remaining due as aforesaid and whether in respect of principal or interest shall bear simple interest on that sum at the rate of £60 per cent. per annum from the date of such demand until payment and until such demand to continue to pay the said monthly instalments and all moneys paid on account of the said advance and interest shall be applied firstly in payment of the interest due to that date and then to principal." H I

(1) Section 6 of the Moneylenders Act, 1927, provides, so far as is material, as follows: " (1) No contract for the repayment by a borrower of money lent to him . . . by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent . . . shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract . . . " (2) The note or memorandum aforesaid shall contain all the terms of the contract. . "

A Although the draftsmanship is not elegant, the terms of the contract, and in particular the terms of the default clause, are, I think, clear.

The memorandum, however, a copy of which was sent to the defendant, does not set out the terms of the promissory note in relation, in particular, to the default clause. An explanation has been given that in 1948 a re-print was made of the then existing clause as a result of which a line was left out. I do not think B that the circumstances in which the mistake arose really affect my judgment. This is what the memorandum said in relation to the default clause. Having referred to the promissory note, it goes on:

> " and in the event of default in payment of any instalment or part thereof then the said Edgware Trust, Ltd. shall be at liberty at their option to demand payment of the whole of the balance of the said sum of £2,000 remaining unpaid and interest at the rate aforesaid whether in respect of principal or interest shall bear simple interest on that sum at the rate of £60 per cent. per annum from the date of such demand until payment and until such demand continue to pay the said monthly instalments."

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That wording seems to me to be unintelligible, and I find it impossible to put D any clear meaning on it. The relevant words are:

> " in the event of default . . . shall be at liberty at their option to demand payment of the whole of the balance of the said sum of £2,000 remaining unpaid and interest at the rate aforesaid whether in respect of principal or interest shall bear simple interest on that sum at the rate of £60 per cent. per annum from the date of such demand until payment and until such demand continue to pay the said monthly instalments."

E

What is the sum on which simple interest shall be borne? In the earlier part it says: " interest at the rate aforesaid " To what date is that interest to be calculated? It follows the words: " the balance of the said sum of £2,000 remaining unpaid and interest at the rate aforesaid ". Is it interest agreed to be F paid but not yet due and remaining unpaid, as it is in the case of one of the earlier loans for £500? I find the words in the memorandum by themselves unintelligible, and certainly as not bearing the meaning which is clearly expressed in the promissory note. If, therefore, I must read them by themselves, it seems to me that the note or memorandum does not contain all the terms of the contract, because it does not contain the very important terms of the default clause, a G clause which appears to have been misread by the person who drafted, and by Mr. Genese (2) who swore, the affidavit in support of the specially indorsed writ in this action.

Counsel for the plaintiffs, while arguing that the clause in the memorandum is intelligible if not wholly clear, says that if there is any difficulty about it I am entitled to look at the promissory note which is referred to in the memorandum; H and in support of that proposition he relies on the observations of SCRUTTON, L.J., and in particular GREER, L.J., in *Reading Trust, Ltd.* v. *Spero* (3). The question in that case was whether the promissory note might be identified as being the promissory note mentioned in the note or memorandum of the contract. But in the course of his judgment GREER, L.J., says (4):

> " Once the form of the promissory note is identified, it can, in my judgment, be treated as part of the memorandum of contract, and the memorandum can then be read as if it contained the words, ' on the security of a promissory note in the following form '. The words of s. 6 are that, without such a note, no contract of loan shall be enforceable. They are analogous to the words of the Statute of Frauds and the Sale of Goods Act [, 1893]."

I

(2) The plaintiffs' representative who dealt with the defendant.
(3) [1929] All E.R. Rep. 405; [1930] 1 K.B. 492.
(4) [1929] All E.R. Rep. at p. 411; [1930] 1 K.B. at p. 507.

He then refers to the cases under those statutes and continues (5): A

> "Following the same line of reasoning, I think that if a memorandum of a contract of loan states that the loan is granted on the security of a promissory note, it may be proved by oral evidence that at the time of the loan there was in existence a form of promissory note ready for signature, and that when this evidence is given, the court can read the two documents together as a complete memorandum of the contract of loan." B

Those observations were obiter in that particular case.

Counsel for the plaintiffs relies also on the judgment of DU PARCQ, L.J. (sitting as a judge of the King's Bench Division) in *Mills Conduit Investments, Ltd.* v. *Tattersall* (6). The learned lord justice said:

> "One may, I think, incorporate the terms of one document by reference into the memorandum, provided that one gives the borrower a copy of the document, so incorporated with the copy of the memorandum. One may incorporate, for instance, the terms of a bill of sale . . ." C

It seems to me that plainly DU PARCQ, L.J., in that case was contemplating that a copy of the promissory note was handed to the borrower and available for reference by him. There are subsequent cases (7), to which I need not refer, where that practice and DU PARCQ, L.J.'s decision were followed. D

In my view (and I refer in passing to *Dunn Trust, Ltd.* v. *Feetham* (8) and *Kent Trust, Ltd.* v. *Cohen* (9)), the memorandum itself must contain all the terms of the contract, and where, as in this case, in my view, the memorandum does not contain the important provisions of the default clause, it is not permissible for me to look at the promissory note to ascertain what the meaning of those unintelligible words was meant to be unless a copy of the promissory note was left with the borrower. It seems to me that the whole purpose of s. 6 of the Act of 1927, requiring a note or memorandum in writing of the contract to be made and signed personally by the borrower, and a copy delivered or sent to the borrower within seven days of the contract, providing that unless this is done the contract shall not be enforceable, and that the note or memorandum shall contain all the terms of the contract, would be defeated unless the document in the possession of the borrower contained all the terms of the contract. I find, therefore, with considerable reluctance, because the point is a technical one, that the defence on these grounds succeeds. E F

[HIS LORDSHIP then dealt with the counterclaim and having reviewed the evidence held that the appropriate rate of interest on the loans made prior to February, 1959, would be forty per cent. per annum and on the loans made after that date, thirty per cent. per annum, and HIS LORDSHIP ordered that the six earlier transactions should be re-opened on that basis (the three transactions sued on being unenforceable under s. 6 of the Moneylenders Act, 1927).] G

Judgment for the defendant on the defence and counterclaim. H

Solicitors: *M. A. Jacobs & Sons* (for the plaintiffs); *Walter Burgis & Co.* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

I

(5) [1929] All E.R. Rep. at p. 411; [1930] 1 K.B. at p. 508.
(6) [1940] 1 All E.R. at p. 283.
(7) See, e.g., *Tooke* v. *Bennett & Co., Ltd.*, [1939] 4 All E.R. 200; and *Allighan* v. *London and Westminster Loan and Discount Co., Ltd.*, [1940] 3 All E.R. 530, where a bill of sale was attached to the note or memorandum. See also dicta of LORD JAMIESON in *George Shaw, Ltd.* v. *Duffy*, 1943 S.C. at pp. 360, 361.
(8) [1935] All E.R. Rep. 280; [1936] 1 K.B. 22.
(9) [1946] 2 All E.R. 273: [1946] K.B. 584.

A

YEOMAN CREDIT, LTD. v. WARAGOWSKI.

[COURT OF APPEAL (Ormerod, Upjohn and Davies, L.JJ.), June 27, 1961.]

Hire-Purchase—Damages for breach of contract—Hirer's breach by not paying instalments—Goods re-sold by owners—Hirer's option to determine agreement not exercised—Measure of damages.

B

Under a hire-purchase agreement the total hire-purchase price of the vehicle hired thereunder was £434 7s., being £72 cash deposit plus thirty-six monthly rentals each of £10 0s. 9d., plus £1 payable if the hirer exercised his option to purchase the vehicle. The cash price, which the owners had paid a dealer for the vehicle, was £360. The hirer paid the £72 deposit, but did not make any further payment. The agreement gave the hirer an express option, which he did not exercise, to determine the agreement by returning the vehicle. Six months after the agreement had been made, the owners terminated the hiring and re-took possession of the vehicle, which they later sold for £205, the best price that they could reasonably get. Clause 7 of the agreement provided that "Should the hiring be terminated by the hirer or the owner then . . . the hirer shall forthwith pay to the owner damages for breach hereof (if any) and either (a) such further sum as with the total already paid by the hirer by way of first payment and rentals shall equal one-half of the hire-purchase price as agreed compensation for depreciation of the goods or at the option of the owner (b) the amount of the rentals and other moneys then already due hereunder together with such further sums as would if the hiring had not been terminated have been payable in respect of rent during the period (if any) between the termination of the hiring hereunder and the return of the goods to the owner." In an action by the owner for the amount of rentals in arrear (claimed pursuant to cl. 7 (b) of the agreement) and for damages for breach of contract the owner recovered judgment for £60 4s. 6d. arrears of rentals and damages assessed at £96 2s. 6d., viz., the difference between £433 7s. (the hire-purchase price less the £1) and £337 4s. 6d. (the sum of £72 deposit, the £205 re-sale price and £60 4s. 6d. arrears of rentals). On appeal by the hirer.

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Held: (i) damages were recoverable for breach of the agreement, the owner's remedy not being merely one for recovery of money not paid, nor being a claim for depreciation, but lying in damages for breach of contract by the hirer.

G

(ii) the amount of the damages was rightly assessed.

Appeal dismissed.

[As to the owner's right to damages on determination or repudiation of a hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 550, para. 891; and for cases on the subject, see 17 DIGEST (Repl.) 154, 155, *522, 523.*]

H

Cases referred to:

Cooden Engineering Co., Ltd. v. *Stanford*, [1952] 2 All E.R. 915; [1953] 1 Q.B. 86; 17 Digest (Repl.) 154, *523.*

Elsey & Co., Ltd. v. *Hyde*, (1926), JONES & PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 107.

I

Appeal.

The defendant hirer, who had entered into an agreement with the plaintiff finance company, the owners of a motor vehicle, for the hire-purchase of that vehicle, appealed against an assessment of the damages for breach of the agreement, the damages being assessed by Master LAWRENCE on Feb. 15, 1960, at £96 2s. 6d. The facts are stated in the judgment of DAVIES. L.J.

M. Mann for the hirer.

J. Lloyd-Eley for the owners, was not called on.

DAVIES, L.J., delivered the first judgment at the request of ORMEROD, L.J.: The circumstances giving rise to the case can be very shortly stated. The plaintiffs are a well-known hire-purchase finance company. On Jan. 19, 1959, a hire-purchase agreement was entered into between the parties for the hire of a Thames Ford van. The owners had, according to the learned master's finding, paid to the dealer the agreed cash price of £360. The detailed figures of the transaction appear on the face of the photostatic copy of the hire-purchase agreement that we have seen, and it is sufficient for the purposes of this judgment to say that the total hire-purchase price was a sum of £434 7s. That was made up of a cash deposit of £72, thirty-six monthly instalments of £10 0s. 9d., commencing on Feb. 6, 1959, and the usual £1 if the hirer exercised the option to purchase at the end of the hiring if it so long lasted. The defendant hirer paid the initial deposit of £72 and, for reasons that we have not been told, paid not a penny more. The owners, as they were entitled to under the agreement, terminated the hiring on July 18, 1959, and re-took possession of the vehicle on July 21, 1959, and eventually sold it for the sum of £205, which the learned master has found—and no complaint whatsoever is made of this finding—was the best price that in all the circumstances they could reasonably get.

That having been done, the owners brought an action in the Queen's Bench Division against the hirer under cl. 7 of the hire-purchase agreement. I bear in mind that by cl. 5, as in all these agreements, the hirer is given expressly the option at any time to determine the hiring by returning, at his own risk and cost, the goods in good condition and repair to the owner at such address as the owner may appoint. Clause 7 says:

> "Should the hiring be terminated by the hirer or the owner then (subject to the provisions of cl. 11 hereof) [which I think are not material to the present case] the hirer shall forthwith pay to the owner damages for breach hereof (if any) and either (a) such further sum as with the total already paid by the hirer by way of first payment and rentals shall equal one-half of the hire-purchase price as agreed compensation for depreciation of the goods or at the option of the owner (b) the amount of the rentals and other moneys then already due hereunder together with such further sums as would if the hiring had not been terminated have been payable in respect of rent during the period (if any) between the termination of the hiring hereunder and the return of the goods to the owner."

In fact what the owners, the plaintiffs, chose to sue for in this action was the amount of the rentals due up to July 6, 1959, a total of £60 4s. 6d.; that is to say they proceeded under para. (b) of cl. 7 of the agreement and elected not to go under para. (a) of the agreement, which provides, as I have said, for a claim for compensation for depreciation at a sum to be ascertained according to a scale, and in addition they claimed under the main part of cl. 7 damages for breach of contract. On Dec. 30. 1959, Master GRUNDY gave judgment for the owners for the sum of £60 4s. 6d., the arrears of monthly instalments due; there was no dispute by the hirer as to his liability for that; and also gave judgment for the owners for damages to be assessed, and the order of Master LAWRENCE on that assessment, on Feb. 15, 1960, was as I have already said, that the damages should be £96 2s. 6d. As I understand the calculation of the learned master, he arrived at that figure in this way: he took not the full hire-purchase price but the hire-purchase price less the £1 at £433 7s., he deducted from that the £72 which was the cash deposit, the £205 which was the sum that the car fetched when it was sold and the £60 4s. 6d. which was the amount of instalments for which the owners had recovered judgment against the hirer, the answer was the figure of £96 2s. 6d., and that sum he awarded for damages for breach of contract.

Counsel for the hirer has argued that the owners failed to show any damage at all and that they were not entitled to recover anything. As I understand his

A contention, though it is put in several different ways in the notice of appeal, it really amounts to two points. The first point is that this claim for damages for breach of contract is really a claim for damages for the non-payment of money, and in accordance with well-known principles the remedy for non-payment of money in the ordinary way is not damages but a judgment for the money that was not paid. In that connexion counsel referred us to some observations of B SALTER, J., in an unreported case in the Divisional Court of the Queen's Bench Division (1) which is referred to in a judgment of JENKINS, L.J., in *Cooden Engineering Co., Ltd.* v. *Stanford* (2). However, I am bound to say that, as is apparent if one looks at the relevant clause that was under consideration in the Divisional Court there (3) the hirer undertook to pay the owners

C

> ". . . 'such further sum as with the total amount previously paid under cll. 1 and 2 hereof [the deposit and instalments] will equal the sum of £25—by way of compensation for depreciation of the said article '."

JENKINS, L.J., points out expressly (4) the importance of those words in that case. I do not feel that I can derive any assistance in the decision of this case from D that authority. It seems to me that the circumstances here are entirely different from a case where there has been a failure of an obligation to pay money. This was not merely the failure of an obligation to pay money. The hirer had agreed to hire this vehicle, and, subject to his right to terminate the agreement lawfully by notice when certain circumstances would ensue, to pay the sums that I have E mentioned spreading over a period of three years. Had he carried out that contract, then the total sum of money which the owners would have received would have been £433 7s. He did not carry out that contract and I can really see no answer to the broad proposition contended for by the owners: he agreed over a period of three years to make us payments totalling £433 7s. He chose to pay us nothing apart from the £72. He did not exercise his right to terminate the F contract. He broke it. As a result of that, instead of receiving that sum of money, we have, by selling the car, by suing him and getting judgment, received that sum of money less £96 2s. 6d., and that is our damage. In my judgment that proposition is sound in law, and I can see no way in which it can validly be attacked.

The second ground of counsel's submission for the hirer was this: He points G out correctly that the owners here chose to go under para. (b) of cl. 7 of their agreement and not under para. (a). Paragraph (a) is the one which provides for the ascertainable compensation for depreciation. But, says counsel, this really is a claim for depreciation, and as the owners have chosen not to make the claim which under the contract they might have done for depreciation but H to proceed under the alternative limb of the clause, they cannot by a back door recover damages for depreciation in this case. If in truth and in fact what they were claiming was damages for depreciation, I should have thought there was a great deal of force in that contention; but I am quite satisfied that they are not claiming damages for depreciation. As was said in the course of the argument, although £360 was the cash price, that was a cash price fixed between I the dealer and the hirer, and it may very well be that the car that the hire-purchase finance company paid £360 for was in fact worth only £250 or less. This is not a claim for damages for depreciation; this is a claim for damages for

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(1) *Elsey & Co., Ltd.* v. *Hyde*, (1926), JONES & PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 107.

(2) [1952] 2 All E.R. at p. 922; [1953] 1 Q.B. at p. 99.

(3) See [1952] 2 All E.R. at p. 922; [1953] 1 Q.B. at p. 100.

(4) [1952] 2 All E.R. at p. 924; [1953] 1 Q.B. at p. 102.

breach of contract, and I cannot see that the second submission made by counsel for the hirer has any more force in it than the first. A

In my judgment this appeal fails and must be dismissed.

ORMEROD, L.J.: I agree, and have nothing to add.

UPJOHN, L.J.: I agree. *Appeal dismissed.*

Solicitors: *Foss, Bilbrough, Plaskitt & Co.*, agents for *Tuckey & Rylatt*, St. Albans (for the hirer); *Paisner & Co.* (for the owners). B

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

MEEK *v.* FLEMING.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), June 21, 22, 23, 26, 1961.] C

Court of Appeal—New trial—Misleading the court at trial—Concealment of material matter relevant to credit of party—Duty of advocate to court—Action for false imprisonment—Defendant police officer reduced in rank while action pending—Disciplinary charge leading to reduction showing deception of court in relation to another arrest—Concealment of reduction in rank during trial of action—Miscarriage of justice. D

At the trial in October, 1960, of an action for false imprisonment and assault, in which the main question was whether the plaintiff's or the defendant's account of the circumstances of the plaintiff's arrest by the defendant at Trafalgar Square and his detention at a police station on Guy Fawkes night, 1958, was correct, it was concealed from the court that in December, 1959, while the action was pending, the defendant had been reduced in rank from chief inspector to station sergeant on a disciplinary charge of having been party to an arrangement whereby a police constable purported to have arrested a street bookmaker in October, 1959, when the defendant was the officer who in fact made the arrest. This matter was known to the defendant's legal advisers, but neither the plaintiff nor his legal advisers had reason to suspect it. It was deliberately concealed from the court at the trial of the plaintiff's action, which took place before a judge and jury. Judgment in the action was given for the defendant. The plaintiff applied for a new trial. E F

Held: where a party deliberately misled the court in a material matter, e.g., by the concealment of a matter of vital significance even though one that affected the party's credit and did not relate directly to an issue in the action, a judgment obtained or probably obtained by the deception should not be allowed to stand (see p. 154, letter D, p. 156, letter F, p. 156, letter H, post); accordingly the judgment in the present case would be set aside and a new trial would be ordered. G

Dicta of LORD ESHER, M.R., in *Praed* v. *Graham* ((1889), 24 Q.B.D. at p. 55), of LORD BUCKMASTER in *Hip Foong Hong* v. *Neotia & Co.* ([1918] A.C. at p. 894), and of DENNING, L.J., in *Tombling* v. *Universal Bulb Co., Ltd.* ([1951] 2 T.L.R. at p. 297) applied. H

Appeal allowed.

[As to grounds of new trial, see 30 HALSBURY'S LAWS (3rd Edn.) 475, para. 891; and for cases on the subject, see DIGEST (Practice) 817, 818, *3778-3781.*] I

Cases referred to:

Braddock v. *Tillotson's Newspapers, Ltd.*, [1949] 2 All E.R. 306; [1950] 1 K.B. 47; 2nd Digest Supp.

Brown v. *Dean*, [1910] A.C. 373; 79 L.J.K.B. 690; 102 L.T. 661; Digest (Practice) 602, *2431.*

Hip Foong Hong v. *Neotia & Co.*, [1918] A.C. 888; 87 L.J.P.C. 144; 119 L.T. 588; Digest (Practice) 602, *2433.*

Ladd v. *Marshall*, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489; 3rd Digest Supp.

A *Mohahir Ali* v. *Ellmore*, [1953] 2 All E.R. 1044; 3rd Digest Supp.

Praed v. *Graham*, (1889), 24 Q.B.D. 53; 59 L.J.Q.B. 230; Digest (Practice) 602, *2426*.

R. v. *Copestake, Ex p. Wilkinson*, [1926] All E.R. Rep. 252; [1927] 1 K.B. 468; 96 L.J.K.B. 65; 136 L.T. 100; 90 J.P. 191; 3 Digest (Repl.) 464, *475*.

B *Tombling* v. *Universal Bulb Co., Ltd.*, [1951] 2 T.L.R. 289; 2nd Digest Supp.

Appeal.

This was an appeal by Alan Sidney Charles Meek, the plaintiff, from a judgment of STREATFEILD, J., sitting with a jury, given on Oct. 21, 1960, dismissing the plaintiff's action for assault and battery, trespass and false imprisonment C against the defendant, Richard Fleming. The defendant was a police officer. On the night of Nov. 5, 1958, he held the rank of chief inspector, and was engaged in controlling a disorderly crowd in Trafalgar Square. The plaintiff, who was a press photographer, was there with his camera for the purpose of taking photographs. At about 9.40 p.m., the defendant arrested the plaintiff and took him in a tender to a police station where he was kept in a cell until about 1.30 a.m. D the following morning when he was released on bail after being charged with obstructing the defendant in the execution of his duty and wilful damage to a police inspector's raincoat. On Nov. 17, 1958, the plaintiff issued the writ in the action. On Dec. 17, at Bow Street Magistrates' Court, the plaintiff was fined £5 on the obstruction charge, and the charge of wilful damage was dismissed. By his statement of claim in the action, dated Mar. 20, 1959, the E plaintiff alleged that he had been arrested by the defendant without reasonable and probable cause, further and alternatively that the defendant had detained the plaintiff or caused him to be detained in custody for an unnecessary and unreasonable length of time and without reasonable or probable cause, and he also alleged assault. The allegations of assault were that on arrival at the police station the defendant assaulted and beat the plaintiff by punching him on his F mouth with closed fist causing him to fall on his knees, that then the defendant (together with other police officers) beat the plaintiff by striking him repeatedly with the fist on the face, head and body, and that then police officers acting under the defendant's direction dragged him by his feet along a corridor and threw him violently into a cell. The plaintiff alleged that as a consequence of these assaults, he sustained personal injuries, including a false tooth broken from G a denture and bruising, and that his trousers were torn beyond repair. By his defence, delivered on May 11, 1959, the defendant alleged that the arrest of the plaintiff was justified and was made in the following circumstances. That the plaintiff on at least four occasions during the course of the evening had obstructed police officers in the course of their duty by interposing himself between them and police tenders which were drawn up in Trafalgar Square for the purpose of H conveying arrested persons to the police station; that the defendant on two occasions had cautioned the plaintiff concerning such obstruction; that on another occasion the defendant had directed police officers to remove the plaintiff from the vicinity of the tenders; and that finally the defendant had arrested the plaintiff on a charge of obstruction and conveyed him in a tender to the police station. The defendant alleged that the plaintiff resisted arrest with such I violence that the defendant was pushed to the ground and other police officers were compelled to come to his assistance. The defendant denied that he had assaulted or beaten the plaintiff, and alleged that no more force than was necessary to effect his arrest and to conduct him to the charge room had been used, and that if violence was shown to the plaintiff by officers acting under the direction of the defendant (as was not admitted), it was done for the protection of the defendant and in the course of a violent assault on him by the plaintiff and in order to avoid a further breach of the peace, using no more force than was reasonably necessary. If the plaintiff sustained any personal injury or damage,

the defendant alleged that resulted from the plaintiff's own violence and the necessity to overcome it. A

On Dec. 16, 1959, while the action was pending, the defendant was charged before a disciplinary board with offences involving the deception of a court of law and reduced from the rank of chief inspector to station sergeant. At the trial of the action the plaintiff and the court believed that the defendant was still a chief inspector. The defendant's altered status and the reason for it were known to the defendant's legal advisers, but his leading counsel decided as a matter of policy that they should not be put before the court. B

The facts in relation to the concealment of the alteration in status are stated in the judgment of HOLROYD PEARCE, L.J., at p. 151, post.

Neville Faulks, Q.C., and *Sebag Shaw* for the plaintiff, the appellant.
Victor Durand, Q.C., and *W. W. Stabb* for the defendant, the respondent. C

Cur. adv. vult.

June 26. The following judgments were read.

HOLROYD PEARCE, L.J.: The plaintiff appeals from the judgment of STREATFEILD, J., sitting with a jury, given on Oct. 21, 1960, after a trial lasting five days. The jury, after an absence of four hours, gave answers to certain questions on which the learned judge dismissed the action and entered judgment for the defendant. The plaintiff by his notice of appeal complains that the verdict was against the weight of evidence, and makes certain unsubstantial criticisms of the summing-up. These have not been stressed, and in my judgment no criticism can be made of the conduct of the judge or the verdict of the jury on the evidence before them. The real ground of this appeal is stated in the notice of appeal as follows: D E

> " (6) That at the trial the rank and status of the defendant was by implication represented to be that of a chief inspector when in fact between the date of the matters complained of in the action and the date of the trial he had been reduced to the rank of a station sergeant by reason of misconduct and that the credit of the parties was a crucial issue at the trial." F

A further notice of motion for leave to give fresh evidence alleges that on the question of credit the defendant deceived or misled the court, and thereby occasioned a miscarriage of justice.

The plaintiff was claiming damages for assault and wrongful imprisonment in respect of an incident that happened on Guy Fawkes night, Nov. 5, 1958. There was a disorderly crowd in Trafalgar Square, and many police officers had been detailed to deal with it. They made a number of arrests that night, and removed the arrested persons in a police tender to Cannon Row police station where they charged them and then, as a rule, released them. The defendant was the chief inspector at Cannon Row police station, and was actively engaged in helping to control the disorder in Trafalgar Square. The plaintiff, a press photographer with a good record, was there with his camera for the purpose of taking photographs. At about 9.40 p.m. the defendant arrested him on a charge of obstructing the police, and took him in a tender to Cannon Row police station where he was kept in a cell until 1.30 a.m. If the plaintiff's story was correct, the defendant arrested him without proper cause, used considerable violence to him which caused physical injury, and without justification locked him up for some hours instead of charging him straight away and releasing him. If the defendant's story was correct he acted with propriety; he was justified in arresting the plaintiff, and the subsequent violence (which was far less than the plaintiff alleged) was wholly occasioned by the plaintiff's own violence and resistance. G H I

On Nov. 17, 1958, the plaintiff issued the writ in this action. On Dec. 17 he appeared at the magistrates' court and was convicted of obstructing the police and fined £5. Another charge was dismissed. On Dec. 16, 1959, while this action was pending, certain events occurred which at the trial were unknown to

A the plaintiff's advisers, and which they had no reason to know or to suspect. These events were deliberately concealed at the trial by the defendant and his legal advisers. It is on this concealment that the plaintiff relies in this appeal. He asks for a new trial in order that these facts may be proved by fresh evidence. The facts have been agreed between the parties for the purpose of this appeal in the following terms:

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> "(1) At the date when the defendant gave evidence at the trial of the action, his true rank in the Metropolitan Police Force was station sergeant. (2) The defendant was reduced from the rank of chief inspector to station sergeant on Dec. 16, 1959. (3) On Dec. 16, 1959, the defendant appeared before a disciplinary board on the following charges: (i) Acting in a manner prejudicial to discipline by being a party to an arrangement with [a police constable] whereby that officer purported to have arrested a street bookmaker on Oct. 26, 1959, when in fact you were the officer who made the arrest. (ii) Without good and sufficient cause did omit promptly and diligently to attend to a matter which was your duty as a constable, that is to say having arrested . . . for street betting on Oct. 26, 1959, you did not attend the hearing of the case against him at Thames Metropolitan Magistrates' Court on Oct. 27, 1959. The defendant was reduced in rank to station sergeant on each charge, but on appeal to the commissioner on Dec. 30 the punishment on the second charge was reduced to a reprimand, but there was no variation in the first punishment."

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It is conceded that those facts were known to the defendant's legal advisers and his counsel, and that as a matter of deliberate policy (1) they were not put before the court. A letter written by the defendant's solicitor on Nov. 21, 1960, pending the appeal says:

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> "The learned Queen's Counsel instructed by me was throughout, as I believe you are aware, in full possession of all the facts relating to my client's past and present status and the reasons for his reduction in rank, and conducted the case in full knowledge of these facts in the manner he felt was consistent with his duty to his client and the court, and he is fully prepared to defend and justify his handling of the case at the proper time if called upon to do so."

F

It having been decided not to reveal these facts, the following things occurred at the trial. The defendant attended the trial not in uniform, but in plain clothes, whereas all the other police witnesses were in uniform. Thus there was no visible sign of the defendant's altered status. He was constantly addressed by his counsel as "Mr.", and not by his rank of sergeant. Counsel tells us that he would so address a sergeant in the normal case. When the defendant entered the witness-box, he was not asked his name and rank in the usual manner. No suspicions were aroused since no one had any reason to suspect. The plaintiff's counsel, however, and the judge frequently addressed the defendant, or referred to him, as "inspector" or "chief inspector", and nothing was done to disabuse them.

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The defendant started his evidence with a brief summary of his career up to the time when he was chief inspector at Cannon Row police station, but no reference was made to his reduction in rank. In cross-examination he was asked:

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> "Q.—You are a chief inspector, and you have been in the force, you told us, since 1938? A.—Yes, that is true."

That answer was a lie.

> "Q.—You realise, as chief inspector, the importance of the note being

(1) See as regards responsibility for this policy p. 157, letter F, post.

accurate? A.—The importance of it conveying to me what I want to give in evidence." A

He was asked further:

"Let us understand this. You are a chief inspector. How old are you? A.—I am forty-six years of age . . . Q.—I am not asking you whether you took part in the inquiries, but whether you as a responsible and senior adult man—never mind about your being a chief inspector—had no anxiety about this case, no concern or interest? A.—No. I can only repeat I have nothing to fear." B

The learned judge referred to the defendant as "inspector" or "chief inspector Fleming" many times in his summing-up to the jury. It is clear that he reasonably considered that the defendant's rank and status were relevant on credibility in a case where there was oath against oath, and where there was a question of the defendant's conduct in the course of his duty. No doubt he felt what SINGLETON, L.J., expressed in *Mohahir Ali* v. *Ellmore* (2) when, in dealing with a matter concerning evidence, he said: C

"It appears to me that that evidence was irrelevant and unnecessary. The fact that a witness who is also a defendant, is a superintendent of Leeds city police force shows that he is of good standing and that he has the confidence of his superior officers." D

Nor was the defendant's counsel prepared to forgo the advantage to be derived from the status in the police force of his witnesses in general. The parties have, fortunately, in the interests of economy, been able to use the reports of the case in "The Times" newspaper. These show that in his opening speech for the defence, counsel stated that the jury had not yet had an opportunity of listening to persons against whom it was at times fashionable to make wild hysterical allegations, but who could not have reached their positions unless they had shown to those who controlled the Metropolitan Police a substantial degree of responsibility. They were not concerned here with some newcomer to the force who had only just finished his course, and was out on the street full of enthusiasm to arrest the first person he could. "The Times" report of the final speech of defendant's counsel shows that he said in reference to the allegations of the plaintiff: E F

"That was un-English, and not what the jury would expect of any police officer who had passed through the sieve, been trained and risen to any rank in the Metropolitan Police." G

He then went on to contrast unfavourably the plaintiff's background in Fleet Street where "words come out in very large letters, and the range of adjectives and description is so wide as to make us callous". I accept from counsel that he was intending to refer to the generality of his seven or eight witnesses, all of whom had attained some rank above that of constable. Nevertheless, such references must inevitably have connoted in the minds of judge and jury a reference to the status of the defendant, who was the leading person in the case, and held (in their erroneous belief) the highest rank of all the witnesses. H

The fact that the defendant's advisers were prepared to act as they did showed the great importance which they attached to the facts concealed. If one leaves aside for the moment any question of ethics, the hazards of such a course were extremely great. With so many police witnesses who might well know the truth (since the defendant's demotion was circulated in police orders) the chance of somebody in cross-examination referring to the defendant by his present rank of sergeant, or letting the truth out in some other way, was not negligible. Had that occurred, or had the plaintiff's counsel known the facts, and elicited them in cross-examination, it seems very unlikely that the jury would accept the I

(2) [1953] 2 All E.R. at p. 1046.

A defendant's case when they found how they had been deceived. Even without knowing the facts, the jury took four hours for their deliberations; and since the plaintiff's evidence was, broadly speaking, that of one against so many, one must, I think, conclude that he did well in the witness-box.

How, then, does the matter stand now that the truth has come out? This court is rightly loth to order a new trial on the grounds of fresh evidence. Interest B reipublicae ut sit finis litium. The cases show that this court has given great weight to that maxim. There would be a constant succession of re-trials if judgments were to be set aside merely because something fresh that might have been material has come to light. In the case of fresh evidence relating to an issue in the case, the court will not order a new trial unless such evidence would probably have an important influence on the result of the case, though such C evidence need not be decisive; *R.* v. *Copestake, Ex p. Wilkinson* (3), per SCRUTTON, L.J., and *Ladd* v. *Marshall* (4). Such evidence must also, of course, be apparently credible and such that it could not have been obtained with due diligence (ibidem). But in the present case the fresh evidence is agreed, and it could not have been found out with due diligence since there was no reason to suspect it. In the present case, therefore, these two latter considerations are D not in issue.

Where, however, the fresh evidence does not relate directly to an issue, but is merely evidence as to the credibility of an important witness, this court applies a stricter test. It will only allow its admission (if ever) where, per TUCKER, L.J., in *Braddock* v. *Tillotson's Newspapers, Ltd.* (5),

> E "the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act on the evidence of the witness whose character has been called in question",

or, per COHEN, L.J. (6),

> "... where the court is satisfied that the additional evidence *must* have led a reasonable jury to a different conclusion from that actually arrived at F in the case."

Counsel for the plaintiff claims that the fresh evidence in the present case satisfies even that strict test. Whether that be so it is not necessary for us to decide.

Where the judge and jury have been misled, another principle makes itself felt. LORD ESHER, M.R., in *Praed* v. *Graham* (7) said:

> G "If the court can see that the jury in assessing damages have been guilty of misconduct, or made some gross blunder, or have been misled by the speeches of the counsel, those are undoubtedly sufficient grounds for interfering with the verdict ..."

In *Tombling* v. *Universal Bulb Co., Ltd.* (8) it was sought to adduce fresh evidence on the ground that there had not been revealed to the judge the fact that a H highly material witness was at the time of the trial serving a prison sentence for a motoring offence. Counsel had allowed him to give in evidence a residential address which was his normal home, and asked him questions which indicated that he had in the past held a responsible position. The appeal was dismissed; but SINGLETON, L.J., described the case as "near the line". DENNING, L.J., there said (9):

> I "This case raises an important question of professional duty. I do not doubt that, if a favourable decision has been obtained by any improper conduct of the successful party, this court will always be ready to grant a

(3) [1926] All E.R. Rep. at p. 257; [1927] 1 K.B. at p. 477.
(4) [1954] 3 All E.R. 745. (5) [1949] 2 All E.R. at p. 311; [1950] 1 K.B. at p. 53.
(6) [1949] 2 All E.R. at p. 312; [1950] 1 K.B. at p. 56.
(7) (1889), 24 Q.B.D. at p. 55. (8) [1951] 2 T.L.R. 289.
(9) [1951] 2 T.L.R. at p. 297.

new trial. The duty of counsel to his client in a civil case—or in defending an accused person—is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the court, either on the facts or on the law, but, short of that, he may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client."

I respectfully agree with those words. DENNING, L.J., then discussed the facts of that case, and came to the conclusion that there had been nothing improper in the conduct of the case for the plaintiffs. In that case the failure to reveal was not a premeditated line of conduct. Nor was conviction for a motoring offence so relevant on credibility as the demotion of a chief inspector (who is a party to the case) for an offence which consisted in deceiving a court of law as to the accurate facts relating to an arrest. There is no authority where the facts have been at all similar to those of the present case, but in my judgment the principles on which we should act are clear.

Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. In my judgment the duty to the court was here unwarrantably subordinated to the duty to the client. It is no less surprising that this should be done when the defendant is a member of the Metropolitan Police Force on whose integrity the public are accustomed to rely.

It was argued that there were several other police witnesses against the plaintiff's story; that although part of the issue depended on the evidence of the parties alone, the greater part of the defence depended on other witnesses than the defendant, and that, therefore, the concealment did not have any substantial result. Since the defendant and his advisers thought fit to take so serious a step they must, in the light of their own intimate knowledge of their case, have regarded the concealment as being of overwhelming importance to their success. Therefore, I am not prepared to countenance their present argument that it may have made no difference to the result.

It was argued that the defendant was justified in that a party need not reveal something to his discredit; but that does not mean that he can by implication falsely pretend (where it is a material matter) to a rank and status that are not his, and, when he knows that the court is so deluded, foster and confirm that delusion by answers such as the defendant gave. Suggestio falsi went hand in hand with suppressio veri. It may well be that it was not so clear in prospect as it is in retrospect how wide the web of deceit would be woven before the verdict came to be given; but in the event it spread over all the evidence of the defendant. It affected the summing-up of the learned judge, and it must have affected the deliberations of the jury. The defendant and his legal advisers, and probably some at least of his witnesses, on the one hand, were aware of the facts, and intent not to reveal them, in order that on the other hand the plaintiff and his counsel and the jury and the judge might remain in ignorance, and that the defendant might be thereby enabled to masquerade as a chief inspector of unblemished reputation enjoying such advantage as that status and character would give

A him at the trial. It would be an intolerable infraction of the principles of justice to allow the defendant to retain a verdict thus obtained. I would accordingly allow the appeal with costs, and order a new trial.

WILLMER, L.J.: I agree. In saying that, I wish to make it clear that not only do I concur in the result, but that I agree with and subscribe to the B reasons which HOLROYD PEARCE, L.J., has so clearly stated.

The course which the defendant took resulted in the learned judge and the jury, as well as the plaintiff and his advisers, being deceived into thinking that the defendant was, and remained, a high-ranking officer of unblemished reputation. In view of the nature of the charges brought against him, the character of the defendant was in my judgment a matter of vital importance for the proper C determination of the case. We now know not only that the defendant has been reduced in rank to station sergeant, but that this was done in consequence of a disciplinary offence which involved the deception of a court of law. This is, therefore, the second occasion on which the defendant's conduct has had the result of deceiving the court. It is in these circumstances that the plaintiff now asks for an order for a new trial, basing himself on the submission that there has D been a miscarriage of justice.

We are not dealing here with an ordinary case of an application to adduce fresh evidence. The plaintiff's contention involves something much more fundamental, and I regard this case as a wholly exceptional one, as was, I think, conceded in argument by counsel for the defendant. The rules which are ordinarily applied where an application is made to adduce further evidence on appeal E are those set out by DENNING, L.J., in *Ladd* v. *Marshall* (10). Where the fresh evidence sought to be adduced is directed solely to credit, the rules are even more stringent, as was pointed out by TUCKER, L.J., and COHEN, L.J., in *Braddock* v. *Tillotson's Newspapers, Ltd.* (11) in the passages to which HOLROYD PEARCE, L.J., has already referred. These rules are based on the maxim that it is in the public interest that there should be an end to litigation; but in my judgment F the application of this maxim cannot be pressed to the extent of allowing a miscarriage of justice to go uncorrected. The rules relating to the admission of fresh evidence do not apply, e.g., in a case where fraud or surprise is alleged; see per LORD BUCKMASTER in delivering the judgment of the Privy Council in *Hip Foong Hong* v. *Neotia & Co.* (12). He there said:

> " In all applications for a new trial the fundamental ground must be that G there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, H and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail . . ."

In my judgment this is an analogous case, and much the same considerations must apply.

I think that the exceptional nature of the present case becomes clear when regard is had to the features which distinguish it from *Tombling* v. *Universal* I *Bulb Co., Ltd.* (12a). There the application was to adduce further evidence by way of cross-examination of a witness for the plaintiff in respect of matters going to his credit. True, he was an important witness, but failure to disclose his record was only of incidental significance. But here we are concerned with evidence relating to the character of one of the parties to the suit, and it is a case

(10) [1954] 3 All E.R. at p. 748.
(11) [1949] 2 All E.R. at pp. 311, 312; [1950] 1 K.B. at pp. 53, 56.
(12) [1918] A.C. at p. 894.
(12a) [1951] 2 T.L.R. 289.

in which the character of the parties was of peculiarly vital significance, so that failure to disclose the defendant's record amounted in effect to presenting the whole case on a false basis. Next, the matter sought to be proved against the witness in *Tombling's* case (13) was his conviction for a wholly irrelevant offence, that is to say, a motoring offence. Here the matter sought to be proved against the defendant was an offence involving not only the deception of a court of law, but also a question of police discipline, a matter which, I should have thought, was of crucial importance having regard to the issues to be determined. Lastly, in *Tombling's* case (13) what was done was not done knowingly to deceive the court; see per DENNING, L.J. (14). Had it been done knowingly, DENNING, L.J., would have regarded it as improper; and it is to be inferred that he would have concurred in the view of SINGLETON, L.J., that a new trial should have been directed.

In the present case there is no doubt that the course taken, which had the effect of deceiving the court, was taken deliberately. Counsel for the defendant has so informed us with complete candour. I accept his assurance that the decision was not taken lightly, but after careful consideration, and in the belief that the course taken was proper in all the circumstances. But for my part I am in no doubt that it was a wrong decision. I would venture to follow the example of SINGLETON, L.J., in *Tombling's* case (15) in quoting from LORD MACMILLAN on THE ETHICS OF ADVOCACY, at p. 17. This is what LORD MACMILLAN said:

> "In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to the state and a duty to himself."

It seems to me that the decision which was taken involved insufficient regard being paid to the duty owed to the court and to the plaintiff and his advisers.

The result of the decision that was taken was that the trial proceeded in a way that it should not have done. Where the court has been thus deceived in relation to what I conceive to be a matter of vital significance, I think that it would be a miscarriage of justice to allow a verdict obtained in this way to stand. For these additional reasons, as well as for the reasons already stated by HOLROYD PEARCE, L.J., I agree that this appeal must be allowed.

PEARSON, L.J.: I agree with the judgments which have been delivered. In the reported cases great emphasis has been laid on the need for finality in litigation, and the courts have been unwilling to order a new trial on the ground of fresh evidence having become available unless very stringent conditions were fulfilled; and there is no reported civil case in which a new trial has been ordered on account of fresh evidence not directly relating to an issue in the case, but merely affecting the credit of a witness. *Brown* v. *Dean* (16); *Hip Foong Hong* v. *Neotia & Co.* (17); *R.* v. *Copestake* (18); *Braddock* v. *Tillotson's Newspapers, Ltd.* (19); *Mohahir Ali* v. *Ellmore* (20); *Ladd* v. *Marshall* (21). In the present case the fresh evidence only affects the credit of the defendant, and does not relate directly to any issue in the case. Accordingly it would not be right to order a new trial unless there is some feature of paramount importance outweighing the grave disadvantage of protracting the litigation. In my opinion, however, there is such a feature in the present case.

It was decided, after very careful consideration, that the defendant's case should be conducted in such a way as not to reveal to the judge and jury the fact that the defendant had been demoted from the rank of chief inspector to the rank of station sergeant. Well-devised and effective steps were taken to

(13) [1951] 2 T.L.R. 289. (14) [1951] 2 T.L.R. at p. 298.
(15) [1951] 2 T.L.R. at p. 296. (16) [1910] A.C. 373. (17) [1918] A.C. 888.
(18) [1926] All E.R. Rep. 252; [1927] 1 K.B. 468.
(19) [1949] 2 All E.R. 306; [1950] 1 K.B. 47. (20) [1953] 2 All E.R. 1044.
(21) [1954] 3 All E.R. 745.

A carry out the decision, with the consequence that the defendant appeared to the judge and jury throughout the trial as a person still holding the rank of chief inspector, and therefore as a highly credit-worthy person, whereas in fact he had been demoted for an offence involving deception of a court. Whatever erroneous analogies may have prompted the decision, which was well-intentioned, it was, in my view, utterly wrong, and it had deplorable results. There was in the result B at the trial of this action a deception of the court, and the defendant in cross-examination was giving uncandid (and at one point false) evidence in order to preserve the concealment of the truth.

The fresh evidence has materiality. The main issue at the trial was whether the evidence of the plaintiff or the evidence of the defendant should be believed as to what happened in the passage at the police station. If the purport of the C fresh evidence had become known in the course of the trial, it would have shown both that the defendant had taken part in the deception of a court in the matter for which he was demoted, and also that he was at the trial of this action participating in another deception of a court.

LORD BUCKMASTER said in *Hip Foong Hong* v. *Neotia & Co.* (22):

> " In all applications for a new trial the fundamental ground must be that D there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of E surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail . . ."

Having regard to the deception of the court and the materiality of the fresh evidence, I agree that the appeal should be allowed with costs, and that there F should be an order for a new trial.

Appeal allowed: new trial ordered.

After delivery of the judgments the following statement was made by *Victor Durand, Q.C.:* I indicated last week in the course of my argument before your Lordships that I took responsibility for the decision; I hope that the words I used then left the court under no misunderstanding as to my personal responsi- G bility. It is right that I should say as emphatically and clearly as I can, that the decision not to make disclosure of the defendant's change of status was mine, and mine alone. Having come to the conclusion that this course was justifiable, I determined and dictated the policy which was thereafter followed during the course of the trial. Neither my learned junior counsel, Mr. Stabb, nor my instructing solicitor was responsible for initiating or pursuing that policy, and, H indeed, they expressed their disapproval of it. I thought it right, having regard to the observations made last week, to make that statement before your Lordships in open court, and I am very grateful to your Lordships for allowing me to make it.

Solicitors: *Zeffertt, Heard & Morley Lawson* (for the plaintiff, the appellant); *J. Stewart Williams* (for the defendant, the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(22) [1918] A.C. at p. 894.

COUTTS & CO. *v.* INLAND REVENUE COMMISSIONERS.

A

[CHANCERY DIVISION (Buckley, J.), May 30, 31, June 1, 22, 1961.]

Estate Duty—Exemption—Property which has borne duty on death of spouse—Derivative settlement—Marriage settlement followed by derivative settlement by widow of defeasible, but otherwise absolute, interests in settled estates—Estate duty paid on death of husband on settled estates comprised in marriage settlement—Death of widow—Passing of property settled by derivative settlement—Whether estate duty ascertainable on her death was payable in respect of the settled estates so as to attract exemption under Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5 (2).

B

By a settlement dated May 12, 1914, made on the marriage of S. and B. certain freeholds and leaseholds ("the settled estates") were settled (in the events which happened) on the following trusts: (i) on trust to secure a yearly rentcharge of £200 to B. during the joint lives of S. and B. and subject thereto (ii) on trust for S. for life with remainder (iii) on trust to secure a yearly rentcharge of £1,500 (reducible to £1,000 on her re-marriage) to B. during her life if she should survive S. and subject thereto (iv) on trust for the sons of A., successively according to seniority in tail male ("the paramount limitations") with remainder (v) on trust for S. in fee simple. On Sept. 15, 1916, S. died having bequeathed his residuary estate to W. absolutely; and on his death estate duty was paid in respect of all the settled estates less the "slice" referable to the yearly rentcharge of £200. On July 5, 1917, B. re-married, and on Dec. 14, 1923, she executed a voluntary settlement whereby she settled (in the events which happened) all her terminable and defeasible interests in the settled estates on the following trusts: (a) on trust to give effect to the yearly rentcharge of £1,000 and the paramount limitations; (b) for a term of ninety-nine years determinable on her death on trust to hold the net income arising therefrom on discretionary trusts for the benefit of herself and others; (c) on trust for her daughter L. for life; and (d) on trust for the sons of L. successively according to seniority in tail male, with remainders over. On May 17, 1957, B., who had re-married, died; and on her death estate duty was claimed under the 1923 settlement in respect of an absolute interest, subject only to the paramount limitations, in all the property held on the trusts of the 1914 settlement at her death. At the date of the hearing A. was aged eighty-six and had never had a son. The question arose whether the Finance Act, 1894, s. 5 (2)* (as amended)† gave exemption from the claim.

C D E F G

Held: (i) the exemption from estate duty provided by s. 5 (2) of the Finance Act, 1894, as amended, applied in respect of the proportion of the value of the property indicated at (c) p. 159, post, for the following reasons—

(a) estate duty whose amount was ascertained by reference to the value of an interest in settled property that was less than the whole beneficial interest in that property was, when paid, paid "in respect of" the settled property within the meaning of s. 5 (2) of the Finance Act, 1894 (see p. 169, letter G, post).

H

Inland Revenue Comrs. v. *Priestley* ([1901] A.C. 208) and *A.-G.* v. *Dodington* ([1897] 2 Q.B. 373) followed.

(b) in the present case the amount of estate duty in question on B.'s death was ascertainable by reference to the cesser of B.'s jointure rentcharge and the passing of her defeasible interests in the settled estates and, in accordance with (a) above, that duty (if it were paid) would be paid "in respect of" the settled estates within s. 5 (2); and as estate duty had been paid in relation to the settled estates on the death of S., and B. had

I

* For the Finance Act, 1894, s. 5 (2), see p. 162, letter B, post.
† As amended by the Finance Act, 1898, s. 13.

A never been competent to dispose of the settled estates as distinct from her interests therein, the exemption conferred by s. 5 (2) applied on the death of B. (see p. 169, letter I, to p. 170, letter A, and p. 170, letter I, to p. 171, letter A, post).

(c) the words " any settled property " in the phrase " paid in respect of any settled property " in s. 5 (2) described, in the circumstances of the present B case, the part of the settled estates in respect of which estate duty was paid on the death of S., viz., the whole of the settled estates less the " slice " referable to B.'s £200 jointure rentcharge; accordingly, the exemption conferred by s. 5 (2) extended only to a like part or proportion of the duty otherwise payable on the settled property at B.'s death, viz., of the duty referable to the cesser of her £1,000 jointure rentcharge and the passing of her C defeasible interests in the settled estates (see p. 171, letter C, post).

(ii) the principle stated in *Midland Bank Executor and Trustee Co., Ltd.* v. *Inland Revenue Comrs.* ([1959] 1 All E.R. 180), viz., that where an interest arises under a settlement is itself settled by a second settlement the phrase " settled property " (in s. 1 of the Finance Act, 1894) refers to the property settled by the second settlement, applies generally irrespective (a) of the D nature of the limited interest sub-settled and (b) of the question whether there would have been a passing of settled property on the death if the second settlement had not been made (see p. 166, letter C, post).

[As to exemption for prior payment of estate duty on settled property, see 15 HALSBURY'S LAWS (3rd Edn.) 49, para. 97; and for cases on the subject, see 21 DIGEST 20, 21, *111-121.*

E For the Finance Act, 1894, s. 2 (1) (b), s. 5 (2), s. 7 (10), s. 16 (3), s. 22 (1) (h), see 9 HALSBURY'S STATUTES (2nd Edn.) 350, 356, 365, 376, 383.]

Cases referred to:

A.-G. v. *Dodington*, [1897] 2 Q.B. 373; 66 L.J.Q.B. 684; 77 L.T. 299; 61 J.P. 644; 21 Digest 20, *111.*

F *A.-G.* v. *Hay*, [1899] 2 Q.B. 245; 68 L.J.Q.B. 557; 80 L.T. 712; 21 Digest 20, *116.*

Inland Revenue Comrs. v. *Priestley*, [1901] A.C. 208; 70 L.J.P.C. 41; 84 L.T. 700; *affg.* sub nom., *Re Finance Act, 1894, and Studdert*, [1900] 2 I.R. 281, 400; 21 Digest 8, *30.*

Midland Bank Executor and Trustee Co., Ltd. v. *Inland Revenue Comrs.*, [1959] 1 All E.R. 180; [1959] Ch. 277; [1959] 2 W.L.R. 77; 3rd Digest Supp.

G *Parsons, Re, Parsons* v. *A.-G.*, [1942] 2 All E.R. 496; [1943] Ch. 12; 112 L.J. Ch. 65; 167 L.T. 384; 2nd Digest Supp.

Adjourned Summons.

This was an application by originating summons dated Feb. 1, 1961, by Coutts & Co., who were (i) trustees of a settlement made on May 12, 1914, H between the late Hon. Richard Philip Stanhope, the late Hon. Beryl Franziska Kathleen Bianca Groves, then Le Poer Trench (" the deceased "), and the Right Hon. James Richard Earl Stanhope, and (ii) trustees of a settlement made on Dec. 14, 1923, between the deceased then the Hon. Beryl Franziska Kathleen Bianca Gilbert, the Right Hon. James Richard Earl Stanhope and William Bennett, and (iii) the executors of the deceased as to the settled land comprised I in the settlements. The application was to determine whether the property comprised in the settlement dated May 12, 1914, or any interest therein was chargeable with estate duty in connexion with the death of the deceased and, if so, that the extent, if any, of the plaintiffs' liability for such duty (a) as trustees of that settlement, (b) as trustees of the settlement dated Dec. 14, 1923, and (c) as executors, might be determined. The facts appear in the judgment.

Lionel Edwards, Q.C., and *J. P. F. E. Warner* for the plaintiffs.

E. I. Goulding, Q.C., for the defendants.

Cur. adv. vult.

June 22. **BUCKLEY, J.,** read the following judgment: In this case I have to decide what estate duty (if any) is payable on the death of Lady Beryl Groves, who died on May 17, 1957, in respect of property comprised in a settlement dated May 12, 1914, made on the occasion of her first marriage. By that settlement (which I will call the " 1914 settlement ") certain freeholds and leaseholds were settled by way of legal and equitable limitations (a) to the use that Lady Beryl should during the joint lives of herself and her first husband, Capt. the Hon. Richard Philip Stanhope, receive for her separate use by way of pin money a yearly rentcharge of £200 and subject thereto (b) to the use of Capt. Stanhope during his life with remainder, (c) to the use that if the deceased should survive Capt. Stanhope she should during her life receive for her separate use a yearly rentcharge of £1,500 reducible to £1,000 on her re-marriage, such rentcharge to be in full for her jointure and in bar of all dower and free-bench and to be payable without any deduction except in respect of death duties and subject thereto (d) to uses which failed (partly because of the absence of issue of the marriage and partly because Capt. Stanhope did not exercise a power of appointment in favour of the deceased thereby conferred on him) with remainder, (e) to the use of the trustees in fee simple in trust for the second, third, fourth and every other younger son of the Right Hon. James Richard Earl Stanhope, who is still living, aged eighty, but has never had a son, (whether born in the lifetime or after the death of Capt. Stanhope) successively in remainder one after the other according to seniority in tail male with remainder (f) on trusts which failed (owing to the absence of daughters of the marriage) with remainder (g) in trust for Capt. Stanhope in fee simple.

The 1914 settlement contained a proviso that:

> ". . . if and so long as during the life of Lord Stanhope there should be no person living who under the equitable limitations thereinbefore contained in favour of his younger sons [to which I will refer as " the paramount limitations "] should be entitled to the possession or receipt of the rents and profits of the hereditaments thereby settled the trustees or trustee for the time being of the 1914 settlement should pay or apply the income of the settled hereditaments to the person for the purposes and in the manner to whom for and in which the same would be payable or applicable under the equitable limitations thereinbefore contained if Lord Stanhope were dead without issue inheritable under the paramount limitations, but that such proviso should be without prejudice to the estates of the younger sons of Lord Stanhope under the paramount limitations if and when they respectively should come into existence."

Captain Stanhope was killed in action on Sept. 15, 1916, having devised and bequeathed his residuary estate to Lady Beryl absolutely. His interest under the ultimate trust in remainder contained in the 1914 settlement formed part of his residuary estate. Estate duty was paid on the death of Capt. Stanhope by the trustees of the 1914 settlement in respect of all the property then comprised in that settlement, subject to deduction from the principal value thereof of a notional " slice " sufficient to produce the £200 yearly pin money payable to Lady Beryl. Lady Beryl married for the second time on July 5, 1917, and there were issue of that marriage a son who was killed in action on May 2, 1942, without having married and a daughter, now Mrs. Lee, who is married and has an infant son. On Dec. 14, 1923, Lady Beryl made a voluntary settlement, which I will call " the 1923 settlement ". The material provisions of the 1923 settlement were briefly as follows: by cl. 2 thereof Lady Beryl conveyed to the grantee all the freeholds then subject to the limitations or trusts of the 1914 settlement (including, expressly, the benefit of any trust for payment of the rents profits or income thereof to the deceased) to hold unto the grantee in fee simple subject to the yearly jointure rentcharge of £1,000 limited to the deceased during her life by the 1914 settlement and subject to the paramount limitations, to uses

A declared by numbered paragraphs as follows: (i) to such uses as might be necessary for confirming the said jointure rentcharge; (ii) to such uses as Lady Beryl should appoint for the purpose only of exercising her statutory powers as tenant for life; (iii) to such uses as should be necessary for confirming the paramount limitations; (iv) to the use of the said trustees for a term of ninety-nine years if Lady Beryl should so long live on the trusts thereinafter declared B concerning the same and subject to the said term and the trusts thereof; (v) to uses conferring on Lady Beryl a power of appointment among her issue (which she did not exercise) and subject thereto, in (vi) to (xi) to certain uses for the benefit of Lady Beryl's son and issue; (xii) to the use of Mrs. Lee during her life with remainder (xiii) to the use of the first and other sons of Mrs. Lee successively according to seniority in tail male, with remainders over.

C By cl. 3 thereof it was declared that the trustees should stand possessed of the said term of ninety-nine years determinable on the death of Lady Beryl on trust to enter into and during the life of Lady Beryl continue in possession or receipt of the rents and profits of the premises (with power from time to time to delegate the right to enter into such possession or receipt to Lady Beryl) and to hold the net income of the premises on trust in the first place to keep on foot cer- D tain policies therein mentioned (which policies all became fully paid before the death of Lady Beryl) and subject thereto on a discretionary trust for the benefit of Lady Beryl, her issue for the time being in existence and any after taken husband of hers and other persons.

By cl. 4 thereof, power was conferred on Lady Beryl to appoint a rentcharge in favour of such a husband of hers, but she did not exercise this power. By cl. 11, E Lady Beryl assigned and confirmed unto the said trustees all the leaseholds then subject to the trusts of the 1914 settlement, (again including expressly the benefit of any trust for the payment of the rents profits or income to her) to hold unto the trustees (subject to the said yearly jointure rentcharge and to the paramount limitations) and it was declared that those trustees should hold such leaseholds on trusts and subject to powers and provisions as nearly corresponding with F the uses trusts powers and provisions thereby declared concerning the freeholds thereinbefore settled as the different tenure would permit, with usual exceptions. By cl. 12 thereof Lady Beryl directed the trustees to stand possessed of all investments and money representing capital money arising out of the Settled Land Acts from the premises settled by the 1914 settlement, subject to the said yearly jointure rentcharge and to the paramount limitations on the trusts and subject G to the powers and provisions on and subject to which capital money arising under the same Acts from the freehold premises settled by the 1923 settlement or investments representing the same would be held.

Although, apart from her jointure rentcharge, Lady Beryl's interests in the settled estates in 1923 were equitable only, the 1923 settlement purported to convey the legal estate and to create legal limitations. It has not, however, been H questioned that the 1923 settlement was effective in equity to achieve its manifest intention. The trustees from time to time of the 1923 settlement have always been the same persons as the trustees for the time being of the 1914 settlement. The plaintiff is the present trustee of both settlements. On Dec. 2, 1931, Lady Beryl married for the third time. There was no issue of this marriage. She died, as I have said, on May 17, 1957, and the present plaintiffs are her special personal I representatives in respect of the settled land vested in her under the compound settlement constituted by the 1914 settlement and the 1923 settlement. At her death the settled property consisted in part of land and in part of investments and cash representing capital moneys. The Commissioners of Inland Revenue have claimed estate duty in connexion with Lady Beryl's death under the 1923 settlement in respect of an absolute interest, subject only to the paramount limitations, in all the property held on the trusts of the 1914 settlement at her death.

In these circumstances, estate duty having been paid to the extent I have mentioned in connexion with the death of Capt. Stanhope in respect of the property comprised in the 1914 settlement (which I will refer to as "the settled estates" in order to avoid confusion with the property settled by the 1923 settlement, which comprised, I think, only limited or defeasible interests in the settled estates) the question arises whether the exemption from estate duty provided by the Finance Act, 1894, s. 5 (2) (which is still effective under the Finance Act, 1914, s. 14, on the death of a surviving spouse) is applicable in the present case. Subsection (2) is in the following terms:

> 'If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in para. 5 of Sch. 1 to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property, and who if on his death subsequent limitations under the settlement take effect in respect of such property was sui juris at the time of his death or had been sui juris at any time while so competent to dispose of the property."

That is the form of the subsection as it was amended by the Finance Act, 1898, s. 13.

The contention of counsel on behalf of the plaintiff trustee of the two settlements is, stated shortly, (a) that duty was paid on the settled estates on Capt. Stanhope's death; (b) that Lady Beryl was never competent to dispose of the settled estates by reason of the paramount limitations; and (c) that the claim for duty which apart from s. 5 (2) would arise on her death would be "in respect of" the settled estates within the meaning of that subsection. As regards (b), Lady Beryl's statutory powers of disposition as a person having the powers of a tenant for life are, of course, not relevant: competence to dispose must for the purposes of the subsection be competence to dispose of the beneficial ownership of the settled property. Counsel says that it matters not whether what passed on Lady Beryl's death was the settled estates or only her terminable and defeasible interests in the settled estates: exemption from duty under s. 5 (2) is available, he contends, in either case.

Counsel's argument on behalf of the Inland Revenue, on the other hand, may be stated shortly to be (a) that what was settled in 1923 was not the settled estates but only Lady Beryl's terminable and defeasible interests therein, and that this was what passed on her death; (b) that the claim for duty which, subject to the operation, if any of s. 5 (2), arose on her death arose on the passing of that property and no other; (c) that until 1923 Lady Beryl was competent to dispose of that property and in fact did so by the 1923 settlement; and accordingly (d) that, even if duty can be said to have been already paid in respect of that property on Capt. Stanhope's death, the exemption under s. 5 (2) is nevertheless not available.

For the purpose of construing the subsection, counsel invite me to approach it at different points of time. Counsel for the plaintiff takes his stand at that moment at which the opening words are first satisfied, that is to say, when estate duty is paid in respect of any settled property. Thereafter, he says, until the death of a person who is at his death competent to dispose of that property or has been so at any time during the continuance of the settlement to which the property was subject when that duty was paid, no claim can arise for any duty which could properly be described as "in respect of" that settled property. Counsel for the Inland Revenue, on the other hand, takes his stand at the moment when some property passes or is deemed to pass so as to give rise to a prima facie claim for duty which may or may not be defeated by the subsection. One must then, he says, see whether any duty has previously been paid "in respect of" that property in circumstances in which that duty can be said to have been paid

A in respect of that property since it became settled. If not, cadit quaestio; but, if it can be so said, then one must consider whether anyone has since died who at his death or at any time during the continuance of the settlement was competent to dispose of the property the passing or notional passing of which occasions the claim for duty which is under consideration. Counsel for the Inland Revenue's method of approach is more oblique than that of counsel for the plaintiff, but B counsel for the Inland Revenue suggests that it produces the more reasonable result.

Following in the footsteps of KENNEDY, J., in *A.-G.* v. *Hay* (1), I should, I think, read the section in a straightforward and simple manner as the first step to discovering its meaning and its application to the facts of the present case. The first question which the subsection poses is whether, in fact, estate duty has C already been paid in respect of any settled property since the date of the settlement by virtue of which the property was settled when that duty became payable. "Settled property" is defined in the Act by s. 22 (1) (h) as meaning property comprised in a settlement. Accordingly the opening words of s. 5 (2) must be interpreted as though they ran: "If estate duty has already been paid in respect of any property comprised in a settlement since the date of the settlement." It D is, in my judgment, clear as a matter of language that when the passage is read in this way the word "settlement" must in each place where it occurs refer to the same settlement. In the present case the settled estates were clearly settled property at the death of Capt. Stanhope by virtue of the 1914 settlement and estate duty was then paid in the way I have stated. It is common ground that that duty was paid in respect of the settled estates with the possible exception of E a sufficient "slice" to produce the £200 a year pin money. I will for the present ignore the complication introduced by the fact that duty was not paid on that occasion on the pin money "slice" and will return to it at the end of my judgment.

For the sake of simplicity I will proceed to discuss the case as though duty had been paid on the whole settled estates on Capt. Stanhope's death. It follows that no estate duty is to be paid "in respect thereof" until the occurrence of the event F mentioned in the subsection. I shall have to say something about the words "in respect" in a moment. The word "thereof" must grammatically relate back to "any settled property." The event which puts an end to the exempting effect of the subsection is the death of a person "competent to dispose of such property". Again the words "such property" must, in my opinion, relate back to "any settled property". Neither counsel before me has contended that G either "thereof" or "such property" must be construed as relating only to the entirety of the property comprised in the settlement. Counsel for the Inland Revenue suggested that if, for instance, both Blackacre and Whiteacre were settled by one settlement and duty had been paid in respect of both on a death since the date of settlement but at a later stage a person died competent to dispose of Blackacre but not of Whiteacre, exemption could still be claimed for H Whiteacre but not for Blackacre. In such a case each of Blackacre and Whiteacre would fall to be treated on its own for the purposes of the subsection as "any settled property". This, in my judgment, must be right.

In *Re Parsons, Parsons* v. *A.-G.* (2) where a testatrix made a specific bequest of stock to her husband and settled her residuary estate on him for life and thereafter on her son absolutely and the husband disclaimed the specific bequest, I the Court of Appeal treated the case as though the stock at all relevant times formed part of the residue subject to a power for the husband to appoint the stock in his own favour absolutely, and reached the conclusion that the stock was not exempt from duty on the husband's death under s. 5 (2) because the husband was, until he disclaimed, competent to dispose of the stock. It was not argued that s. 5 (2) did not apply because the husband's competence did not extend to disposing of the whole residuary estate, but the judgments clearly

(1) [1899] 2 Q.B. at p. 251. (2) [1942] 2 All E.R. 496; [1943] Ch. 12.

proceed on the footing that, had he not been competent to dispose of the stock, s. 5 (2) would have applied. This view was also assumed both in argument and by the court in *A.-G.* v. *Hay* (3) which related to an undivided share in settled property. In cases of this kind the distinguishable settled property or the undivided share, as the case may be, can be traced back into, and be shown to have formed part of, the corpus of settled property in respect of which the earlier payment of duty was made; and exemption from duty is lost in respect of that part or share of the settled property, if before the second claim for duty arises someone has become competent to dispose of that part or share. It is not, in my judgment, difficult to make the language of the subsection fit such a case and to read the expressions " any settled property ", " in respect thereof " and " such property " in the subsection as applicable to one subject-matter throughout.

Such cases, however, differ from the present case because I am not presently concerned with an identifiable part or undivided share of the trust property but with a qualified interest in the whole of the trust property. When she made the 1923 settlement Lady Beryl was clearly not capable of settling the entire beneficial interest in the settled estates. She was then entitled to her jointure rentcharge of £1,000 a year, and, subject thereto, she was entitled under the combined operation of the 1914 settlement and Capt. Stanhope's will to the income of the settled estate during Lord Stanhope's life so long as there should be no son of Lord Stanhope inheritable under the paramount limitations and after Lord Stanhope's death, to the absolute interest in the settled estate defeasible in the event of the birth of a son to Lord Stanhope inheritable under the paramount limitations. She could have settled her rentcharge as well as her terminable and defeasible interests. In fact, she only settled the latter. From the date of the 1923 settlement until Lady Beryl's death the income of the settled estates was payable as to £1,000 a year to Lady Beryl and the balance was applicable under the discretionary trust of the term created by that settlement for the benefit of Lady Beryl herself and others. On the death of Lady Beryl the rentcharge ceased to be payable and the term and discretionary trust came to an end: the whole income thereupon became payable to Lady Beryl's daughter, Mrs. Lee, for life.

The enjoyment of the whole of the income therefore changed hands on Lady Beryl's death. Counsel for the plaintiff says that consequently the settled estates thereupon passed for the purposes of the Finance Act, 1894. This does not, in my judgment, necessarily follow. The fact that the enjoyment of the whole of certain income changes hands on a death is a manifestation of the fact that some property has then passed, but does not without more identify the property which has passed. For example, a change in the enjoyment of all the rents and profits of certain land would be equally consistent with a passing of the fee simple or of a term of years or of some other limited interest such as an estate pur autre vie. To ascertain what in fact has passed one must look at the trust instrument under the provisions of which the passing has occurred to see what property is subject to the trusts of that instrument, or, if there is no trust instrument, one must look at the relevant circumstances to discover what property has changed hands by operation of law.

This is, I think, the effect of the decision of the Court of Appeal in *Midland Bank Executor and Trustee Co., Ltd.* v. *Inland Revenue Comrs.* (4). In that case a testator who died on July 20, 1937, had by a codicil declared trusts of certain property to continue until the expiration of twenty-one years from his death or the earlier death (which did not occur) of his daughter. After that period in the events which happened three-fifths of the property were to be held in trust during another life to apply the income thereof for the benefit of the children of a nephew of the testator for the time being alive and if more than one in such shares as the nephew and his wife should direct. By an arrangement made in

(3) [1899] 2 Q.B. 245. (4) [1959] 1 All E.R. 180; [1959] Ch. 277.

A 1941, the trusts during the first-mentioned limited period were put an end to and it was declared that as from the testator's death until the end of the twenty-one year period or the earlier death of the testator's daughter the settled property should be held on the trusts declared by the codicil in respect of the income thereof after the expiration of the twenty-one year period. In 1955, before the twenty-one year period expired, a son of the nephew died who was at his death in receipt B of one-fifth of the income of the settled property under a direction given by the nephew and his wife. The Crown claimed duty on his death on one-fifth of the corpus of the trust property, but the court held that what passed on the death in question was derived not from the codicil but from the 1941 arrangement and that duty became payable only on the actuarial value as at the date of the death of one-fifth of the income of the settled property during the remainder of the C twenty-one year period or until the earlier death of the testator's daughter.

JENKINS, L.J., said that the somewhat complicated facts tended to obscure the point at issue and continued (5):

> "However, it is in fact a question of considerable general importance, which so far as I can see enters into every case in which there has been a D derivative disposition or settlement of a limited interest created by a previous settlement."

He then gives three examples of sub-settlements by persons who are either life tenants under a head settlement or entitled to a limited interest in the nature of a term of years or an estate pur autre vie, and in each case he supposes a change under the sub-settlement in the enjoyment of the whole income of the settled E property during the currency of the limited interest which has been sub-settled. He went on as follows (6):

> "In all three examples and in all comparable cases it appears to me that the true position in fact and in law is that a limited interest conferred on a person by a settlement has been disposed of by the beneficiary as a distinct item of property in right of his or her beneficial interest in it, and that any F subsidiary limited interests carved out of the limited interest disposed of are to be regarded as taking effect exclusively out of and to the extent of the limited interest disposed of and not otherwise. I see no sufficient reason for regarding them in any other way for estate duty purposes. The commissioners' view would seem to produce somewhat remarkable results. For instance, it would mean that a life tenant could by an appropriate disposition of his G life interest in a settled fund subject the capital of the fund, in which he had no interest whatever, to a claim for duty on the death of any person on whom he might choose to confer a life interest carved out of, and necessarily limited in its duration to the duration of his own life interest. This seems to me absurd."

H ROMER, L.J., put the matter thus (7):

> "Counsel for the trustees submitted in effect that the expression 'settled property' in s. 1 of the Finance Act, 1894, is referable to property which is settled by a disposition and which passes under that disposition; and that the section should in this regard be confined to property passing under a disposition on the death of a person entitled under that disposition. It appears I to me that, at all events in general, this contention is well founded and that, applying it to the present case, the disposition under which the deceased was entitled at his death to one-fifth of the income of the retained shares was the deed of 1941 and not the testator's codicil."

Counsel for the plaintiff says that that case is distinguishable from the present

(5) [1959] 1 All E.R. at p. 188; [1959] Ch. at p. 289.
(6) [1959] 1 All E.R. at p. 189; [1959] Ch. at p. 290.
(7) [1959] 1 All E.R. at p. 193; [1959] Ch. at p. 297.

case on two grounds: (i) that in that case the court was concerned with a sub-settlement of an interest which was limited as to time and that all the examples of JENKINS, L.J., were of a similar kind, whereas in the present case what was settled in 1923 was an absolute, although defeasible, interest, and (ii) that in the present case, had there been no 1923 settlement, the settled estates would have passed on the death of Lady Beryl, whereas in *Midland Bank Executor and Trustee Co., Ltd.* v. *Inland Revenue Comrs.* (8) but for the 1941 arrangement, nothing would have passed on the death in 1955. In that case and in the case of each of the examples of JENKINS, L.J., says counsel for the plaintiff, to raise a claim for duty the Inland Revenue was or would be compelled to rely on the terms of the sub-settlement and nothing else as giving rise to the actual or notional passing of property occasioning the claim for duty. It is true that, subject to what I shall say later about what the position would have been on Lady Beryl's death had there been no 1923 settlement, there are these distinctions of fact between the two cases, but they do not appear to me to be relevant to the application of the principle of the Court of Appeal's decision to the present case. Logically, in my opinion, the nature of the limited interest which is sub-settled can have no bearing on the principle in question which JENKINS, L.J., described in a passage already cited as entering into every case in which there has been a derivative disposition or settlement of a limited interest created by a previous settlement.

As regards the second ground of distinction of counsel for the plaintiff, I do not see why consideration of whether some, and if so what, property would have passed or have been deemed to pass on a particular death in certain circumstances should influence the answer to the question whether any, and if so what, property in fact passed or should be deemed to have passed on that death in different circumstances. Moreover, I am not persuaded that, had there been no 1923 settlement, the settled estates would have passed on Lady Beryl's death. Apart from the jointure rentcharge, the cesser of which on her death was unaffected by the 1923 settlement, she had no interest in the settled estates which would have ceased on her death. Apart from the cesser of the rentcharge, it seems to me that what would have passed on Lady Beryl's death, if there had been no 1923 settlement, would have been that interest in the settled estates which would have formed part of her own estate at and after her death. Not only would what would have so passed have been something other and less than the whole beneficial interest in the settled estates, but also the passing would have had no reference to the trusts of the 1914 settlement. In my view what would have passed on Lady Beryl's death, apart from the "slice" of the settled estates referable to the jointure rentcharge, would have been not the settled estates but Lady Beryl's terminable and defeasible interest therein. The rentcharge, of course, ceased on Lady Beryl's death, but, if there had been no 1923 settlement, the income of so much of the settled estates as was required in her lifetime to service the rentcharge would have continued after her death to be payable to her estate in virtue of her determinable interest in the income during the life of Lord Stanhope.

In these circumstances it would, I think, have been at least arguable that there was no passing, actual or notional, on Lady Beryl's death of the "slice" of the settled estates referable to the rentcharge. Although for these reasons I do not go all the way with counsel for the plaintiff in thinking that, but for the 1923 settlement, the settled estates would have passed on Lady Beryl's death, it seems to me that he is right in suggesting that, subject to possible exemption under s. 5 (2), some claim for duty would have arisen on her death. Nevertheless, I do not consider that this is a valid ground of distinction between the present case and *Midland Bank Executor and Trustee Co., Ltd.* v. *Inland Revenue Comrs.* (8). I have, therefore, to consider the question whether, on the footing that the

(8) [1959] 1 All E.R. 180; [1959] Ch. 277.

A settled estates as a whole did not pass either actually or notionally on Lady Beryl's death, any and if so what, claims for duty which, but for s. 5 (2), would have arisen on her death in the events which happened, can properly be described as being "in respect of" the settled estates within the meaning of s. 5 (2).

So far as such claims would have arisen under s. 2 (1) (b) because of the cesser of the rentcharge, it seems to me to be clear that they would have arisen if not B "in respect of" the settled estates as a whole, at least "in respect of" the "slice" of the settled estates referable to the rentcharge and would fall within s. 5 (2), as would have been the case if the annuity had been a fractional undivided share (*A.-G.* v. *Hay* (9)). But what of the duty which, unless s. 5 (2) applies, became payable on Lady Beryl's death by reason of the passing of her other interests in the settled estates; that is to say, the interests comprised in the 1923 C settlement?

In this respect counsel for the Inland Revenue points out that Lady Beryl was until 1923 competent to dispose of these other interests. This is, of course, true; she did in fact dispose of them by the 1923 settlement. But this competence ceased on her making that settlement. She was never, since that settlement, competent to dispose of the interests thereby settled. On the other hand she was D not at any time competent to dispose of the settled estates. Counsel for the Inland Revenue concedes that if counsel for the plaintiff can establish that in this connexion "in respect of" in s. 5 (2) means "in relation to the settled estates or any part thereof or any interest therein" the subsection is applicable to the present case. Counsel for the plaintiff contends that this is in fact the effect of these words. He points out that s. 1 of the Act in conjunction with Sch. 1, E para. 3 and para. 5 enacted that, inter alia, succession duty, which was of course a duty payable on the value not of the property involved but of the interest of the successor in that property, should to a certain extent not be levied "in respect of" property chargeable with estate duty. He makes a similar point on the reference in para. 4 of the same Schedule to s. 6 of the Customs and Inland Revenue Act, 1889, which taxed the value of successions. He points out that s. 5 F (2) also refers to these duties as "payable in respect thereof". He says that s. 7 (10) by inference indicates that, but for that subsection, duty might become payable more than once on the same death by reason of the deceased having more than one interest in the property.

Finally, he draws attention to the fact that s. 16 (3) in its original form enacted that where estate duty had been paid on the principal value of a small estate G ". . . the legacy and succession duties shall not be payable . . . in respect of that estate". Counsel for the plaintiff contends that these passages all indicate that the expression "in respect of" any property is of wide import and extends to matters relating to interests in that property. He relies on *A.-G.* v. *Dodington* (10) in which probate duty paid in respect of a reversionary interest in settled property was treated as having been paid "in respect of" the settled property within the H meaning of s. 21 (1) of the Finance Act, 1894; and, coming nearer home, he relies strongly on *Re Finance Act, 1894, and Studdert* (11), a case decided in Ireland and ultimately in the House of Lords under s. 5 (2).

In that case property was settled on trust for B for life and after his death for his wife A for life, and after the death of the survivor in the event which happened of there being no issue of the marriage in trust as A should appoint. A I pre-deceased B and on her death estate duty was paid on her reversionary interest in the trust fund. On B's death, s. 5 (2) was held to apply. PALLES, C.B., said this (12):

> "Now I assume, for the purposes of my judgment, that had it not been for s. 5 (2), the contention of the Inland Revenue would have been correct; and, therefore, the sole question which I propose to consider is whether the

(9) [1899] 2 Q.B. 245. (10) [1897] 2 Q.B. 373. (11) [1900] 2 I.R. 281.
(12) [1900] 2 I.R. at p. 285.

provisions of that subsection are, in the events which have happened, applicable to the case before us. To render them so applicable, two, but only two, matters must be shown: 1, that the £97 1s. 4d. paid upon the death of Mrs. Studdert was 'paid in respect of settled property'; 2, that until after the death of the Rev. George Studdert there was not any person who was 'at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property'."

Having first answered the second question in the negative, and having held that the relevant property was at the relevant time "settled property" he proceeded as follows (13):

"If, then, the property, at the time the first duty accrued, answered the description of 'settled property', the only remaining consideration is, was the duty which was paid upon Mrs. Studdert's death so paid in respect of that settled property? I find it difficult to see how this question can receive any answer other than an affirmative one. Indeed, the contrary seems to me to be incapable of argument. As, however, we are told that the question has not as yet been decided, and that this case is to be brought to an appellate court for a binding decision upon this question, I must, in courtesy, assume that there is something which renders it worthy of consideration, and for this reason only I refer further to it. The argument for the Inland Revenue is that as the duty paid on Mrs. Studdert's death was paid in respect of her reversionary interest in the settled property, it was paid in respect of something different from the 'settled property' mentioned in the section, the latter expression being confined, as is insisted upon by the commissioners, to the entire interest in such settled property; and it is said that, were any other construction given to these words, the amount which the Crown would be limited to recovering during the continuance of a settlement in a case in which the event upon which the first duty accrued was such that an interest of but small value in the property became subject to the duty would be less than that which would have been assessed upon the full capital value of the trust funds. It was, as I understand, in consequence of this argument that the appellants admitted liability to duty upon the death of George Studdert on the value of his life estate. Now, I do not propose to stop to consider whether the estate duty paid on Mrs. Studdert's death was so paid in respect of a partial interest only in the settled property, within the meaning of this subsection, or whether it was not so paid in respect of the then present value of the entire capital moneys which passed or were deemed to pass, but which moneys were not payable until the deferred time to which the payment of the duty might have been deferred. Had the executors elected to defer payment until the death of Mr. Studdert, it would be difficult to argue that the deferred duty was not paid in respect of the entire corpus of the fund; and I do not myself see that the omission to exercise the option of the executors can vary the case."

Then he made a reference to *A.-G.* v. *Dodington* (14), and a little later went on (15):

"Assuming, then, that the payment of £97 1s. 4d. was made in respect of a partial interest in the settled property, I am still of opinion that that payment was in respect of the 'settled property' within s. 5 (2), because, on ordinary principles of construction, the whole must include a part, and because the taxing section (i.e., s. 1), by using the words 'save as hereinafter expressly provided', renders it necessary to construe s. 5 (2), as part of that taxing section; and if, on the true construction of both together, the case is not within the words of the enactment the omission cannot be supplied. In other words, if we read 'settled property' so as to exclude a part of it, we, for the purpose of extending taxation, omit to give to that expression

(13) [1900] 2 I.R. at p. 287. (14) [1897] 2 Q.B. 373. (15) [1900] 2 I.R. at p. 288.

A its full force—a construction which I hold to be impossible in a taxing enactment."

The case is reported in the Court of Appeal in Ireland (16). The Court of Appeal affirmed the decision of the Divisional Court. It is, I think, sufficient if I read the following passage from the judgment of HOLMES, L.J. (17):

B "Therefore no estate duty was payable on that event if estate duty had already been payable in respect of such property. There only remains the narrow point—whether, within the meaning of the subsection, duty was so payable upon the death of Mrs. Studdert. It is, in my opinion, quite clear that it was. If it were not payable in respect of the property comprised in the settlement, in respect of what was it payable? It is said on C behalf of the Crown that it was only payable upon a reversionary interest in such property; but it was not for that reason the less payable in respect of the property comprised in the settlement."

The case was taken to the House of Lords under the name *Inland Revenue Comrs.* v. *Priestley* (18). The House affirmed the decision of the court in Ireland, approving the judgment of PALLES, C.B., and also the judgment of D RIGBY, L.J., in *A.-G.* v. *Dodington* (19). I read the following passage from the speech of LORD MACNAGHTEN (20):

"The principal value of the settled property was estimated (as the Act directs) at the price which, in the opinion of the commissioners, the property would have fetched if sold in the open market at the time of the death of Mrs. Studdert. The commissioners seem to have arrived at their estimate E in the ordinary way in which buyers of such property in the market make their calculations, by taking the market value of the securities forming the settled property as at the time of Mrs. Studdert's death, and then making an abatement or allowance in respect of Mr. Studdert's life interest, reckoning the probability of life according to the accepted tables of mortality. But the persons accountable for the duty have nothing to do with the mode in F which the commissioners form their opinion so long as they comply with the directions of the Act, Whatever process the commissioners may go through in their own minds—however they may split up the property for the purpose of coming at their estimate—the duty is leviable in respect of the settled property, not in respect of any particular part or parts of the settled property, or in respect of anything short of the full amount of the property."

G That case, therefore, is authority for the view that duty, the amount of which is ascertained by reference to the value of an interest in settled property which is less than the whole beneficial interest in that property, is none the less properly described as paid "in respect of" the settled property. If so, it must, in my opinion, follow that when, but for s. 5 (2), duty would be payable, the amount of which would fall to be ascertained by reference to the value of some limited or H qualified interest in settled property, such duty would be properly described as duty which, but for the subsection, would "be payable in respect of" the settled property within the meaning of the subsection. No closer nexus between the charge of duty and the settled property is required to satisfy the expression "in respect thereof".

Following the approach of counsel for the plaintiff to the construction of the I subsection therefore (and still ignoring the point about the pin money "slice") I would reach the conclusions: (a) that on the death of Capt. Stanhope estate duty was paid in respect of the settled estates; (b), that, but for s. 5 (2), on the death of Lady Beryl claims for duty would arise in relation to—(i) the cesser of her jointure rentcharge and (ii) the actual or notional passing of her terminable and defeasible interests in the settled estates which were comprised in the 1923

(16) [1900] 2 I.R. 400. (17) [1900] 2 I.R. at p. 413. (18) [1901] A.C. 208.
(19) [1897] 2 Q.B. 373. (20) [1901] A.C. at p. 214.

settlement, and in this connexion I need not pause, I think, to consider how such duty would be assessed or what effect s. 7 (10) would have on these claims; (c) that all such claims would relate to duty which would be properly described as payable in respect of the same property in respect of which duty had been paid on Capt. Stanhope's death; (d) that Lady Beryl was never competent to dispose of the settled property in respect of which duty was paid on Capt. Stanhope's death; (e) that consequently s. 5 (2) is applicable.

The contention of counsel for the Inland Revenue may, I think, be said to be that this reasoning results from approaching the subject through the wrong doorway or viewing it in the wrong perspective. I hope that I do his argument justice if I put it thus. (i) the application of the subsection comes in question only when an actual or notional passing of some property occurs in respect of which duty is payable unless exemption under the section is available. This is the property, be it an absolute or some lesser interest, which is contemplated by the words " in respect thereof." (ii) Since it is clear from the language that these words relate back to " any settled property " the latter words must be construed as referring to the same interest or property. If the interest or property in question be not the corpus of settled property but, say, one only of a series of beneficial interests existing under a settlement, for example, a life interest or a reversionary interest, nevertheless, if duty has been paid since the date of the settlement on the corpus of the settled property, such duty may properly be said to have been then paid " in respect of " the relevant interest in the settled property as well as in respect of every other interest in it (*Inland Revenue Comrs.* v. *Priestley* (21)).

The argument of counsel for the Inland Revenue involves, I think, not merely reading " any settled property " as meaning " any settled property or share thereof or interest therein " but also adding by inference from what follows the words " in respect of which a further claim for estate duty would but for this subsection have subsequently arisen ", for it is only by restricting the effect of the words " any settled property " in some such way as this that he is able to take the last step in his argument by saying (iii) that the words " competent to dispose of such property " refer and refer only to the property the actual or notional passing of which gives rise to the debated liability for duty; that is to say, the relevant limited beneficial interest under the settlement.

Counsel for the Inland Revenue says that what passed actually or notionally on Lady Beryl's death was the subject-matter of the 1923 settlement and nothing else, and that that property would fall to be valued on her death free from the jointure rentcharge; that duty was paid on Capt. Stanhope's death in respect of the same subject-matter as an element or interest in or part of the settled estates, that Lady Beryl was until 1923 competent to dispose of that same subject-matter; and that consequently exemption under s. 5 (2) is not available.

I do not feel justified in putting such a gloss on the words " any settled property " as the argument of counsel for the Inland Revenue seems to me to involve. They can, in my judgment, be construed in this subsection in accordance with their natural and apparent meaning. So construed in the present case they are appropriate to describe the settled estates, or rather, that part of the settled estates in respect of which duty was paid on Capt. Stanhope's death—i.e., the whole settled estates less the " slice " referable to pin money.

Lady Beryl was not at her death or at any time during the subsistence of the settlement competent to dispose of any part of the settled estates. However, in consequence of the 1923 settlement of Lady Beryl's qualified interests in the settled estates a claim for duty will, unless s. 5 (2) is applicable, have arisen on her death in relation to the interests comprised in the 1923 settlement. If that duty could, if exigible, properly be described as payable " in respect of " the settled estates, exemption will be available under the subsection. It appears to me on the

(21) [1901] A.C. 208.

A authority of *Inland Revenue Comrs.* v. *Priestley* (22) that the duty in question can be properly so described. It follows that, in my judgment, the subsection is applicable and the claim for exemption is well founded.

I now return to the complication introduced by the fact that when duty was paid on Capt. Stanhope's death, an allowance was made for a "slice" of the settled estates referable to the pin money rentcharge of £200 a year. If the pin B money "slice" was X per cent. of the value of the settled estates at that date, and if it be assumed that 100—X=Y, then duty was paid on Y per cent. of the then value of the settled estates. It might be said, nevertheless, such duty as was paid was paid in respect of the whole settled estates on reasoning similar to that adopted in *Inland Revenue Comrs.* v. *Priestley* (22). It seems to me, however, (although I have heard little argument on this part of the case) that a distinction C is to be drawn between a case in which duty is paid, as in *Inland Revenue Comrs.* v. *Priestley* (22) in relation to an interest which, although it is less than the full beneficial interest, extends to the whole corpus of settled property, and a case where duty is paid in relation to part only of the settled property. The present case falls, I think, within the latter class.

It follows, in my judgment, that only Y per cent. of the settled estates can D qualify for exemption from duty under s. 5 (2), that proportion of the settled estates constituting the only settled property in respect of which duty was paid on Capt. Stanhope's death. Consequently the effect of s. 5 (2) in the present case is that on Lady Beryl's death, no duty is to be paid in respect of Y per cent. of the settled estates. Accordingly X per cent. only of the duty which would be payable but for s. 5 (2) on her death, whether in respect of the cesser of the jointure E rentcharge or in respect of the passing of Lady Beryl's terminable and defeasible interests in the settled estates, is, in my judgment, exigible in respect of Lady Beryl's death. I declare that the plaintiffs are liable as trustees, under the 1914 settlement, to duty on a proportion of the estate.

Declaration accordingly.

F Solicitors: *Caprons & Crosse* (for the plaintiffs); *Solicitor of Inland Revenue.*

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

Divorce—Practice—Summons—Transfer from solicitors' to counsel's list.

Where, on a summons for hearing by a Registrar of the Divorce Registry, H issued in the solicitors' list, the party to whom the summons is directed intends to be represented by counsel, that party should notify the applicant of his intention and arrange for a fresh time of hearing to be fixed. Application should be made to the clerk to the Registrar who will fix the fresh time between 12 noon and 1 p.m. on the day already fixed for the hearing or, if this is not possible, refer the matter to the Registrar. Notice of the fresh time for hearing must be given to the applicant.

B. LONG,
Senior Registrar.

July 18, 1961.

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(22) [1901] A.C. 208.

INLAND REVENUE COMMISSIONERS *v.* J. B. HODGE & CO. (GLASGOW), LTD. (in voluntary liquidation).

[HOUSE OF LORDS (Lord Reid, Lord Cohen, Lord Hodson and Lord Guest), June 5, 6, 7, July 13, 1961.]

Profits Tax—Distribution—Distribution charge—Reconstruction—Vendor company's business sold in 1950 *in consideration of shares in purchasing company—Subsequent sale by vendor company of shares of purchasing company—Liquidation of vendor company in* 1955*—Liability to distribution charge—Finance Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 30 (3), *s.* 36 (4), *s.* 43 (1).

The respondents, a limited company, carried on a business of selling heavy earth-moving equipment from 1941 to 1950. During that period they were allowed non-distribution relief from the profits tax under the Finance Act, 1947, s. 30 (2)*. On Apr. 5, 1950, they sold that business to another company in consideration of shares in the purchasing company, and thereafter carried on business as an investment company. In September, 1950, the respondents and the purchasing company gave notice of election under s. 36 (4)* of the Act of 1947. The respondents sold their shares in the purchasing company and, on Mar. 18, 1955, went into voluntary liquidation. In their last chargeable accounting period (Nov. 1, 1954 to Mar. 18, 1955) the net relevant distributions to proprietors exceeded the profits of the period. The respondents were assessed for that period to a distribution charge under s. 30 (3)* of the Act of 1947 in respect of the non-distribution relief allowed during years when the business of selling heavy earth-moving equipment had been carried on.

Held: the respondents were liable to the distribution charge for the following reasons—

(i) since, during the chargeable accounting period for which the respondents were assessed they were carrying on a trade and made net relevant distributions in excess of the profits of the trade for that period, they were within the charging words of s. 30 (3) of the Finance Act, 1947, and there was nothing to exclude their liability in the proviso to s. 30 (3) of that Act; moreover, the scheme of the Act of 1947 was that the profits of each chargeable accounting period should no longer be put into separate watertight compartments, and s. 43 (1)* of the Act of 1947 (by which all trades carried on were to be treated as one) applied in respect of different trades carried on successively as well as in respect of different trades carried on simultaneously (see p. 178, letter G, p. 176, letter F, p. 180, letter I, to p. 181, letter A, and p. 179, letter I, post).

(ii) liability to the distribution charge was not transferred by virtue of s. 36 (4) (ii) from the respondents when election under that subsection was made, but remained with the respondents, there being no express relief from it in the statute (see p. 179, letters B and F, p. 180, letter A, p. 174, letter I, and p. 179, letter I, post).

Dictum of CROSS, J., in *Ackland & Pratten, Ltd.* (*in liquidation*) v. *Inland Revenue Comrs.* ([1960] 3 All E.R. at p. 377) approved.

Per LORD COHEN and LORD HODSON, LORD GUEST concurring: if the Crown recovered distribution charge from the respondents, the amount could not be recovered a second time from the purchasing company (see p. 179, letters G and I, and p. 180, letter E, post).

Appeal allowed.

[**Editorial Note.** Owing to the repeals noted on p. 173 the principal relevance of the decision for future cases is, perhaps, its application to the interpretation of s. 43 (1) of the Finance Act, 1947.

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* The terms of s. 30 (2), (3), of s. 36 (4) and of s. 43 (1) of the Finance Act, 1947, are printed at p. 177, letter C, to p. 178, letter C, post.

A As to the treatment of trades and changes in trades for purposes of the profits tax, see 20 HALSBURY'S LAWS (3rd Edn.) 615, para. 1199; as to election for purposes of the profits tax on the reconstruction of companies, see 20 HALSBURY'S LAWS (3rd Edn.) 636, para. 1244.

For the Finance Act, 1947, s. 30, s. 36 and s. 43 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 774, 780, 788; and for the repeal of s. 30 and s. 36, see the B Finance Act, 1958, s. 40 (5) and Sch. 9, Part 2; 38 HALSBURY'S STATUTES (2nd Edn.) 507, 513.]

Cases referred to:

Ackland & Pratten, Ltd. (in liquidation) v. *Inland Revenue Comrs.*, [1960] 3 All E.R. 367; [1960] 1 W.L.R. 1117; 3rd Digest Supp.

Inland Revenue Comrs. v. *Butterley Co., Ltd.*, [1956] 2 All E.R. 197; [1957] C A.C. 32; 36 Tax Cas. 411; [1956] 2 W.L.R. 1101; 28 Digest (Repl.) 377, *1645*.

Appeal.

Appeal by the Crown from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland (LORD CLYDE (Lord President), LORD CARMONT, LORD SORN and LORD GUTHRIE), dated July 14, 1960, dismissing D an appeal by the Crown from a determination of the Commissioners for the Special Purposes of the Income Tax, dated May 14, 1959. The commissioners sustained an appeal by the respondents against an assessment to the profits tax made on them for the chargeable accounting period from Nov. 1, 1954, to Mar. 18, 1955, in the sum of £63,237 16s. by way of distribution charge under the Finance Act, 1947, s. 30 (3). The facts are set out in the opinion of LORD REID.

E *The Solicitor-General for Scotland* (*D. C. Anderson, Q.C.* (of the Scottish Bar)), *A. S. Orr* and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the Crown.

Sir John Senter, Q.C., D. C. Miller, Q.C., and *N. P. M. Elles* for the respondents.

Their Lordships took time for consideration.

July 13. The following opinions were read.

F **LORD REID:** My Lords, the respondents carried on a business of selling heavy earth-moving equipment from 1941 to 1950. During that period, they were allowed non-distribution relief under s. 30 (2) of the Finance Act, 1947. On Apr. 5, 1950, they sold that business to another company, and thereafter they carried on business as a holding or investment company. They went into voluntary liquidation on Mar. 18, 1955. They were assessed in respect of their G last chargeable accounting period, Nov. 1, 1954, to Mar. 18, 1955, to a distribution charge of £63,237 16s. under s. 30 (3) of the Act of 1947. They maintain that that assessment is invalid on two separate alternative grounds. First, they say that they are relieved of liability by s. 36 (4) of the Act of 1947. Alternatively, they say that, in any event, the assessment is bad because it is made in respect of the wrong chargeable accounting period. The First Division sustained the first H objection but not the second.

Admittedly s. 36 (4) applies. The former business was sold to another company as part of a scheme of reconstruction, the consideration consisted wholly or mainly of shares of the purchasing company, and the two companies jointly elected that the section should apply. This section enacts two " modifications " of the other provisions of the Act, and this first point turns entirely on the proper I construction of the second of these modifications. They are:

" (i) any distribution of those shares to any person in a winding-up of the first company shall, notwithstanding anything in sub-s. (1) of this section, not be deemed for the purposes of the last preceding section to be a distribution to that person; and

" (ii) in considering what distribution charge, if any, falls to be made on the second company, any difference on which non-distribution relief for chargeable accounting periods before the transfer was given to the first company

or other person assessable to profits tax on the profits of the trade or business of the first company shall, except so far as it has already operated to increase a distribution charge on the first company, be taken into account as if it had been a difference arising in relation to the second company on which non-distribution relief had been given to that company, and shall also be taken into account, in the case of the last chargeable accounting period of the second company, so as to increase the amount which, for the purposes of sub-s. (1) (c) of the last preceding section, is to be treated as not a distribution of capital."

The general scheme of the Act of 1947 was to encourage the retention of profits in the business by granting non-distribution relief under s. 30 (2). But, if the retained profits were later distributed, that relief was withdrawn by means of a distribution charge under s. 30 (3). So, a purchaser of a business, not having received relief, would not be liable to pay a distribution charge, but the seller would remain liable in the event of the retained profits being later distributed. The modifications alter this in two respects: the second makes the purchasing company liable to pay distribution charges in future as if it had received the non-distribution relief which the selling company received before the sale, and the first grants a limited exemption from distribution charges to the seller — limited in that it only applies on a liquidation of the selling company and only applies to certain assets of that company, its shares in the purchasing company.

These modifications would be comparatively easy to apply if the selling company went into liquidation soon after the sale. But that did not happen in this case. The selling company, the respondents, carried on business for a considerable time and, during that time, they sold their shares in the purchasing company. Accordingly, modification (i) gave them no benefit. They maintain that the terms of modification (ii) are such as to relieve them from all liability for distribution charges, and, if I had to consider this modification by itself, I would agree with the First Division in reaching that conclusion. If that were right, however, modification (i) would be unnecessary. No doubt there are cases where an unnecessary provision is inserted in an Act to avoid some possible doubt; but, in the circumstances of this case, I cannot regard that as a possible explanation. I cannot imagine any competent draftsman inserting modification (i) if he intended that every distribution whether of shares or money and whether in a winding-up or not should not be deemed for the purposes of sub-s. (1) to be a distribution; but that is said to be the effect of modification (ii). Of course, if the language of modification (ii) were capable of no other interpretation, that would be an end of the matter. But the most that can be said is that it has failed to provide for important matters which clearly ought to have been provided for if the intention was to make the purchasing company liable and also to preserve the liability of the selling company subject only to the relief given by modification (i). I do not think that, in the circumstances, that is sufficient to turn the scale. The draftsman may have overlooked the possibility that companies would make this election and yet the selling company would not go into liquidation at once; it is difficult to see why companies should make this election otherwise, because the selling company would get no immediate benefit from it, whereas the purchasing company would get an immediate detriment. But, whether or not that is a possible explanation, I find it impossible to dissent from your Lordships' view on this point, though I recognise the strength of the respondents' case.

The second point is highly technical, and I agree with the decision of the First Division. The respondents first argue that s. 43 (1) of the Act of 1947 does not apply to this case. Subsection (1) is in the following terms:

"All trades or businesses to which s. 19 of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

A Under the original Act of 1937, if a person carried on two trades simultaneously, these trades had to be dealt with separately. It is argued that the sole purpose of s. 43 is to require that all trades carried on by a person simultaneously shall be treated as one for the purposes of this tax, and that it has no application where, as in the present case, a taxpayer first carries on one trade and then, after ceasing to carry it on, he starts another. Then the respondents go to s. 35 (1) (c) B of the Act of 1947, which includes in the gross relevant distribution

> " in the case of the last chargeable accounting period in which the trade or business is carried on so much of any distribution made after the end of that period . . . as is not a distribution of capital."

If s. 43 does not apply, then " *the* trade or business " must in this case be the C former trade in machinery, because it was in respect of the profits of that trade that the non-distribution relief was granted, and a distribution charge is merely a belated collection of the tax of which payment was postponed by the non-distribution relief. The reasoning in this House in *Inland Revenue Comrs.* v. *Butterley Co., Ltd.* (1) shows that profits tax in respect of the profits of any trade can never be assessable except for a chargeable accounting period during which D that trade is in fact being carried on. So, it is argued, both the general scheme of the Act and the express terms of s. 35 (1) (c) show that any assessment for the purpose of collecting by means of a distribution charge the tax of which payment was postponed by non-distribution relief can only be effective if it is made in respect of the last chargeable accounting period in which the trade which yielded the profits sought to be taxed was actually carried on. If one stops there, the E argument is attractively logical, but it would lead to strange consequences, and I do not think that it can be reconciled with the scheme of s. 30 (2), (3) of the Finance Act, 1947, which are in the following terms:

> "(2) Subject to the provisions of this Part of this Act, if, in the case of any trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable account- F ing period are less than the profits thereof for that period chargeable to the profits tax, the amount chargeable by way of the profits tax in respect of that period shall be reduced by an amount equal to seven and a half per cent. (2) of the difference.
>
> "(3) Subject to the provisions of this Part of this Act, if, in the case of a trade or business, the net relevant distributions to proprietors (as defined G in the subsequent provisions of this Part of this Act) for any chargeable accounting period are greater than the profits thereof for that period chargeable to the profits tax, there shall be charged for that period, in addition to the other profits tax, if any, chargeable therefor, profits tax at the rate of seven and a half per cent. (2) on the amount of the difference: Provided that the amount on which tax is chargeable under this subsection for any H chargeable accounting period shall not, when added to the total of the amounts on which tax is charged thereunder for previous chargeable accounting periods, exceed the total of the differences in respect of which reductions have been made under sub-s. (2) of this section for previous chargeable accounting periods."

I I cannot see how these provisions can properly be applied if a line has to be drawn when a company ceases to carry on one trade and begins another. They appear to me to require that, so long as a company is trading at all, each year's accounts shall be considered. If, in respect of a particular year, less is distributed than the profits of that year, non-distribution relief is granted under sub-s. (2). The difficulty arises under sub-s. (3). When more is distributed than the profits

(1) [1956] 2 All E.R. 197; 36 Tax Cas. 411.

(2) Increased retrospectively to fifteen per cent. by the Finance (No. 2) Act, 1947, s. 7.

of the year, it authorises a distribution charge which will collect the tax of which payment was postponed by operation in a previous year of non-distribution relief. Suppose a case where, in the course of a previous trade, there was non-distribution relief in respect of £10,000. Then, in some year after that trade ceased and a new trade started, £15,000 more is distributed than the profits of that year. It appears to me to be plain that the subsection requires a distribution charge which will withdraw the earlier non-distribution relief. But, if that is so, it completely destroys the respondents' theory, because the subsection requires this charge to be made for the period when the excess distribution was made, whereas the respondents' theory is that it is incompetent to make a distribution charge of this kind in respect of any period after the cessation of the former trade; the former trade yielded the profits in respect of which the non-distribution relief was granted, and that relief can only be withdrawn—so it is said—by an assessment relating to a period during which the trade was still being carried on. The respondents' theory can be plausibly argued in the present case, because the assessment is made in a liquidation. I do not see how it could work if the excess distribution was made by a going concern which continued to carry on the new trade, unless, indeed, some limitation is to be read into sub-s. (3) which would go far to destroy the whole scheme.

The real flaw in the respondents' argument is, I think, a misconstruction of s. 35 (1) (c). If the last chargeable accounting period there referred to is the last period during which any trade or business is carried on, the scheme works perfectly well. But if it is the last period during which a particular trade was carried on, it leads to an absurd result; it would require "any distribution" made after that particular trade ceased—which would include distribution of the profits of the new trade—to be included in the gross relevant distributions of the last year of the old trade, and thereby make the whole scheme unworkable. And, further, I think that the argument is based on a mis-reading of *Butterley's* case (3). That case decided that the profits of any trade could not directly be assessed in respect of a period after the trade has ceased. It did not decide that non-distribution relief could not be withdrawn by a distribution charge in respect of a period after the trade has ceased; the plain meaning of s. 30 (3) is that it can be so withdrawn.

Now I must return to s. 43 (1). I was at first inclined to think that the respondents' argument about it was right, but now I am inclined to take a different view. If it means that all trades or businesses, whether carried on concurrently or in succession, are to be treated as one trade or business, then all the difficulties with which I have been dealing are avoided. I do not think it necessary to decide this. Whether I take that simple solution or proceed by considering the interrelation of s. 30 and s. 35, I reach the same result; I am satisfied that this objection to the assessment cannot be sustained. Accordingly, as neither of the respondents' objections to the assessment is valid, the Crown must succeed.

I, therefore, move that this appeal should be allowed.

LORD COHEN: My Lords, before the Special Commissioners and in the Court of Session, the issues between the parties were as follows:—(i) Whether (as contended by the Crown and disputed by the respondents) on the true construction of s. 30 (3) of the Finance Act, 1947, the respondents, having in April, 1950, transferred to another company a trade of selling and servicing heavy earth-moving equipment previously carried on by the respondents, and having thereafter carried on a new business of investment-holding, are liable to be assessed, for a chargeable accounting period of such new business, to a distribution charge by reference to non-distribution relief obtained by them in chargeable accounting periods of the said former trade. (ii) Whether (as contended by the respondents and disputed by the Crown) the effect of a notice of election (4)

(3) [1956] 2 All E.R. 197; 36 Tax Cas. 411.

(4) The respondents gave due notice of this election on Sept. 25, 1950, and the requirements of paras. (a), (b) and (c) of s. 36 (4) of the Finance Act, 1947, were satisfied.

A pursuant to s. 36 (4) of the said Act, given by the respondents as transferors and the said other company as transferees of the said trade, was to free the respondents from all further liability by way of distribution charge in respect of non-distribution relief obtained by them before the date of the said transfer. The Special Commissioners decided both the said issues in favour of the respondents, and on both grounds allowed the respondents' appeal against an assessment B to the profits tax made on the respondents for the chargeable accounting period from Nov. 1, 1954, to Mar. 18, 1955, the date of the voluntary liquidation of the respondents. On appeal by the Crown to the Court of Session, the First Division held that the Special Commissioners had been in error in deciding the first of the said issues in favour of the respondents, but upheld the Commissioners' decision on the second issue and, accordingly, dismissed the appeal.

C It will be convenient at this stage to set out the relevant portions of the Finance Act, 1947.

" 30. . . . (2) Subject to the provisions of this Part of this Act, if, in the case of any trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are less than the profits thereof for that period D chargeable to the profits tax, the amount chargeable by way of the profits tax in respect of that period shall be reduced by an amount equal to seven and a half per cent. (5) of the difference.

"(3) Subject to the provisions of this Part of this Act, if, in the case of a trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable E accounting period are greater than the profits thereof for that period chargeable to the profits tax, there shall be charged for that period, in addition to the other profits tax, if any, chargeable therefor, profits tax at the rate of seven and a half per cent. (5) on the amount of the difference: Provided that the amount on which tax is chargeable under this subsection for any chargeable accounting period shall not, when added to the total of the amounts on F which tax is charged thereunder for previous chargeable accounting periods, exceed the total of the differences in respect of which reductions have been made under sub-s. (2) of this section for previous chargeable accounting periods.

"(4) The reductions falling to be made under sub-s. (2) of this section and the charges falling to be made under sub-s. (3) thereof are hereafter in this G Act respectively referred to as 'reliefs for non-distribution' and 'distribution charges'.

" 36. . . . (4) Where—(a) as part of a scheme of amalgamation or reconstruction a trade or business carried on by a body corporate (in this subsection referred to as 'the first company') is transferred to another body corporate (in this subsection referred to as 'the second company'); (b) the H consideration for the transfer consists wholly or mainly of shares in the second company; and (c) the first and second companies jointly so elect by notice in writing given to the commissioners within six months after the transfer or such longer time as the commissioners may in any case allow, the provisions of this Part of this Act shall apply subject to the following modifications, that is to say—

I "(i) any distribution of those shares to any person in a winding-up of the first company shall, notwithstanding anything in sub-s. (1) of this section, not be deemed for the purposes of the last preceding section to be a distribution to that person; and

"(ii) in considering what distribution charge, if any, falls to be made on the second company, any difference on which non-distribution relief for chargeable accounting periods before the transfer was given to the first company

(5) Increased retrospectively to fifteen per cent. by the Finance (No. 2) Act, 1947, s. 7.

or other person assessable to profits tax on the profits of the trade or business of the first company shall, except so far as it has already operated to increase a distribution charge on the first company, be taken into account as if it had been a difference arising in relation to the second company on which non-distribution relief had been given to that company, and shall also be taken into account, in the case of the last chargeable accounting period of the second company, so as to increase the amount which, for the purposes of sub-s. (1) (c) of the last preceding section, is to be treated as not a distribution of capital.

"43.—(1) All trades or businesses to which s. 19 of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

I need not cite in full any other section of the Act. Suffice it to say that it is not disputed that the respondents built up "reliefs for non-distribution" during the years in which they were carrying on the business of selling and servicing heavy earth-moving equipment which they ceased to carry on after Apr. 5, 1950. Nor is it disputed that, in the accounting period in respect of which the disputed assessment was made, distributions were made in excess of the profits of that period.

So far as the first point in dispute is concerned, the respondents claim that, since the profits distributed arose from a trade which was not carried on by the company during the accounting period in respect of which assessment was made, the assessment must be discharged. This contention was upheld by the Special Commissioners because, in their view, the proviso to s. 30 (3) forced them to the conclusion that the respondents' argument was well founded. I am unable to agree. On the admitted facts, it cannot be disputed that, during the relevant accounting period, the respondents were carrying on a trade and made net relevant distributions as defined in s. 35 of the Act in excess of the profits of that trade for that period chargeable to profits tax. I see nothing in the wording of the proviso which enables me to cut down the plain meaning of the charging section. I understand there is no question here on the figures of the proviso being called into operation, but I think it right to add that, in my opinion, the proviso would operate notwithstanding that the differences in respect of which reductions had been made under s. 30 (2) had arisen from a trade other than that which was being carried on during the accounting period in respect of which the disputed assessment was made. The First Division based their decision in favour of the Crown on this point on s. 43 (1). I arrive at my conclusion in favour of the Crown without recourse to that subsection, but I respectfully agree with the Lord President (LORD CLYDE) that the scheme of the Act of 1947 was no longer to put the profits of each accounting period into separate watertight compartments, and that s. 43 (1) is more consistent with the conclusion at which he and I have arrived on the first point than with that reached by the Special Commissioners.

Before I leave this part of the case, I ought to mention the decision of this House in *Inland Revenue Comrs.* v. *Butterley Co., Ltd.* (6), which was relied on by the respondents. That case raised quite a different question from that which is before your Lordships. It was whether certain interim income payments received by the Butterley Co. under the Coal Industry Nationalisation Act, 1946, were profits from a trade or business being carried on by the company during the relevant chargeable accounting periods and, therefore, had to be included in the return of profits chargeable to tax. It was held that these payments were not profits arising from any trade or business. No question arose as to liability to distribution charges under s. 30 (3). I agree with the Lord President in thinking that the observations of their Lordships in the *Butterley* case (6) throw no light on the point which your Lordships have now to decide.

I turn to the second question. It is common ground that the respondents and

(6) [1956] 2 All E.R. 197; 36 Tax Cas. 411.

A the company to which they had sold their trading assets gave the notice required by s. 36 (4) (c) and that, in consequence, the modifications specified in the subsection became applicable. The first modification does not apply as the respondents did not distribute in the winding-up the shares it received from the purchasing company. The Special Commissioners held that the word "already" in modification (ii) referred to the date of the election, and that the subsection B impliedly operated to transfer the liability from the first company to the second when the election was exercised. The same view was taken by LORD SORN. The Lord President took a similar view, though he did not place so much reliance on the word "already". I agree with LORD SORN that the section is not free from obscurity, but I have come to the opposite conclusion to that reached by the First Division. In my opinion, the opening words of the modification "in C considering what distribution charge, if any, falls to be made on the second company" decide the moment when the calculations directed by the modification have to be made. They indicate a recurring event, and it seems to follow that, in respect of each accounting period of the second company for which it makes a distribution in excess of its profits of that period, it will be necessary to see what distribution charges have been made on the first company; in other words, D "already" refers to the time of consideration directed in the modification not to the date on which the election was made.

I am fortified in the construction I have placed on the word "already" by the observations of CROSS, J., in *Ackland & Pratten, Ltd.* (*in liquidation*) v. *Inland Revenue Comrs.* (7). The learned judge, dealing with an argument similar to that advanced by the respondents in the present case, said:

E "In my judgment, that argument, which is an ingenious one, rests on a misconstruction of the word 'already'. This part of s. 36 (4) is not dealing with the liability of the first company at all, but simply with the liability of the second company; and the word 'already', I think, refers not simply to the time before liquidation but to all the time before the question of the amount of any distribution charge on the second company falls to be con- F sidered. Consequently, any distribution charge to which the first company becomes subject after liquidation will be taken into account in estimating the liability of the second company as and when that liability falls to be determined."

There is no express relief of the first company from liability, and it would have been so easy expressly so to provide if that had been the intention. I can well G understand that Parliament may have decided not to relieve the first company from liability before the second company had paid. It is said that the effect of the Crown's argument would be to enable it to recover once from one company and again from the other. This does not now arise for decision. Suffice it for the moment to say that, as at present advised, I think if the Crown recovers from the respondents, it would fail pro tanto in a claim against the second H company, since the "difference" would already have operated to increase the distribution charge on the respondents. The construction of s. 36 (4) on which the Crown relies seems to me to accord with the natural meaning of the words used and to give effect to the policy of the part of the Finance Act, 1947, dealing with profits tax and distribution charges.

I would allow the appeal.

I My noble and learned friend, **LORD GUEST,** who is unable to be present today, has asked me to say that he agrees with the speech that I have delivered.

LORD HODSON: My Lords, on the first point, which concerns the two modifications, I think that the contention of the Crown is right. Section 36 (4) (i) of the Finance Act, 1947, gives an advantage to the first company, if in a winding-up it distributes shares that it received from the purchasing company. Section

(7) [1960] 3 All E.R. at p. 377.

36 (4) (ii) does not purport to give an advantage to the first company and is directed to the second company. The opening words are: "in considering what distribution charge, if any, falls to be made on the second company". The first company is not expressly or, in my opinion, by implication freed from the charge. It it were so freed, modification (i) would be unnecessary. The phrase "except so far as it has already operated to increase a distribution charge on the first company" covers any operation prior to the time of consideration. I cannot accept the argument that "already" means before the date of winding-up or election. If Parliament had meant this it could have said so. The taxpayer's construction was, I think, rightly rejected by CROSS, J., in *Ackland & Pratten, Ltd. (in liquidation)* v. *Inland Revenue Comrs.* (8). I agree with the passage in the judgment, which reads (9):

> "This part of s. 36 (4) is not dealing with the liability of the first company at all, but simply with the liability of the second company; and the word 'already', I think, refers not simply to the time before liquidation but to all the time before the question of the amount of any distribution charge on the second company falls to be considered. Consequently, any distribution charge to which the first company becomes subject after liquidation will be taken into account in estimating the liability of the second company as and when that liability falls to be determined."

The First Division were impressed by the apparent futility of the election. The election is not futile if the first company is in a position to avail itself of modification (i), which the respondents cannot do in the events which have happened. I agree with my noble and learned friend, LORD COHEN, that it does not seem that any question of double taxation arises for, as he says, it would appear that, if the Crown recovers from the respondents, it would fail in a claim against the second company since the difference would have already operated to increase the distribution charge on the respondents.

On the second point, the respondents contend that, since the profits distributed arose from a trade which was not carried on by the company during the accounting period in respect of which the assessment was made, the assessment must be discharged. I have felt some difficulty in accepting the solution reached by the First Division, who found the answer to this contention in the language of s. 43 (1) of the Act, which provides:

> "All trades or businesses to which s. 19 of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax."

The Lord President (LORD CLYDE), construing this section as applying to trades carried on whether simultaneously or in succession, held that it was not open to the respondents to contend that, because the trade in which they were engaged before 1950 and in respect of which they got relief from the profits tax for non-distribution of profits has been discontinued by them, and because in 1954 and 1955 they were engaged in quite a different trade, the relief they got before 1950 must be excluded from consideration in computing their liability to the profits tax in the latter period.

It would seem at first sight that the expression in s. 43 (1) "carried on by the same person" means carried on simultaneously and not whether simultaneously or in succession. On consideration, however, I am not prepared to dissent from the contrary construction of s. 43 (1) adopted by their Lordships of the First Division. Indeed, this construction fits in with the general scheme of the Act. At the same time, without recourse to s. 43 (1), I would reach the same conclusion on the reading of s. 30 (2) and (3) of the Act. There is nothing in the proviso which cuts down the effect of the charging provision, and I agree with the noble and learned Lord on the Woolsack that these provisions cannot be applied

(8) [1960] 3 All E.R. 367. (9) [1960] 3 All E.R. at p. 377.

A properly if a line has to be drawn when a company ceases one trade and begins another. The plain meaning of s. 30 (3) is that non-distribution relief can be withdrawn by a distribution charge.

I would allow the appeal.

Appeal allowed.

B Solicitors: *Solicitor for Scotland of the Board of Inland Revenue*, agent for *Solicitor for England of the Board of Inland Revenue* (for the Crown); *E. P. Rugg & Co.*, agents for *Dundas & Wilson*, Edinburgh (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

WEG MOTORS, LTD. *v.* HALES AND OTHERS.

C [COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), June 5, 6, 7, 8, 9, July 4, 1961.]

Option—Renewal of lease—Option of taking a further lease granted by agreement in writing (but not under seal), executed on same date as lease—Whether option for renewal of lease or void as infringing rule against perpetuities—

D *Whether obligation to grant new lease ran with reversion—Whether agreement was "covenant" within Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 142 (1).

Mortgage—Charge by way of legal mortgage—Estate of mortgagee—Whether legal term of years vested in chargee—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 87 (2).

E By a mortgage, dated July 8, 1937, G.R.I., Ltd., as the registered proprietors with an absolute title under the Land Registration Act, 1925, of property* in London, including certain land with the garages erected thereon, charged the property by way of legal mortgage to an insurance company. Clause 15 of the mortgage provided that the statutory powers of leasing should not be exercisable by the borrowers without the written

F consent of the lenders except in the case of lettings for any period up to twenty-one years. The charge was registered. By a lease, dated July 26, 1938, G.R.I., Ltd. demised the land with the garages thereon to the plaintiff company for a term of twenty-one years from Dec. 25, 1938, determinable by the lessee at the end of seven or fourteen years, at a rent of £1,500 a year. A clause in the lease referred to "making good [certain matters] at the

G expiration of the term or any renewal thereof". By an agreement (not under seal) made on the same date and between the same parties (referred to therein as "the lessors" and "the lessees"), but signed before the execution of the lease, it was stated that the expressions "lessors" and "lessees" included, wherever appropriate, their respective successors in title, and it was agreed that "In consideration of the lessees taking a lease

H of even date with but executed after these presents from the lessors the lessees shall have the option of taking a further lease of the premises demised by the . . . lease for a term of twenty-one years at the yearly rental of £1,500". By cl. 2 it was agreed that the option should be exercisable by notice in writing given by the lessees to the lessors at any time before Dec. 25, 1959, and that, if and when it should be exercised, the lessors

I should grant "a further lease" of the premises "for the said term (such term to commence from the date of the exercise of the option) at the said rent", and the lessees should thereupon surrender the unexpired residue, if any, of the lease of July 26, 1938. By cl. 3 it was agreed that the lease should be in the form and to the effect of the lease of July 26, 1938. On Jan. 5, 1939, notice of the option was registered in the charges register. On Oct.

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* The property which was the subject of the legal charge and of the agreements between the defendants comprised not only the property demised to the plaintiff (title No. 348760), but also other property (title Nos. 348759 and 396102).

15, 1941, G.H.C., Ltd., transferees of the freehold, were registered as the proprietors of the land. By an agreement in writing dated Jan. 10, 1947, G.H.C., Ltd. sold the freehold to a friendly society, subject to the plaintiff company's lease and with notice of the option agreement, and, by a transfer dated Feb. 11, 1947, the land was transferred to the trustees of the society, subject to the matters set out in the register of title so far as they were still subsisting and capable of being enforced. By a lease, dated Feb. 11, 1947, the trustees of the friendly society demised the land to G.H.C., Ltd. for a term of one hundred and fifty years from that date, subject to the matters set out in the register, at a yearly rent. By a deed of substituted security, also dated Feb. 11, 1947, and made between G.H.C., Ltd., of the first part, the insurance company, of the second part, and the trustees of the friendly society, of the third part, G.H.C., Ltd. demised the land comprised in the lease of the same date to the insurance company for the term of a hundred and fifty years less the last ten days thereof, and the insurance company surrendered to the trustees of the friendly society the land comprised in the freehold titles to the intent that the term subsisting therein by virtue of, among other deeds, the mortgage of July 8, 1937, might cease and merge in the reversion immediately expectant thereon. No term had, in fact, subsisted under the mortgage, but the insurance company was protected under s. 87 (1) (a) of the Law of Property Act, 1925. On Feb. 21, 1947, the entry on the charges register relating to the mortgage of July 8, 1937, was cancelled. By notices dated Apr. 30, 1959, the plaintiff company's solicitors gave notice to G.H.C., Ltd., the insurance company and the friendly society, requiring a renewed lease of the land for a further term of twenty-one years from the date on which the notices were served, in accordance with the agreement of July 26, 1938. Before giving these notices (and again at a later date) the plaintiff company's solicitors had written to the insurance company explaining the circumstances and asking if the insurance company would be agreeable to the grant of a lease in accordance with the option. In written replies, the assistant investment manager of the insurance company said that the company did not consider that its consent would be required. All moneys due to the insurance company were paid by Sept. 2, 1959. As G.H.C., Ltd. and the trustees of the friendly society refused to grant a lease in accordance with the agreement of July 26, 1938, the plaintiff company brought an action against them for specific performance of the agreement.

Held: the plaintiff company was entitled to specific performance of the option agreement of July 26, 1938, for the following reasons—

(i) the option agreement was not, when it was entered into, a contract to create a term of years and was not, therefore, rendered void by s. 149 (3)* of the Law of Property Act, 1925, for it was not until the option was exercised (in 1959) that the option agreement could be said to create a term of years (see p. 186, letter E, and p. 192, letters F to I, post).

(ii) the execution of the option agreement and of the lease formed a single transaction, since in view of the fact that the " taking of [the] lease of even date " was the expressed consideration for the grant of the option, the option agreement was in truth no more than an offer having no binding effect until the lease was executed, and since the documents were contemporaneous and intimately related (see p. 187, letter D, p. 191, letter G, and p. 191, letter I, to p. 192, letter A, post); accordingly the right and obligation of the option agreement were properly incidents of the demise, were for the renewal of the lease and, as such, were excepted by long established authority from the scope of the rule against perpetuities (see p. 188, letters D to F, post).

Woodall v. *Clifton* ([1905] 2 Ch. 257) followed as regards the exception.

* The relevant terms of s. 149 (3) are printed at p. 186, letter A, post.

A (iii) if it were necessary that, in order to be within the exception from the application of the rule against perpetuities, the obligation of the option agreement should run with the reversion under s. 142 (1)* of the Law of Property Act, 1925 (*Muller* v. *Trafford*, [1901] 1 Ch. 54 considered), the obligation of the option agreement did fall within that subsection because—

(a) the relationship of lessor and lessee subsisted between the parties to B the option agreement when it came into force, viz., when the lease was executed;

(b) neither the fact that the option agreement was a separate document nor the fact that it was not under seal excluded the option agreement from s. 142 (1) (see p. 189, letter I, to p. 190, letter A, and p. 191, letters H and I, post);

C (c) the existence of the legal charge at the time when the option agreement was entered into did not prevent the lessor from satisfying the requirement of s. 142 (1) that he should have "power to bind the reversionary estate immediately expectant on the term granted by the lease" since this objection, based on the charge by way of legal mortgage, was available only to the mortgagee and in fact there was no mortgagee to raise it (see p. 190, letter D, D cf., p. 192, letter E, post); moreover the charge by way of legal mortgage did not have the effect, under s. 87 (2) of the Law of Property Act, 1925, of vesting a term of years in the chargee (see p. 190, letter C, and p. 192, letter D, post).

Decision of DANCKWERTS, J. ([1960] 3 All E.R. 762) affirmed.

[As to an option to renew a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 473, E para. 1094; and for cases on the subject, see 31 DIGEST (Repl.) 67-69, *2236-2258*. For the Law of Property Act, 1925, s. 142 (1), s. 149 (3), see 20 HALSBURY'S STATUTES (2nd Edn.) 734, 753.]

Cases referred to:

Muller v. *Trafford*, [1901] 1 Ch. 54; 70 L.J.Ch. 72; 31 Digest (Repl.) 470, *5960*.

F *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 40 Digest (Repl.) 340, *2769*.

Strand & Savoy Properties, Ltd., Re, D.P. Development Co., Ltd. v. *Cumbrae Properties, Ltd.*, [1960] 2 All E.R. 327; [1960] 3 W.L.R. 1; 3rd Digest Supp.

G *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 30 Digest (Repl.) 495, *1395*.

Appeal.

These were two appeals, by the first three and by the remaining defendants, from an order of DANCKWERTS, J., dated Nov. 3, 1960, and reported [1960] 3 All E.R. 762, granting to the plaintiffs specific performance of an agreement (alleged H to have been constituted on the plaintiffs' exercise of an option) for the grant of a further lease of garages and outbuildings at the rear of a block of flats known as Grove Hall Court, St. John's Wood, London, for a term of twenty-one years from Apr. 30, 1959, at a yearly rent of £1,500. The facts are summarised at pp. 184, 185, post, and are more fully stated in the judgment of DANCKWERTS, J., [1960] 3 All E.R. at pp. 765-769.

I *H. A. P. Fisher, Q.C.*, and *A. A. B. Fuller* for the defendants.

R. W. Goff, Q.C., and *I. M. Phillips* for the plaintiffs.

Cur. adv. vult.

July 4. The following judgments were read.

LORD EVERSHED, M.R.: The judgment which I am about to read is the judgment of HARMAN, L.J., and myself and is the judgment in both appeals.

* The relevant terms of s. 142 (1) of the Law of Property Act, 1925, are printed at p. 189, letter F, post.

The long and somewhat complicated history of the title to the premises which are the subject of the present appeals, has been fully set out in the judgment of DANCKWERTS, J., and we do not find it necessary to repeat that history for the purposes of this judgment. The claim in the action arises under an agreement (not under seal) dated July 26, 1938, made between the plaintiffs, Weg Motors, Ltd., who are respondents in this court and a company known as G.R. Investments, Ltd., which has long since ceased to exist, but which at the date of the agreement was the freehold owner of the premises. The purport of the agreement was to give to the plaintiffs the option of " taking a further lease " of the premises for a period of twenty-one years from the date of the exercise of the option at the rent of £1,500 per annum; and the option was expressed to be exercisable " at any time before Dec. 25, 1959 ". The date last mentioned was one more than twenty-one years from the date of the agreement. It is on that fact, for reasons which we will later define, that the defendants, the present appellants, have based their contention that the option agreement was and is ineffective or void at law. The defendants have accordingly submitted that they are entitled to disregard the exercise of the option by the plaintiffs on Apr. 30, 1959. The essential phrase in the option agreement was that which we have already quoted—viz., " taking a further lease " of the premises; and the use of the phrase is explained by the fact that on the same date as that of the option agreement, viz., July 26, 1938, G.R. Investments, Ltd., granted to the plaintiffs a lease of the premises in suit for a term of twenty-one years from Dec. 25, 1938 (a term which would accordingly expire on Dec. 25, 1959). It is, however, important to observe that the lease contained provisions (a) enabling the lessees, i.e., the plaintiffs or their successors in title, to determine the demise at the end of seven or fourteen years and (b) requiring the reinstatement "at the expiration of the term or any renewal thereof " of certain openings in party walls between the demised premises and adjoining premises which the plaintiffs were given by the lease authority to make.

We shall revert hereafter to the terms of the lease and (more patricularly) to those of the option agreement. It may be convenient at this point to summarise the other facts relating to the title, the history of which, as we have said, was fully related by the learned judge. They are as follows:—

(1) At the date of the option agreement and the lease the freehold interest of G.R. Investments, Ltd. was subject to a mortgage dated July 8, 1937, by way of legal charge in favour of the Standard Life Assurance Co. of Edinburgh. The mortgage provided that the statutory powers of leasing should not be exercisable by the borrowers without the written consent of the mortgagees, but such prohibition was expressed not to be applicable to leases for any period up to twenty-one years.

(2) The land in question being registered land, G.R. Investments, Ltd., had been registered as proprietors with absolute title in 1934 and the mortgage was also duly registered in the charges register. The lease of July 26, 1938, was duly entered in the register and similarly there was entered on the register a notice of the option agreement, such entry being prior to any of the subsequent dealings with the premises.

(3) As a result of various transactions dated in 1947, the freehold of the premises became in that year vested in the trustees of the Royal Liver Friendly Society who in February, 1947, granted a lease to the fourth defendants, Grove Hall Court, Ltd., for a term of one hundred and fifty years subject to the lease of 1938. At or about the same time the Standard Life Assurance Co. accepted a charge on the one hundred and fifty years' term in substitution for their charge on the freehold of the premises which they released. At the time of the transactions mentioned in this paragraph the trustees of the Royal Liver Friendly Society, Grove Hall Court, Ltd., and the Standard Life Assurance Co. all had full notice of the option agreement, and the last named company later expressed the view through its agent (the assistant investment manager) on receiving

A notice from the plaintiffs of their intended exercise of the option in April, 1959, that no consent to the grant of the new lease was, on their part, required. In fact, on or before Sept. 2, 1959, all moneys due to the Standard Life Assurance Co. on their mortgage were paid off and such mortgage discharged accordingly.

(4) After the date of the commencement of the present proceedings the unexpired residue of the term of one hundred and fifty years was assigned by Grove B Hall Court, Ltd., to Daejan Investments (Grove Hall), Ltd., who were added as fifth defendants to the action.

Although before DANCKWERTS, J., the first three defendants (being the present trustees of the Royal Liver Friendly Society) were separately represented, in this court all five defendants have made common cause as appellants.

It was the foundation of the judgment of the learned judge that the option C agreement and the lease respectively of July 26, 1938, were part of a single transaction. Consequentially on this finding the learned judge proceeded to hold (a) that the obligation of G.R. Investments, Ltd., was a covenant or obligation on their part for the renewal of the lease and, as such, fell within the long-established rule of law exempting such obligations or covenants from the application of the so-called "rule against perpetuities", (b) that, if necessary so to D decide, such obligation or covenant ran with the reversion expectant on the lease within the meaning of s. 142 of the Law of Property Act, 1925, so as to bind the fourth and fifth defendants and (if requisite) the first three defendants, (c) that the interest of the Standard Life Assurance Co. was not such as to vest in them a reversion to the said lease or any relevant interest in such reversion so as to qualify his immediately preceding conclusion and (d) (founding himself, as it was E conceded in his court that he should do, on a decision of BUCKLEY, J., in *Re Strand & Savoy Properties, Ltd., D.P. Development Co., Ltd.* v. *Cumbrae Properties, Ltd.* (1)) that the option contract was not rendered void by the terms of s. 149 (3) of the Law of Property Act, 1925.

Counsel for the defendants very naturally and forcibly, directed his main attack on the premise to the conclusions which we have set out. It was the con- F tention of counsel for the defendants, expressed in summary form, that although it might no doubt be true that in a somewhat loose or broad "business" sense, the option agreement and the lease could fairly be called a single transaction, yet in truth the parties thereto deliberately chose—and chose no doubt with an eye on the restricted leasing power comprised in the original mortgage—to carry through the transaction by means of two separate and distinct instruments; G with the result that the obligation of G.R. Investments, Ltd. (and of those others who might be bound thereby) could not be properly regarded as though it were a covenant for renewal in the lease, so as to fall within the historic exception to the perpetuity rule, but must be strictly construed in accordance with the terms of the option agreement itself and so construed could not fairly be described as necessarily capable of taking effect as a covenant for renewal; with the result H that the agreement must fail in effect through remoteness. As this argument must lie at the root of this court's conclusion of the appeal as it lay at the root of the judgment under appeal, and as the argument was put forward with great force and persuasiveness, it will be necessary to examine closely the terms of the agreement and its relation to the lease of the same date. Since, however, the argument raised under s. 149 of the Act of 1925 is not only quite distinct from I the other questions in the case but also, if well founded, would be conclusive against the plaintiffs whatever be the answer to such other questions, it will be convenient to deal first with the argument on that section. It may also be stated that the point taken in the court below that the action was not properly constituted in the absence of G.R. Investments, Ltd.—a point which the learned judge unhesitatingly rejected—has not been put forward by counsel for the defendants in this court. It is therefore unnecessary to say anything more about it.

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(1) [1960] 2 All E.R. 327.

Section 149 (3) of the Law of Property Act, 1925, provides: A

> " A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void . . ." B

It is to be observed that the section cited has to be read in conjunction with certain unrepealed parts of the Law of Property Act, 1922 (which came into operation like the Act of 1925 on Jan. 1, 1926), particularly certain paragraphs of Sch. 15 to the Act of 1922. For the purposes of the present appeal, however, it is unnecessary to refer to the latter statutory provisions. For present purposes the question is, in our judgment, an extremely short one—viz., does the option C agreement of July, 1938, fall within the scope of the language in s. 149 (3) of the Act of 1925 as being a contract " to create such a term " as therein mentioned? The view of the learned author of the note to the section in WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES (12th Edn.), Vol. 1, p. 497, appears clearly to have been that a contract to create a term of years, which might begin to take effect more than twenty-one years from the date of the contract, D fell within the vice of the subsection. It was this view that BUCKLEY, J., rejected in the case already cited; and he did so on the basis that the phrase " such a term " could in its context refer and refer only to a term commencing more than twenty-one years from the instrument purporting to create the term, that is to say, the lease executed in pursuance of the contract and not the contract itself. We must not be taken to be expressing any doubt of the correctness of E the decision of BUCKLEY, J. But in the present case we are concerned not with a contract, that is a binding agreement, to grant and take a lease, but with an option which might never be exercised and cannot, until exercised, be in any event said, in our judgment, to create a term of years at all. It follows, therefore, in our view, that the option agreement with which we are concerned cannot be said to be such a contract as is comprehended in s. 149 (3) of the Act of 1925. The F challenge to the plaintiffs based on that section must therefore fail.

We return to the option agreement, and since so many of the points in argument turned on its exact language, and since the document is short, we set it out substantially in full:

> " An agreement made the 26th day of July, 1938 between G.R. Investments, Ltd., . . . (hereinafter called ' the lessors ' that term including G wherever appropriate their successors in title) of the one part and Weg Motors, Ltd. . . . (hereinafter called ' the lessees ' that term including wherever appropriate their successors in title) of the other part
>
> " Whereby it is agreed as follows:
>
> " 1. In consideration of the lessees taking a lease of even date with but H executed after these presents from the lessors the lessees shall have the option of taking a further lease of the premises demised by the above mentioned lease for a term of twenty-one years at the yearly rental of £1,500.
>
> " 2. The said option shall be exercisable by notice in writing given by the lessees to the lessors at any time before the 25th day of December, 1959, and if and when the same shall be exercised then the lessors shall grant and I the lessees shall accept a further lease of the said premises for the said term (such term to commence from the date of the exercise of the option) at the said rent and the lessees shall thereupon surrender the unexpired residue (if any) of the above mentioned lease of the 26th July, 1938 to the lessors who shall accept such surrender.
>
> " 3. The lease shall be in the form and to the effect of the above mentioned lease of the 26th day of July, 1938.
>
> " As witness, etc."

A It may be noted as a matter of almost piquant interest, but not of relevance to the case, that this somewhat unusual document appears to have been executed by the same individual on behalf respectively of both contracting parties.

The first point to notice—and it is in our judgment one of considerable importance—is that the expressed consideration moving from the "lessees" is that, not of promising to execute a lease in a form already prepared and identified, but B of "taking a lease of even date with but executed after these presents". As the learned judge observed, it is in fact impossible to execute two documents at precisely the same time. No doubt, as counsel for the defendants pointed out, it was deliberately contrived that the signing of the option should by some period of time, however short, precede the signing of the lease so as to avoid any suggestion that the consideration given by the lessees for the option was a past con- C sideration. But although there was no evidence of what exactly happened on this July date in 1938, it must clearly be inferred that the execution of the lease immediately followed that of the option agreement. The relevant words, after all, are "executed after these presents" and not "to be executed . . .". What is more (and more important) no binding contract came into existence until the lease was in fact executed. The option document, although expressed to be an D agreement, was in truth a mere offer having no binding effect until the lease was executed, the execution being in fact the acceptance of the offer so that no agreement for an option came into existence until the relationship of lessor and lessee existed between the parties. It follows in our judgment that the execution of the two documents did in a real, and not merely a loose sense, form a single transaction, viz., the grant of a lease coupled with the option. Further, the E substantial contemporaneity of the two documents and their essential and intimate relationship has, we think, a strong influence on the matters of construction next to be discussed.

We turn to the definition of the two parties to the agreement called respectively "the lessors" and "the lessees" "that term including wherever appropriate their successors in title". Counsel for the defendants laid considerable emphasis F on the difference in language between these definitions and those to be found in the lease. In the latter document G.R. Investments, Ltd., are defined as "The lessor which expression shall include the reversioner for the time being immediately expectant on the term hereby created . . ." and the plaintiffs as "the lessee which expression shall include its successors and assigns . . ." Counsel for the defendants contended, particularly in light of this variation in terminology, G that by "successors in title" in the option agreement was meant those who might by appropriate assignment succeed to the obligation and benefit respectively of the agreement, whether or not they were also respectively successors in title to the reversion and the lease. Like the learned judge, we have been unable to accept that view. In our judgment, having regard to the nature and purport of the option agreement and to the intimate relation between the agreement and H the lease already noticed, the terms of the definition in the agreement must have been intended to limit its effect to the two parties thereto so long as they retained the quality of being respectively "lessors" and "lessees" and thereafter to those who should succeed to the reversion immediately expectant on the lease, on the one hand, and to the lease on the other. No doubt an express assignment of the benefit of the option agreement would be necessary to its effective implementation I by subsequent holders of the plaintiffs' title under the lease. But it follows in our judgment inevitably from our last conclusion that, according to the true construction of the agreement, and in particular of cl. 2 thereof, the option would only be exercisable by the plaintiffs or by any assignees of the benefit of the option agreement so long as the lease continued to subsist and the plaintiffs or such assignees respectively continued to have vested in them the term of the lease. DANCKWERTS, J., was of the same opinion though he also took the view that, if necessary, a term could and should be implied in the option agreement so to limit the duration of the option and the right to exercise it. For our part we

prefer to base ourselves on what we hold to be the true construction of the instrument itself. Counsel for the defendants contended that on the true construction of its language the plaintiffs (or some assignee of the plaintiffs' rights under the agreement) might still assert the benefit of the agreement notwithstanding that they had previously determined the lease under the powers in that respect therein contained; and he relied somewhat in support of that argument on the two words "(if any)" after the phrase "surrender the unexpired residue" towards the end of cl. 2 of the agreement. We cannot agree; and, as regards the last mentioned point, the words "if any" were in our view merely intended to cover the case where the lease was still subsisting but the option was exercised at some date prior to Dec. 25, 1959.

We do not overlook the impressive point made by counsel for the defendants that the court's duty is to give effect to that which in fact the parties to any transaction or arrangement have chosen to bring about in accordance with the method which they have selected and not to disregard that method because they might well—and perhaps even should—have gone about their business in a different, a simpler, a more usual way. Nonetheless we have in the end come to the conclusion, in light of the circumstances of the execution of the option agreement and the lease (as we have felt bound to assume them to have been) and particularly of the fact that (as earlier stated) the agreement only became effective as such on the execution of the lease and in light also of our construction of the option agreement itself, that the agreement and lease formed a single transaction so that the former was in truth an addendum or appendix to the latter and the plaintiffs' right under the option agreement and G.R. Investments, Ltd.'s corresponding obligation may properly be said to have been an incident of the demise. We add that we obtain some slight support for this view from the reference to any renewal of the lease in the provision therein contained in regard to the restoration of the contemplated wall opening to which we have earlier referred.

If we are so far right, it follows that the right and obligation under the option agreement were a right and obligation, properly so called, for renewal of the lease of 1938. It follows also that the right and obligation prima facie fall into the class excepted by long established authority from the challenge of remoteness. Nevertheless that is still not the end of the matter. If the excepted class is long established, its basis and justification appear somewhat lost in the mists of antiquity. A basis and justification for the exception were stated by FARWELL, J., in 1901 in *Muller* v. *Trafford* (2), and if they were correctly stated by him, then the question remains whether the present case, in all its circumstances, including the existence of the original mortgage in favour of the Standard Life Assurance Co., can properly be said to fall within the exception having regard to the impact of s. 142 of the Law of Property Act, 1925.

In *Muller* v. *Trafford* (2) FARWELL, J., had based his conclusion in favour of the defendant in the first place on the view that the covenant in question was personal to the covenantor. On that view the covenant was not a covenant "running with the land". The learned judge proceeded then to consider what the result would be if his first conclusion was not well founded. To that extent what he then stated may be said to have been obiter. The material passage is as follows (3):

> "But now I will assume that this is a covenant for renewal running with the land: it is then in my opinion free from any taint of perpetuity, because it is annexed to the land. See *Rogers* v. *Hosegood* (4): 'The accurate expression appears to me to be that the covenants' (i.e., running with the land) 'are annexed to the land and pass with it in much the same way as title deeds'. That is adopted by the Court of Appeal as correct, and the same phrase, 'annexed to the land', is used by COLLINS, L.J., in delivering

(2) [1901] 1 Ch. 54. (3) [1901] 1 Ch. at p. 61. (4) [1900] 2 Ch. 388.

A the judgment of the court. He then goes on to say, after referring to the cases (5): 'These observations, which are just as applicable to the benefit reserved as to the burden imposed, show that in equity, just as at law, the first point to be determined is whether the covenant or contract *in its inception* binds the land'. It must bind the land from its inception, because it would otherwise be an executory interest in land arising in futuro, and B therefore obnoxious to the rules against perpetuity. Perpetuity has no application to covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted. It is a C term subject to something and with the benefit of something. It is a reversion subject to something and with the benefit of something, and those two somethings are annexed to and form part of the land from the beginning of the term in such a sense that the doctrine of perpetuity has no application."

D It was, therefore, the view of that very learned judge that the so-called doctrine of perpetuity did not apply to covenants for renewal of a lease, because such covenants—like other covenants running with the land—are annexed to the land and "form part of it ab initio". On this view it was contended that, even though the option agreement and the lease form one transaction, none the less the "covenant for renewal" in the present case is not in the lease itself, but outside it and, therefore (according to the defendants), outside the scope of s. 142 E of the Act of 1925 wherein is now stated the law as to the obligations of a lessor under covenants by him which run with the reversion. It remains to consider this point. Section 142 (1) provides:

> "The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as F the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the G lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

(a) The first objection taken is that the section deals with the lessor's covenants and that the covenantor was not the lessor when the contract was made. This is the same point as that with which we have already dealt and the fallacy is H that it treats the option as a concluded agreement before the execution of the lease. In our judgment this is wrong and the relationship of lessor and lessee did exist between the parties when the contract to grant an option came into force.

(b) Next, it is said that this covenant, like the covenants referred to in the preceding s. 141 which deals with the benefits of lessee's covenants, only applies I to covenants contained in the lease. That is so in the case of s. 141, but in this s. 142 the language is different. It is "entered into by a lessor with reference to the subject-matter of the lease". We take "subject-matter" to mean the demised property. This contract satisfies those words, and we see no reason why, provided the relationship of lessor and lessee exists, a covenant to renew should not be included in an independent document.

(c) It is next objected that the option contract is under hand only. We have

(5) [1900] 2 Ch. at p. 405.

been unable to see the force of this. The lease itself would have taken effect in equity if under hand only, and we do not think that the word " covenant " in s. 142 is limited to covenants under seal.

(d) It is next objected that a covenant will only bind the reversion

> " if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease."

It is said that this condition is not satisfied, because at the time when the contract was entered into, the freehold was subject to a mortgage in favour of the Standard Life Assurance Co. and that although this instrument was expressed to be made by charge by way of legal mortgage, the effect of s. 87 of the Law of Property Act, 1925, was to vest a term in the mortgagee. In our judgment this is precisely what the section does not do. It provides that the mortgagee shall have the same protection and so forth as if a mortgage term had been created in his favour. That is to say that he has in fact no term. Moreover, s. 87 (2) enables a mortgagee to convert his mortgage into a charge by way of legal mortgage and provides that in that case the mortgage term shall be extinguished. This seems to us conclusive that the chargee by way of legal mortgage has no term.

In our judgment, even if that conclusion be wrong, the mortgagor being the freeholder can create against all the world except his mortgagee any right or estate he chooses in the land so that even if an option was beyond the mortgagor's powers and could not have prevailed against the mortgagee either as being a lease extending beyond the term of twenty-one years without leave or not being at the best rent, this is not a point which can be relied on except by the mortgagee himself who in this case raised no objection. Apart from this, the charge by way of legal mortgage imposing these terms about leasing was surrendered by the mortgagee by the deed of substituted security executed in 1947. In addition the substituted charge on the term of one hundred and fifty years was released in September, 1959, so that there is no encumbrancer to take any objection. It follows in our opinion that if the case has to rest on s. 142, the provisions of that section are no bar to the plaintiffs' rights. If, on the other hand, the so-called anomalous rule under which covenants to renew leases are said not to be obnoxious to the rule against remoteness needs no other explanation than that it was settled law long before the modern rule against remoteness was perfected, and has not been affected by it, then in our judgment this was, truly construed, a covenant to renew a lease and therefore valid. As ROMER, L.J., observed in *Woodall* v. *Clifton* (6)

> ". . . a covenant to renew . . . has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify."

For the reasons which we have given, we think the appeals fail and should be dismissed.

DONOVAN, L.J.: The defendants' principal contention is that while covenants for renewal of leases are in general unaffected by the rule against remoteness of vesting (which for brevity I will call " the rule "), this is not true of any such covenant which is contained in some document separate from the lease itself, as in the present case. The distinction follows, it is said, from the reason why covenants for renewal in a lease are immune from the rule. It is this: that such covenants confer an immediate interest in the land; they are annexed and are incident to the reversion, which they bind; and these are attributes which such covenants now derive from s. 142 of the Law of Property Act, 1925—which I will hereafter refer to as " the Act ". In support of these propositions the decision in *Muller* v. *Trafford* (7) is cited. It follows, say the defendants, that

(6) [1905] 2 Ch. at p. 279. (7) [1901] 1 Ch. 54.

A any covenant for renewal which is outside s. 142 is not immune from the operation of the rule; and such a covenant when contained in a separate document is outside the section. Accordingly, the option agreement in the present case has no immunity, it offends against the rule, and it is therefore void.

The plaintiffs' reply to this is that a covenant for renewal of a lease enjoys immunity from the rule apart altogether from s. 142, and has done so from time B immemorial though the precise reason cannot now be given (see *Woodall* v. *Clifton* (8)). Alternatively they say that if it is necessary for the option agreement to qualify as a covenant within s. 142, it does so notwithstanding that it is contained in a document separate from the lease.

I leave aside the defendants' first contention, for unless one knows the underlying reasons for it, it is impossible to do justice to it. Assuming therefore, C without deciding, that only those covenants coming within s. 142 of the Act now qualify for immunity from the rule, one notices first that the statute of Henry 8, 32 Henry 8 c. 34, s. 2, the prime ancestor of s. 142, dealt only with covenants "expressed in the indenture", and naturally the defendants rely on this fact. Furthermore, s. 141 of the Act, dealing with the benefit of covenants contained in a lease, refers specifically in sub-s. (1) to "rent reserved by a lease, and the D benefit of every covenant or provision therein contained . . .". The defendants ask that s. 142 shall be correspondingly construed. The argument is reinforced by the following considerations. First, it is pointed out that the parties to a covenant for renewal contained in some document other than the lease might not at the time be lessor and lessee of the premises concerned. There would then be no existing reversion for their agreement to bind. It is contended that such E was indeed the position in the present case. Next, while it is conceded that a covenant need not be under seal, it is otherwise when, as here, the lease itself has to be under seal. An agreement for renewal in some separate document must then also be under seal in order to be a covenant for the purpose of s. 142.

These matters are at bottom, I think, questions of construction of s. 142 to be considered against the background of the general law of real property. The section F does not in terms require a covenant for renewal to be in the lease itself. In this respect it differs from the statute of Henry 8 and s. 141 of the Act, and the difference seems to me to tell as much in favour of the respondents as the appellants. The argument would be stronger if it were true, that when the option agreement was signed, the relationship of lessor and lessee of the premises affected had not been brought into being, but I think that it had. The terms of that G agreement are that "in consideration of the lessees taking a lease . . . the lessees shall have the option of taking a further lease . . .". The agreement, therefore, had no binding effect until the lease was executed and the parties had become respectively lessor and lessee thereunder. Up to that moment the so-called agreement was really no more than an offer stipulating the mode of acceptance, viz., the taking of the lease.

H As to the necessity for the covenant to renew to be under seal, again no requirement to this effect is in s. 142. Counsel for the plaintiffs also points out that if the lease itself had been under hand only, it would still have been effective in equity as an agreement for a lease and as such could have been specifically enforced. There would, therefore, seem little point in insisting that the covenant for renewal should be under seal. With this I would agree.

I So far, therefore, I think the defendants' contentions fail. In my view the option agreement was truly an option to renew a lease. As a matter of construction I think that it has effect only while the relationship of lessor and lessee subsists between the parties or their assigns, and that it is unnecessary to imply a term to that effect. If it be necessary that the agreement should qualify as a covenant within s. 142, I think that it does so, notwithstanding that it is contained in a separate document. The whole transaction was clearly one, though two

(8) [1905] 2 Ch. at p. 268.

documents were used; and when the option agreement was signed, the parties had become lessor and lessee respectively of the premises concerned. A

Additional contentions were raised by the defendants. It was said that under s. 142 a covenant entered into by a lessor with reference to the subject-matter of the lease ran with the reversion only in so far as the lessor had power to bind the reversionary estate immediately expectant on the term granted by the lease; and that here G.R. Investments, Ltd., the lessors, had no power at the time to bind that reversion. The reason suggested is that the reversion immediately expectant on the lease which they granted to the plaintiffs on July 26, 1938, was a term of years vested in the Standard Life Assurance Co., as mortgagees under a mortgage of the premises dated July 8, 1937. This was a mortgage by way of legal charge, and accordingly the mortgagees had, under s. 87 (1) of the Act, not an actual term of years, but B C

> ". . . the same protection, powers and remedies . . . as if . . . (a) . . . a mortgage term for three thousand years . . . had been thereby created in favour of the mortgagee . . ."

I agree with counsel for the plaintiffs reply on this point to the effect that the section does not create even a notional term of years in the mortgagee, but simply defines what protection, powers and remedies the mortgagee is to have. This conclusion is unaffected by the further provisions of the Act to which counsel for the defendants drew attention, viz., s. 1 (2) and (4), s. 205 (1) (x) and the statutory note to Sch. 5, Form No. 1. D

Since G.R. Investments, Ltd., was a mortgagor of the land at the time of the grant of the option to renew the lease, such renewed lease would, by s. 99 of the Act, have to reserve "the best rent that can reasonably be obtained . . ." (see s. 99 (6)). It is said for the defendants that in 1959, £1,500 did not answer that description. The plaintiffs might well have been in a difficulty vis-à-vis the mortgagee on this point, but he has never raised it. In any event the mortgagee took in 1947 a fresh and substituted security for the mortgage debt, and that debt has since been paid off. I do not think any point is open to the plaintiffs on s. 99 (6). E F

Finally, it is argued that the option to renew is void under s. 149 (3) of the Act as a contract to create a term limited to take effect more than twenty-one years after the date of the contract. The learned judge rejected this contention, and in doing so based himself on a judgment of BUCKLEY, J., to the effect that s. 149 (3) on its true construction referred in this respect only to contracts to grant a lease which when created would be a reversionary lease taking effect more than twenty-one years from the date of such lease (see *Re Strand & Savoy Properties, Ltd.* (9)). Without in any way differing from this view, I would observe that in the present case there is in fact no contract to create a term limited to take effect more than twenty-one years after the date of the contract. The option agreement enabled the plaintiffs to call for a new lease at any time after the original lease was taken and before Dec. 25, 1959. So that even if the defendants' construction of s. 149 (3) were right, the facts provide no foundation for it. One is dealing here not with the rule, but with a statute, and the language of s. 149 (3) seems to me to postulate a term which will inevitably, not merely possibly, begin outside the period of twenty-one years. G H

On the whole case, therefore, I also think that the learned judge came to a right conclusion, and that these appeals should be dismissed. I

Appeals dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Franks, Charlesly & Co.* (for the defendants); *Curwen, Carter & Evans* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(9) [1960] 2 All E.R. 327.

A

Re DU CROS' SETTLEMENT.
DU CROS FAMILY TRUSTEE CO., LTD. *v.* DU CROS AND OTHERS.

[CHANCERY DIVISION (Pennycuick, J.), July 3, 1961.]

B *Settlement—Construction—Beneficial trusts—"Male issue" and "male descendants"—Whether restricted to the male line of descent.*

A settlement provided by cl. 5 (iii) that the trustees should hold the remaining six-twentieth parts of the trust fund—(a) as to one-half of the income thereof on trust to pay and divide the same between "such of the brothers of the settlor of the first part as shall for the time being be living C and the male issue for the time being living of such of the said brothers of the settlor of the first part as shall be dead . . ." and (b) as to the remaining one-half of the income thereof to pay and divide the same among "such of the male descendants of Harvey du Cros the founder of the Harvey Co. as shall for the time being be responsible for the active management of the business of the Harvey Co. . . ." The questions arose whether (1) the D expression in para. (a) of cl. 5 (iii) included only the sons for the time being living of deceased brothers of the settlor of the first part; or included only the sons and remoter male issue in the exclusively male line for the time being living of the deceased brothers of the settlor of the first part; or included all the male children and remoter issue for the time being living of deceased brothers of the settlor of the first part; and whether (2) the E expression in para. (b) included only the sons and remoter male issue in the exclusively male line of Harvey du Cros or included all his male children and remoter issue.

Held: (i) the expression "male issue" in para. (a) of cl. 5 (iii) was a legal term of art and, as there was no context in the settlement to the contrary, the expression denoted only the sons and remoter male issue in F the exclusively male line for the time being living of the deceased brothers of the settlor of the first part (see p. 197, letter E, post).

Lambert v. *Peyton* ((1860), 8 H.L. Cas. 1), *Lywood* v. *Kimber* ((1860), 29 Beav. 38), and *Allen* v. *Crane* ((1953), 89 C.L.R. 152) followed.

(ii) "male descendants" was an expression of ordinary speech wherein it normally meant male descendants of the propositus whether through G males or females; if, however, in law the court were bound to give to the expression prima facie a meaning limiting it to male descendants of males, yet that meaning would yield to small indication to the contrary in the context; in the present case the use of two different expressions "male issue" and "male descendants" in successive paragraphs provided such a context and indicated that the expression "male descendants" was in- H tended to include male descendants whether through the female or male line (see p. 199, letter I, to p. 200, letter A, post).

Oddie v. *Woodford* ((1821), 3 My. & Cr. 584); *Bernal* v. *Bernal* ((1838), 3 My. & Cr. 559); and *Thellusson* v. *Lord Rendlesham* ((1859), 7 H.L. Cas. 429) distinguished.

Allen v. *Crane* ((1953), 89 C.L.R. 152) applied.

I [As to rules of construction of a gift to "issue male" or "male descendants", see 34 HALSBURY'S LAWS (2nd Edn.) 317, para. 365; and for cases on the subject, see 44 DIGEST 850, *7035-7042*, 861, *7164-7166*.]

Cases referred to:

Allen v. *Crane*, (1953), 89 C.L.R. 152; [1953] A.L.R. 959; 27 A.L.J. 538; 3rd Digest Supp.

Bernal v. *Bernal*, (1838), 7 L.J.Ch. 115; 3 My. & Cr. 559; 40 E.R. 1050; 44 Digest 533, *3499*.

Lambert v. *Peyton*, (1860), 8 H.L. Cas. 1; 11 E.R. 325; 40 Digest (Repl.) 522, *338*. A

Lywood v. *Kimber*, (1860), 29 Beav. 38; 54 E.R. 539; sub nom. *Lywood* v. *Warwick*, 30 L.J.Ch. 507; 7 Jur. N.S. 507; 44 Digest 861, *7165*.

Oddie v. *Woodford*, (1821), 3 My. & Cr. 584; 40 E.R. 1052; *on appeal* (1825), 3 My. & Cr. 625; 40 E.R. 1067; 44 Digest 850, *7035*.

Thellusson v. *Rendlesham* (*Lord*), *Thellusson* v. *Thellusson*, *Hare* v. *Robarts*, (1859), 7 H.L. Cas. 429; 28 L.J.Ch. 948; 11 E.R. 172; sub nom. *Thellusson* v. *Robarts*, *Hare* v. *Robarts*, *Rendlesham* v. *Robarts*, 33 L.T.O.S. 379; 44 Digest 559, *3753*. B

Adjourned Summons.

This was an application by originating summons dated June 21, 1960, by the plaintiff, du Cros Family Trustee Co., Ltd., which was trustee of a settlement dated Jan. 18, 1936, made between William Ernest du Cros and others. The application was to determine, inter alia, (i) whether on the true construction of cl. 5 (iii) (a) of the settlement the expression " male issue for the time being living of such of the said brothers of the settlor of the first part as shall be dead " (a) included only the sons for the time being living of deceased brothers of William Ernest du Cros, deceased; or (b) included only the sons and remoter male issue in the exclusively male line for the time being living of the deceased brothers of William Ernest du Cros; or (c) included all the male children and remoter issue for the time being living of deceased brothers of William Ernest du Cros; and (ii) whether on the true construction of cl. 5 (iii) (b) of the settlement the expression " male descendants of Harvey du Cros " (a) included only the sons and remoter male issue in the exclusively male line of William Harvey du Cros, deceased; or (b) included all the male children and remoter issue of William Harvey du Cros. The defendants were (1) Sir Philip Harvey du Cros, Bart., (2) Arthur Roy Peter du Cros, (3) Verena Eleanor du Cros, (3a) Peter Maurice Barclay, (4) Edward Pierre du Cros, (5) Agnes Mary du Cros, (6) Arthur Claude Philip Mallet du Cros, (7) Julian Claude Arthur du Cros, (8) Harvey du Cros, (9) Charles Gilbert Borlase du Cros Snell, (10) Spencer William Harvey du Cros, (11) Barry Jackson du Cros, (12) Patrick Jackson du Cros, (13) Patrick Graham Hedley-Dent, (14) Enid Mary Thompson, and (15) George Thomas Gordon Stevens. The defendants all claimed to be interested (in the case of the third and third (a) defendants, as personal representatives of Harvey Arthur William du Cros, deceased, in the case of the fifth defendant as personal representative of George Louis du Cros, deceased, in the case of the fourteenth defendant as being interested in the estate of William Ernest du Cros, and in the case of the fifteenth defendant as the personal representative of Dame Florence May du Cros, deceased), under the trusts of the settlement dated Jan. 18, 1936. C D E F G

J. A. Wolfe for the plaintiff.

G. T. Hesketh for the first and second defendants. H

N. C. H. Browne-Wilkinson for the third, third (a), fourth and fifth defendants.

D. G. Scott for the sixth, seventh and eighth defendants.

J. Bradburn for the ninth, eleventh and twelfth defendants.

L. H. L. Cohen for the tenth, fourteenth and fifteenth defendants.

Martin Roth for the thirteenth defendant.

I

PENNYCUICK, J.: This summons raises a number of questions on a settlement dated Jan. 18, 1936, made between William Ernest du Cros, described as " the first settlor ", his son Spencer William Harvey du Cros, described as " the second settlor ", Lady Florence May du Cros, who also contributed something to the settlement, and a number of other parties.

The settlement contains a number of provisions not now in point which are to take effect until the death of the first settlor and the survivor of the wife of the first settlor and a lady called Mrs. Mary Anastasia Thompson. Mrs. Thompson

A died on Nov. 6, 1955, and those provisions then ceased to operate. Clause 5 of the settlement which gives rise to the present question is, so far as now material, in the following terms:

> "Subject as aforesaid the trustees shall after the death of the first settlor and . . . Mrs. Thompson hold the trust fund and the future income thereof upon the trusts and subject to the provisions hereinafter declared concerning the same that is to say (i) the trustees shall hold fourteen-twentieth parts of the trust fund . . ."

B

on certain trusts operative during the life of the second settlor (who is still alive) and any widow of his. Then there is a trust for the children of the second settlor and an ultimate trust. With those fourteen-twentieth parts the present question is not concerned.

C

Sub-paragraphs (iii) and (iv) of cl. 5 are as follows:

> "(iii) The trustees shall hold the remaining six-twentieth parts of the trust fund upon the trusts and for the following purposes namely: (a) as to one-half of the income of such six-twentieth parts or the investments for the time being representing the same on trust during the lives of the issue now living of His Majesty King George V and the lives and life of the survivors and survivor of such issue and the period of twenty-one years after the death of such survivor and for such further period (if any) as shall be allowed by law to pay and divide the same between such of the brothers of the settlor of the first part as shall for the time being be living and the male issue for the time being living of such of the said brothers of the settlor of the first part as shall be dead and who shall have attained the age of twenty-one years per capita and not per stirpes in equal shares.
>
> "(b) As to the remaining one-half of the income of such six-twentieth parts on trust during the lives of the issue now living of His Majesty King George V and the lives and life of the survivors and survivor of such issue and the period of twenty-one years after the death of such survivor and for such further period (if any) as shall be allowed by law to pay and divide the whole or such part of the same and in such proportions as the trustees in their absolute discretion may think fit among such of the male descendants of Harvey du Cros the founder of the Harvey Co. as shall for the time being be responsible for the active management of the business of the Harvey Co. or any part of it and/or its subsidiary and associated companies Provided always that if at any time the trustees in their absolute discretion are of the opinion that the income received by them under this clause is in excess of what they may deem necessary or advisable to divide then they may add such surplus to the income distributable under sub-cl. (a) of this clause and pay and apply the same accordingly.
>
> "(iv) Subject as aforesaid the trustees shall hold the said six-twentieth parts of the trust fund and the future income thereof in trust for all the male descendants of the said Harvey du Cros who shall be living at the time when the period mentioned in the preceding sub-cl. (a) and sub-cl. (b) shall determine and who shall have attained the age of twenty-one years and if more than one in equal shares."

D E F G H

There is nothing else in the settlement which bears directly on the present question except that in one or two passages in the settlement the expression "child or children" is used.

I

Harvey du Cros, the founder of the Harvey Co., was the father of the first settlor. The first settlor is dead, but his son, the second settlor, is still alive. He has no son. The first settlor had a number of brothers, all of whom are now dead. Certain of the brothers had sons who are now living, and some of those sons have sons now living. In addition some of the brothers had daughters who have sons now living. It is unnecessary to go in detail into the particulars

of the family. The first two questions raised by the summons have been argued together, and are in these terms:

> "(1) Whether on the true construction of cl. 5 (iii) (a) of the settlement the expression 'male issue for the time being living of such of the said brothers of the settlor of the first part as shall be dead' (a) includes only the sons for the time being living of deceased brothers of the late William Ernest du Cros; or (b) includes only the sons and remoter male issue in the exclusively male line for the time being living of the deceased brothers of the said William Ernest du Cros; or (c) includes all the male children and remoter issue for the time being living of deceased brothers of the said William Ernest du Cros.
>
> "(2) Whether on the true construction of cl. 5 (iii) (b) of the settlement the expression 'male descendants of Harvey du Cros' (a) includes only the sons and remoter male issue in the exclusively male line of the late William Harvey du Cros; or (b) includes all the male children and remoter issue of the said William Harvey du Cros."

On the first question I have felt very little doubt. The trust in sub-cl. (iii) (a) of cl. 5 is for

> ". . . such of the brothers of the settlor of the first part as shall for the time being be living and the male issue for the time being living of such of the said brothers of the settlor of the first part as shall be dead . . ."

As between the sons of brothers and grandsons of brothers there is no doubt that the word "issue" prima facie connotes descendants of all degrees, and that the expression is to be limited to children—that is of the first generation—only if there is some context which leads to that conclusion. In the present settlement there is no indication of an intention that the class entitled to benefit under cl. 5, sub-cl. (iii) (a) is to be confined to children of the brothers. On the contrary it is accepted that the word "issue" in the expression which limits the trust period by reference to royal lives must mean descendants of all degrees, and it would be strange if the settlors used the same word "issue" in a different sense in different parts of the same sub-clause. That is particularly so because in the ordinary course of nature the first generation—the descendants of the first settlor's brothers—would be likely to die out before the issue of the descendants of all degrees of King George V living at the date of the settlement. One would expect the beneficial provisions in this paragraph to be such as would subsist during the whole of the trust period declared by reference to the lives of royal issue.

As regards the question whether the term "male issue" is confined to sons in the exclusively male line or extends to male children in the female line—that is to say sons of daughters of the brothers—the expression "issue male" is a legal term which can properly be described as a term of art, and which has more than once been judicially held to denote only males in the exclusively male line. I will refer to two cases on that point. In *Lambert* v. *Peyton* (1) the expression under consideration was "issue male", and LORD CRANWORTH said (2):

> "Although I quite agree in the argument that you might have an instrument so worded that the son of a daughter would come under the description of 'issue male', I think that is not the prima facie construction, and certainly not the construction to be put upon these articles."

In fact in that case the expression was held to be limited to male children.

In *Lywood* v. *Kimber* (3) the expression was "unto and amongst his issue male". SIR JOHN ROMILLY, M.R., said (4):

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(1) (1860), 8 H.L. Cas. 1.
(2) (1860), 8 H.L. Cas. at p. 13.
(3) (1860), 29 Beav. 38.
(4) (1860), 29 Beav. at p. 41.

A "I have looked through this will, in order to see if it contained anything to support the argument that the technical words 'issue male' are to be restricted by the general scope and object of the will. I am satisfied that there is nothing of that sort, and that these words must be construed in their strict technical sense, which means issue male claiming through males. I should be unsettling the settled rules of the court, if I gave any other B meaning to these words, unless I found on the face of the will something to show that he intended to use them in another sense."

The prima facie meaning of the expression "issue male" will, of course, yield to a context in which the testator or settlor shows that he intended to use the words in a different sense; but in the absence of a context there is no question that the expression "issue male" has a recognised meaning as a term of art, and C means male descendants through the exclusively male line. I do not think that it would be legitimate to make any distinction for this purpose between the expression "issue male" and the expression contained in this settlement: "male issue". Nor can I find anything in the context of this settlement which affords an indication that the settlors intended by the expression "male issue" anything other than descendants through the exclusively male line.

D The precise expression "male issue" as opposed to "issue male" was discussed in an interesting judgment in the High Court of Australia in *Allen* v. *Crane* (5). DIXON, C.J., discussed at length the expressions "issue male", "male issue" and "male descendants" to which I will come in a moment; and he came to the conclusion on authority that prima facie the effect of a gift to "male issue" is restricted to males through the "male line" though E the meaning may yield to the context.

As regards the first question in the summons, therefore, the answer must be that the expression "male issue" includes, and includes only, the sons and the remoter male issue in the exclusively male line for the time being living of the deceased brothers of William Ernest du Cros.

The next question gives rise to much greater difficulty. In para. (b) of F sub-cl. (iii) of cl. 5 the expression used is

> ". . . such of the male descendants of Harvey du Cros the founder of the Harvey Co. as shall for the time being be responsible for the active management of the business of the Harvey Co."

The expression "male descendants" is not a term of art, but an expression of G ordinary speech. Apart from authority my own view would be that as a matter of ordinary speech the expression "male descendants" includes males descended from the individual propositus whether through males or females. It appears to me that if an elderly man were asked how many male descendants he had, he would sensibly and normally include in the number of his male descendants not only sons and sons of sons, but also sons of daughters. To take another example, H if a man has a daughter but no son, and the daughter has a son, I should have thought that the answer to the question whether the man had a male descendant would be "yes".

It seems to me, further, that the view that here the expression "male descendants" includes males who are the sons of females derives much support from the circumstance that in para. (a) the settlors have used the different I expression "male issue". Where a settlor in the same clause uses two different expressions, one expects those expressions to bear different meanings. One must not strain the natural meaning of one or the other expression in order to produce a difference; but if one of the expressions is ambiguous, then one would naturally prefer that meaning which is different from that of the other expression. So here in sub-para. (a) the settlors have used the expression "male issue", and in sub-para. (b) they have used the expression "male descendants". If the

(5) (1953), 89 C.L.R. 152.

expression " male descendants " is capable of more than one meaning, one would naturally prefer that meaning which is different from the expression " male issue ". A

Moreover there is this in the context, that the gift of income under sub-para. (b) is for such of the male descendants of the founder of the family business " as shall for the time being be responsible for the active management of the business ". There seems no reason in principle why in that connexion any preference should be given to male descendants of the founder through males over male descendants of the founder through females. The position is quite different from that which arises where a settlor or testator is apparently intending to keep an estate in the male line of his family. B

The question then arises whether I am compelled by authority to come to a different conclusion, and on this point some three cases decided in the middle part of the last century have been cited. The first is *Oddie* v. *Woodford* (6). This case was one of several which were concerned with the will of Peter Thellusson, and the expression which was there under review was " eldest male lineal descendant ". LORD ELDON, L.C., said this (7): C

> " Now, upon the best consideration that I can give this case, it does appear to me that ' male lineal descendant ' must mean a male descendant in the male line; ' lineal ' is otherwise altogether surplusage, and it is not only surplusage introduced into the clause, but in every word of this will where the male descendant is mentioned. If the person meant was a male descendant, whether of the male or female line, that intent would have been quite sufficiently expressed by the words ' male descendant ' only, without the word ' lineal ', and yet that word is, as I have said, used in every clause of the will; and I do not think myself at liberty to hold that that word was not intended to have some additional meaning . . ." D E

So in that paragraph LORD ELDON, L.C., says (although no doubt it is by way of dictum) that if one had the expression " male descendant " without the word " lineal ", that would include male descendants whether of the male or female line. F

The next case is *Bernal* v. *Bernal* (8). It appears that the report of *Oddie* v. *Woodford* (6) was inserted as a sort of appendix to the decision in *Bernal* v. *Bernal* (8). In that case the will was that of a person domiciled in Holland, and the gift was in favour not only of certain men and the male children of the men, but also in favour of certain women and the children of the women; and the full terms of the gift were of significance in enabling LORD COTTENHAM, L.C., to reach the decision which he did. By an earlier order in *Bernal* v. *Bernal* (9), dated Aug. 15, 1837, it had been declared in effect that the expression " male children ", which was actually used in the will, as translated from the original Spanish, must mean male descendants. In the course of his judgment LORD COTTENHAM, L.C., said this (10): G H

> " The general class is descendants; the qualification of the class is being male. To entitle anyone to claim, he must show that he is one of the favoured class; that is, one of the class of male descendants. A male, descended from a female of the family, would undoubtedly answer the description, as he would be a descendant and a male; but he would not be one of the class of male descendants. Such would be the ordinary acceptation of the terms. In speaking of a man and his male descendants, as a class, no one would conceive the son of a female descendant as included; and such is the construction which our law has put upon the words; as I

(6) (1821), 3 My. & Cr. 584.
(7) (1821), 3 My. & Cr. at p. 618.
(8) (1838), 3 My. & Cr. 559; 7 L.J.Ch. 115.
(9) See 3 My. & Cr. at pp. 581, 575.
(10) (1838), 3 My. & Cr. at p. 581; 7 L.J.Ch. at p. 117.

A ' issue male ', which is, in fact, the same thing as male descendants. The case of *Oddie* v. *Woodford* (11) appears to me to be a strong authority for the same purpose."

In that passage, LORD COTTENHAM, L.C., was laying down the general proposition that the expression " male descendants " means the same thing as " issue male " and is confined to males deriving exclusively through the male line. But B the authority of that statement appears to me to be considerably weakened when one observes that he relied on *Oddie* v. *Woodford* (11) as a strong authority for the same purpose, whereas in fact in *Oddie* v. *Woodford* (11), as I read it, LORD ELDON, L.C., said exactly the opposite. The actual decision turned on a complicated expression whereby the gift included not only males but females.

The third English case is *Thellusson* v. *Lord Rendlesham* (12) which, again, C was a decision on the will of Peter Thellusson. This case, again, dealt with the expression " eldest male lineal descendant ". LORD ST. LEONARDS went carefully through the components of that expression, and in the course of his speech said (13):

" Then as to the word ' male ', the meaning of that was thought for a long D while to be very doubtful, but it has been held to mean males claiming through males. Full effect, therefore, must be given to that."

Unfortunately LORD ST. LEONARDS did not state where that had been held, and it may be that he was only referring to the decision of LORD ELDON, L.C., on the same will in *Oddie* v. *Woodford* (11), with which his judgment was principally concerned. In truth LORD ELDON, L.C., gave his decision on the whole expression E " eldest male lineal descendant ", and would have decided otherwise, it appears, if the word " lineal " had been omitted. LORD WENSLEYDALE said (14):

" The words ' male lineal descendant ' have already received one judicial construction by this House [that is, *Oddie* v. *Woodford* (14A)] by which we are unquestionably bound; they mean a male descendant claiming entirely through males."

F DIXON, C.J., dealt with the expression " male descendants " in *Allen* v. *Crane* (15). His view was that the expression prima facie bears the same meaning as " male issue " though, as he said (16):

" There can be no doubt that the prima facie meaning restricting such expressions to descent by the male line may readily yield to a context."

G He pointed out that the expression " descendants " was untechnical (17).

I feel great doubt whether, in view of those authorities, I should be at liberty, if there were no favouring context in the will, to give effect to what is my own view, namely, that the expression " male descendants " includes males descended through the female as well as through the male line. To do so would be to bring myself into direct conflict with what was said by LORD COTTENHAM, L.C., H in *Bernal* v. *Bernal* (18). But it certainly seems to me that even if the expression " male descendants " prima facie means descendants exclusively through the male line, this prima facie meaning will readily yield to a very small indication to the contrary in the context.

In the present case it appears to me that an adequate indication to the contrary is to be found in the simple circumstance that the settlors used two different I expressions: " male issue " and " male descendants ", in the two successive sub-clauses of this clause. I think it is natural to construe the expression " male descendants " as meaning something different from " male issue "; and the only meaning which that expression " male descendants " can bear, if it is to bear a

(11) (1821), 3 My. & Cr. 584.
(12) (1859), 7 H.L. Cas. 429.
(13) (1859), 7 H.L. Cas. at p. 512.
(14) (1859), 7 H.L. Cas. at p. 520.
(14A) (1825), 3 My. & Cr. 625, 631.
(15) (1953), 89 C.L.R. 152.
(16) (1953), 89 C.L.R. at p. 163.
(17) (1953), 89 C.L.R. at p. 161.
(18) (1838), 3 My. & Cr. at p. 581; 7 L.J.Ch. at p. 117.

different meaning from the expression "male issue", is male descendants whether through the male or through the female line; and as I have said, that meaning is in harmony with the qualification under sub-cl. (b) that the beneficiaries must for the time being be responsible for the active management of the business.

I conclude, therefore, that question (2) in the summons should be answered by saying that the expression "male descendants" includes all the male children and remoter issue—the word "male" covers both—"of the said William Harvey du Cros". I would only add that I do not think that the distinction in meaning between the expression "male issue" and the expression "male descendants" is purely artificial. It is true that apart from any controlling context the words "issue" and "descendants" are interchangeable; but the composite expression "male issue", which is a legal term of art not used in common speech, and the expression "male descendants", which is not a legal term of art and is used in common speech, have I think a significant difference in their shades of meaning.

I therefore answer questions (1) and (2) accordingly.

Declarations accordingly.

Solicitors: *Shelton, Cobb & Co.*, agents for *J. J. Saunders & Co.* (for the plaintiff and the first, second, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth defendants); *Beachcroft & Co.* (for the third, third (a) and eighth defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

R. *v.* METHARAM.

[COURT OF CRIMINAL APPEAL (Ashworth, Elwes and Thesiger, JJ.), July 5, 1961.]

Criminal Law—Grievous bodily harm—Direction to jury—Intent only to interfere seriously with health or comfort not sufficient—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 18.

As a result of the decision in *Director of Public Prosecutions* v. *Smith** it is now a misdirection, when summing-up to a jury at the trial of a charge of wounding with intent to do grievous bodily harm, contrary to s. 18 of the Offences against the Person Act, 1861, to adopt the formula based on *R.* v. *Ashman*† and to invite the jury to bring in a verdict of guilty of that offence if the only intent established is to interfere seriously with health or comfort, as distinct from an intent to do really serious bodily harm (see p. 202, letter C, post).

[As to the offence of wounding with intent to do grievous bodily harm, see 10 HALSBURY'S LAWS (3rd Edn.) 734, para. 1410; and for cases on the subject, see 15 DIGEST (Repl.) 988, 989, *9670-9699*.

For the Offences against the Person Act, 1861, s. 18, see 5 HALSBURY'S STATUTES (2nd Edn.) 793.]

Cases referred to:

Director of Public Prosecutions v. *Smith*, [1960] 3 All E.R. 161; [1961] A.C. 290; 124 J.P. 473; [1960] 3 W.L.R. 546; 3rd Digest Supp.

R. v. *Ashman*, (1858), 1 F. & F. 88; 175 E.R. 638; 15 Digest (Repl.) 986, *9645*.

Appeal.

The appellant, Pessuman Metharam, was convicted at the Central Criminal Court on Feb. 10, 1961, before the commissioner (His Honour JUDGE BLOCK) and a jury on a charge of wounding Sheila Kay McNally with intent to do her

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* [1960] 3 All E.R. 161; [1961] A.C. 290.

† (1858), 1 F. & F. 88.

A grievous bodily harm and was sentenced to imprisonment for two and a half years. He appealed against conviction on the ground of misdirection in that in summing-up the commissioner had directed the jury that bodily harm which was neither permanent nor dangerous, but which seriously interfered with health and comfort, was sufficient to constitute "grievous bodily harm" for the purposes of the offence charged. This direction accorded with the decision B in *R.* v. *Ashman* (1), but the summing-up contained no reference to the observations on that decision in *Director of Public Prosecutions* v. *Smith* (2) and it was contended on the appellant's behalf that the direction based on *R.* v. *Ashman* (1) was, in view of the decision last cited, a misdirection.

A. C. L. Lewisohn for the appellant.
C *R. I. S. Bax* for the Crown.

ASHWORTH, J., delivered the following judgment of the court in which, after referring to the appellant's conviction and sentence, he continued: The victim was a prostitute, and the incident out of which the charge arose occurred in her premises. They had had trouble together, and on the day in question, according to her, she saw him coming up the stairs to her flat, and he asked to see D her for about five minutes. They went into the lounge, and he said: "I want you to come back to me", to which she replied: "I will never do that". He said: "If you don't I'm going to kill you", and she picked up the telephone and started to telephone the police. Then she felt something go round her neck, and it was tight. She put her fingers underneath and managed to get it off. She then saw him take a knife out of his pocket. She had seen that knife E previously when it was used as a vegetable knife. Then, to quote her description of the incident: "He tried to pull my head back. He had the knife in his left hand. I saw him raise the knife and I put my hands out to try and stop it". That was her version, and it was not disputed that somehow that woman sustained injuries which, it is fair to say, were not as serious as they might well have been considering the respective size of the man and the girl and the weapon he F used, but they did involve the insertion of five stitches on her cheek, six more stitches in her right thumb and another six in her right ring finger, in all seventeen stitches. His defence at the trial was that the infliction of these wounds was accidental, and that was the issue between the parties, whether it was deliberate or accidental, the charge being one of wounding with intent to cause her grievous bodily harm.

G In summing-up the learned commissioner directed the jury in the terms of what one may conveniently call the old-fashioned definition of grievous bodily harm. It was a definition that was taken from *R.* v. *Ashman* (1), decided in 1858, but the learned commissioner omitted to direct the jury having regard to the comments made by the House of Lords on that earlier decision in *Director of Public Prosecutions* v. *Smith* (2). What the learned commissioner said was H this:

> "Grievous bodily harm, about which [counsel for the defendant] has just been addressing me, is defined in the book as not necessarily either permanent or dangerous, but harm that seriously interferes with health or comfort. That is sufficient."

I Then, having called attention to the injuries, he said:

> "It is a matter for you to decide whether you consider that number of stitches is very serious interference with a person's comfort at all events. The definition is serious interference with health or comfort."

It is said with force by counsel on behalf of this appellant that in the circumstances of this case that was a misdirection. He points out that the facts of the

(1) (1858), 1 F. & F. 88. (2) [1960] 3 All E.R. 161; [1961] A.C. 290.

case are distinguishable from those in *Director of Public Prosecutions* v. *Smith* (3), which went to the House of Lords because as VISCOUNT KILMUIR, L.C., pointed out in that case (4), there was really no room for a contrary view about grievous bodily harm; if there was the intent, the intent was at least to do that. In the present case, however, it would have been possible for a jury to take the view that there was no intent to do grievous bodily harm, that is to say, really serious bodily harm, but that there was merely the crime of unlawful wounding, always assuming that it was not an accident. It is said on the other side that although no doubt as the result of the decision in *Director of Public Prosecutions* v. *Smith* (3) it is unnecessary and, indeed, inadvisable to add anything to the words "grievous bodily harm", none the less the direction given in this case cannot be called a misdirection; it was a direction which in the light of the authorities, though regarded as inadvisable, was not wrong.

In the view of this court, as a result of the decision in *Director of Public Prosecutions* v. *Smith* (3) and certainly as applied to the facts of the present case, it is a misdirection of the jury to adopt the old formula and invite a jury to find a man accused of wounding with intent to do grievous bodily harm guilty if the only intent established is one to interfere seriously with health or comfort. Reading the speech of VISCOUNT KILMUIR, L.C., as a whole (5), it seems to follow that certainly as applied to this case the adoption of the old formula is one that amounts to a misdirection. It is a legitimate inference from the closing paragraphs of that speech (4) that were it not for the fact that in *R.* v. *Smith* (6) the learned judge on three other occasions had referred in terms to the serious character of the offence, they would have held that the adoption of the old formula was a misdirection. At any rate, the view of this court is that in this case the direction given to the jury at the start of the summing-up, which was not followed by any further description of the ingredients of the offence, was a misdirection.

That does not conclude the matter. The issue before the jury in essence was whether this was an accident or whether they accepted the girl's story. We take the view, not accepting counsel for the appellant's submission on this point, that if the jury came to the conclusion that the girl's story was right, the intent to do grievous bodily harm was really the only verdict that a reasonable jury could reach. After all, he had attempted, as it appears, to strangle her, and then he drew a knife. He had said he would kill her and he pulled her head back with the knife in his left hand. It was because of her struggle that she escaped with relatively light injury, but the issue before the jury was the intent in the mind of the accused when he inflicted the wounds on her. In our view, this is a case in which the proviso can and should be applied. In so far as we hold that there was misdirection, we think that there was no substantial miscarriage of justice, and this appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *Graham Dawson* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(3) [1960] 3 All E.R. 161; [1961] A.C. 290.
(4) [1960] 3 All E.R. at p. 172; [1961] A.C. at p. 335.
(5) [1960] 3 All E.R. 163-172; [1961] A.C. 323-335.
(6) A direction following the "old formula" will be found in a passage quoted from the summing-up in *R.* v. *Smith*, see [1960] 2 All E.R. at p. 455, letter I; subsequent passages referring to "grievous bodily harm" and "serious harm" will be found in the extracts quoted in [1960] 2 All E.R. at p. 456, letters B, E-F, H and I.

A

SUNSHINE PORCELAIN POTTERIES PROPRIETARY, LTD. *v.* NASH.

[PRIVY COUNCIL (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Hodson), May 2, 3, 8, July 17, 1961.]

B *Privy Council—Australia—Victoria—Workmen's compensation—Injury by accident arising out of or in the course of . . . employment—Worker developing silicosis long after she left employment—Compensation not payable for silicosis at date of worker leaving employment—Later Act providing that compensation to be payable in respect of silicosis due to nature of employment "at any time" prior to disablement—Victoria Workers Compensation Act,* 1951 (*No.* 5601), *s.* 12 (1).

C Between 1931 and 1938, the respondent was employed by the appellants. She ceased such work in 1938, having married in 1937, and had not since then worked for wages. During her employment with the appellants, she was exposed to dust containing silica and, as a result of this exposure, she developed silicosis. She noticed the first symptoms in about 1950, and in 1955 a doctor certified that she was disabled from earning full wages by reason of silicosis. No notice of injury nor claim for compensation was given or made before 1956, and the appellants had not paid any sums by way of compensation. During the period of the respondent's employment, the Victoria Workers' Compensation Act, 1928, was in force and compensation was payable under s. 18 of that Act in respect of certain scheduled industrial diseases which did not include silicosis. By the Workers' Compensation Act, 1946, which was to be read and construed as one with the Act of 1928, a new s. 18* was substituted which was not restricted to scheduled diseases and, whereas under the Act of 1928, the disease had to be due to the nature of employment in which the worker was employed within the twelve months previous to the date of disablement, under the Act of 1946 it was sufficient "if the disease was due to the nature of employment in which the worker was employed at any time prior to the date of the disablement". The Victoria Workers Compensation Acts were consolidated in 1951, and s. 12 (1) of that Act reproduced s. 18 of the Act of 1946 as substituted. On a claim for compensation by the respondent, the appellants contended that the Act of 1946 could not apply to a person who was not in employment after it was passed.

G **Held:** the respondent was entitled to compensation since s. 12 (1) of the Act of 1951 applied to her case because the disease was due to the nature of employment in which she was employed "at any time prior to the date of the disablement", so that the terms of the enactment were satisfied, and there was nothing in their context or in the circumstances that required a restricted meaning to be given to them, as by limiting their application to cases where the worker was in employment after the enactment became law.

Decision in *Victoria Insurance Co., Ltd.* v. *Junction North Broken Hill Mine* ([1925] A.C. 354) not to be regarded as establishing a principle of general application.

Greenhill v. "*Daily Record*" *Glasgow, Ltd.* ([1909] 1 S.L.T. 344) disapproved.

I Appeal dismissed.

[As to statutes prima facie being prospective not retrospective, see 31 HALSBURY'S LAWS (2nd Edn.) 513-516, para. 670; and for cases on the subject, see 42 DIGEST 693, 694, *1083-1096*.]

Cases referred to:

Bellambi Coal Co., Ltd. v. *Clark,* (1953), 53 S.R.N.S.W. 440.

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* The terms of the section are set out at p. 205, letter D, post.

Blatchford v. *Staddon and Founds*, [1927] A.C. 461; 96 L.J.K.B. 608; 137 L.T. 257; 20 B.W.C.C. 391; 34 Digest 465, *3810*. A

Clement v. *D. Davis & Sons, Ltd.*, [1927] A.C. 126; 96 L.J.K.B. 284; 136 L.T. 258; 19 B.W.C.C. 416; 34 Digest 411, *3341*.

Ellerbeck Collieries, Ltd. v. *Cornhill Insurance Co., Ltd.*, [1932] 1 K.B. 401; 101 L.J.K.B. 117; 146 L.T. 153; 24 B.W.C.C. 376; Digest Supp.

Greenhill v. "*Daily Record*" *Glasgow, Ltd.*, (1909), 46 Sc.L.R. 483; [1909] 1 S.L.T. 344; 2 B.W.C.C. 244; 34 Digest 241, *e*. B

R. v. *Ipswich Union*, (1877), 2 Q.B.D. 269; 46 L.J.M.C. 207; sub nom. *Ipswich Union* v. *Great Yarmouth Guardians*, *R.* v. *Burton-on-Trent*, *R.* v. *Aston Union*, 41 J.P. 374; 42 Digest 694, *1089*.

Richards v. *Goskar*, [1936] 3 All E.R. 839; [1937] A.C. 304; 106 L.J.K.B. 85; 156 L.T. 52; 29 B.W.C.C. 357; Digest Supp. C

Victoria Insurance Co., Ltd. v. *Junction North Broken Hill Mine*, [1925] A.C. 354; 34 Digest 463, *r*.

Walder v. *Mono Concrete Co., Ltd.*, [1943] 2 All E.R. 306; 113 L.J.K.B. 1; sub nom. *Walden* v. *Mono Concrete Co., Ltd.*, [1943] 1 K.B. 683; 169 L.T. 210; 36 B.W.C.C. 186; 2nd Digest Supp.

Appeal. D

Appeal by special leave by Sunshine Porcelain Potteries Proprietary, Ltd., from an order of the Full Court of the High Court of Australia (DIXON, C.J., MCTIERNAN, FULLAGAR, TAYLOR and WINDEYER, JJ.), dated Mar. 2, 1959, allowing an appeal by the respondent, Iris Doreen Nash, from an order of the Full Court of the Supreme Court of Victoria (HERRING, C.J., GAVAN DUFFY and SMITH, JJ.), dated Mar. 21, 1958, on a Case Stated pursuant to s. 56 (3) of the Victoria Workers Compensation Act, 1951, by the Workers' Compensation Board. The facts are set out in the judgment of the Board. E

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the appellants.

Anthony Cripps, Q.C., and *J. G. Le Quesne* for the respondent.

LORD REID: This is an appeal from an order of the High Court of Australia which, by a majority (DIXON, C.J., MCTIERNAN and WINDEYER, JJ.; dissenting FULLAGAR and TAYLOR, JJ.), on Mar. 2, 1959, allowed an appeal from an order of the Full Court of the Supreme Court of Victoria (HERRING, C.J., and SMITH J.; dissenting GAVAN DUFFY, J.). The case arises out of an application by the respondent under the Workers Compensation Act claiming compensation from the appellants in respect of the disease of silicosis. On Feb. 21, 1957, the Workers' Compensation Board awarded compensation at the rate of £2 2s. per week, and thereafter, at the request of the present appellants the board stated a Case for the determination of the court. The following facts were therein set out as being admitted or proved:— F G

"(a) Between the years 1931 and 1938 the [respondent] worker was employed by the [appellants] as an insulator cleaner. She was about fifteen years of age when her employment began. (b) The [respondent] married in December, 1937, and ceased to work for the [appellants] in May, 1938. Since that time she has been supported by her husband. (c) At no time since she ceased to work for the [appellants] has she worked for wages and at the time of hearing of this application she had no intention of again taking up any employment. At the date of the hearing she had two children under the age of sixteen years and was fully engaged in the domestic duties involved in being a housewife. (d) During her employment with the [appellants] she was exposed to dust containing silica and as a result of this exposure she developed the disease of silicosis although it was not known to her nor manifested by any signs or symptoms until within the last few years. The first symptom noticed by her was breathlessness from about 1950 onwards. (e) On Dec. 20, 1955, Dr. K. J. Grice certified that the H I

A [respondent] was disabled from earning full wages by reason of silicosis. It was admitted by the [appellants] that the [respondent] had been physically totally disabled for work by reason of the disease for the last twenty-four months preceding the date of hearing. By reason of the disease the [respondent] has incurred expenses for medical treatment since 1953, and she was in Fairfield Hospital for about a month in 1956. (f) No notice of injury B nor claim for compensation was given or made before Jan. 5, 1956, and the [appellant] employer has not paid any sums by way of compensation."

The question of law submitted for the opinion of the Full Court was: "Whether upon its findings of fact the board was justified in law in making the said award or any part of it."

The Act in force during the period of the respondent's employment by the C appellants was the Workers' Compensation Act, 1928 (No. 3806). Under s. 18 of that Act, compensation was only payable in respect of certain scheduled industrial diseases which did not include silicosis. By an amending Act of 1946 (No. 5128), which was to be read and construed as one with the Act of 1928, it was provided, by s. 8, that for s. 18 of the principal Act there should be substituted the following section:

D "18. Where—(a) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or (b) the death of a worker is caused by any disease—and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of the disablement, then subject to the provisions hereinafter contained the worker or his E dependants shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident."

In 1951, the Workers' Compensation Acts were consolidated by Act No. 5601, F Section 12 (1) of this Act reproduces from the Act of 1946, s. 18 as quoted above. This section differs from s. 18 of the Act of 1928 in two respects material to the present case. In the first place, it is not restricted to scheduled diseases and, admittedly, it covers silicosis, and, secondly, whereas under the Act of 1928 the disease had to be due to the nature of employment in which the worker was employed within the twelve months previous to the date of disablement, after G 1946 it was sufficient if the disease was due to the nature of the employment in which the worker was employed at any time prior to the date of disablement. It should also be noted that, whereas under the Act of 1928 injury by accident had to arise out of and in the course of the employment, it was sufficient under the Act of 1946 and subsequent Acts if it arose out of or in the course of the employment. By an amending Act of 1953 (No. 5676) s. 12, the word "injury" H was substituted for the phrase "injury by accident" throughout the principal Act and, by a consequential amendment, the last part of the section which has been quoted now reads "the disablement shall be treated as the happening of the injury." Section 20 of the Act of 1951 provides that the date of disablement shall be deemed to be such date as the medical practitioner certifies as the date on which the disablement commenced, or, if he is unable to certify I such a date, the date on which the certificate is given. The certificate in this case was given on Dec. 20, 1955. In it the medical practitioner states, "I certify that the disablement commenced about 1950, according to the history given." It is unnecessary to determine whether on this certificate the date of disablement is 1950 or 1955.

The respondent's contention is that the section quoted clearly applies to her case. Her disablement—the happening of the "injury" to her—occurred after it came into operation; her disablement and the disease which caused it were admittedly due to the nature of her employment by the appellants; and the

long interval which elapsed between the termination of her employment and the onset of her disease and disability is immaterial because the Act, by using the words " at any time ", expressly entitles a worker to relate his disablement to past employment no matter how long that interval may be. A

The appellants rely on the strong presumption that an Act is not intended to be retrospective, and contend that this section can and should be construed so as to avoid retrospectivity; the general rule of construction is B

> ". . . that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act "

(per COCKBURN, C.J., in *R.* v. *Ipswich Union* (1)). Generally there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that. So, if a worker has already sustained injury or contracted a disease at a time when the employer is under no statutory liability to him arising out of that injury or disease, there would in general be a presumption that an Act bringing that injury or disease within the scope of compensation would not apply to that case; otherwise there would be liability on the employer arising out of a state of things which existed before the Act was passed. But this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it. In their Lordships' judgment, the circumstances of this case clearly prevent its application at least in so wide a form. Notoriously, silicosis is a disease of slow onset; it may result from the inhalation of noxious matter over a long period of years, there is no certainty when that inhalation reaches the danger point, and, after the damage has been done, a long period may elapse, as it did in this case, before the disease manifests itself. It cannot be supposed that the legislature intended that every worker disabled by this disease after 1946 must prove that the disease was contracted or that the damage was done to him after 1946, because that would involve there being a period of many years of uncertainty; there would be doubt in the case of many workers disabled long after 1946 whether their disablement resulted from a state of things already in existence in that year, and there is no provision in the Act to deal with a case where the disease was contracted before 1946 but aggravated by further exposure to noxious inhalation after that date. None of the learned judges in Australia supported the appellants' argument to this extent. So the Act of 1946 must be held retrospective in substance at least to this extent, that all those who were working in noxious employment after 1946 will get compensation when disablement occurs even if it is clear that the disease was contracted or the whole or most of the damage was done before the Act of 1946 was passed. C D E F G

The appellants' main argument was directed to a much more limited application of the presumption that a statute is not retrospective. Admitting that a worker may be entitled to compensation although the disease had manifested itself and the whole or substantially the whole of the damage had been done before the Act of 1946 came into operation, the argument is that a line must be drawn between those who ceased to be workers (or workers in noxious employment) before that date and those who continued in such employment thereafter. That means that, if two workers both contracted the disease before 1946 and both only suffered disablement after 1946, one, who happened to remain in employment for a short time after the Act of 1946 was passed, would get compensation, but the other, who ceased to be employed just before the Act was passed, would not. An examination of the various statutory provisions and of the authorities may show that that result cannot be avoided, but it is not a result which would seem to follow naturally from an application of the broad principle which gives H I

(1) (1877), 2 Q.B.D. at p. 270.

A rise to the presumption—that it is not reasonable to suppose that a legislature intends to impose a new liability in respect of something which has already happened. Moreover, the success of this argument would lead to a further difficulty. Section 14 of the Act of 1951, which took the place of similar earlier provisions, entitles the employer who last employed the disabled worker, and who is primarily liable to pay him compensation, to seek relief against earlier B employers if he can show that the disease was contracted while in their employment, or that, the disease being contracted by a gradual process, a contribution should be made by an earlier employer. So, an employer who employed a disabled worker for a short time after 1946 may be able to show that the disease was due in whole or in part to earlier employment before 1946. But counsel for the appellants rightly admitted that, if his argument is correct, it must mean C that, in such a case, the last employer must pay the compensation, but is deprived of the relief which s. 14 appears to give him because this argument must absolve an employer who ceases to employ a worker before the Act of 1946 was passed from any liability to pay compensation in respect of his disablement by silicosis.

Their Lordships must now consider the relevant sections of the statutes, and it will be convenient to take the sections of the Act of 1951, since the argument D is the same whether one takes those sections or the corresponding sections of the earlier Acts. The main difficulty is the proper correlation of s. 5 and s. 12. Section 5 (1) provides:

> "If in any employment personal injury [by accident] arising out of or in the course of the employment is caused to a worker his employer shall . . . E be liable to pay compensation . . ."

Section 12 has already been quoted; in cases to which it applies the worker is entitled to compensation

> "as if the disease were a personal injury [by accident] arising out of or in the course of that employment and the disablement shall be treated F as the happening of the injury [accident]."

The words in square brackets occurred in the Act of 1951; as already noted, they are now omitted by reason of the amendments made in 1953. But it was not argued that this change was material in the present case. In the ordinary case under s. 5, it would seem clear that the injury must be sustained while the worker is still in the employment, but the position under s. 12 is far from clear. G The appellants argue that s. 12 merely adapts s. 5 to apply it to diseases; s. 5 is the leading section and s. 12 follows it in requiring that, here again, the injury must happen or be sustained during the employment while the claimant is still a worker. On this view, the question at once arises—what is the injury; is it the contracting of the disease or the first manifestation of the disease, or the disablement resulting from the disease? The respondent answers that, in the H case of some diseases, including silicosis, it is often impossible to discover when the disease was contracted, that the date of the first manifestation of the disease may be very doubtful, and that the legislature has foreseen and avoided the difficulty by enacting expressly in s. 12 that the disablement shall be treated as the happening of the injury. The next step in the argument is that the legislature cannot have intended that the right to compensation should depend on I whether or not disablement occurred while the claimant was still in employment; under s. 20, the date of disablement may be the date on which the medical certificate is given, and it would be absurd to suppose that a claimant can lose his compensation merely because he does not get a certificate while he is still in employment. Therefore, it must be held that s. 12 does not follow s. 5 in requiring that the injury must happen or be sustained during the employment. Before proceeding to deal with these arguments their Lordships must consider the authorities.

Victoria Insurance Co., Ltd. v. *Junction North Broken Hill Mine* (2) was an action to recover from an insurance company compensation paid to certain workers in respect of the disease of nystagmus. It was admitted that they contracted this disease during the period covered by the insurance, but their disablement did not occur until after that period. The insurance company was held liable under its policy. Their Lordships' ground of judgment, if of general application, would probably enable the present appellants to succeed. LORD WRENBURY said (3):

> "The date of contraction of the disease and not the date of its ascertainment or its certification is the date for fixing liability . . . The disablement or suspension establishes the happening of the accident, but not the date at which it happened . . . It is an accident to be attributed in point of date so far as liability is concerned to the time at which the disease was contracted, but subject to 'modification' as mentioned in s. 12 (1) (a), that is to say as regards 'compensation' . . . , the accident is to be taken as having happened when disablement or suspension supervened . . . The liability to pay arose so soon as the disease was contracted."

Their Lordships did not consider what the position would be if, in a case of a disease of gradual onset, it was impossible to say when the disease was contracted, and they appear to have been influenced by a view that, unless liability arose during the period of employment, there would be no valid claim for compensation. This case arose under New South Wales legislation (4) which is in general similar to the British legislation and to the Victorian legislation. *Blatchford* v. *Staddon and Founds* (5) was an English case. Here quite a different view was taken of similar provisions, the *Victoria Insurance Co.* case (6) not having been cited. The disease in this case was lead poisoning. VISCOUNT SUMNER pointed out that such diseases (7)

> ". . . come on gradually; their first steps may not be perceptible for some time; their rate of progress may vary widely . . . If there was to be an effective remedy, much more had to be done than simply to declare the disease to be an accident. Means had to be found for enabling the workman to recover compensation from an employer even though he could not prove the precise time when the disease was contracted."

He then dealt with the provision entitling the workman to sue his last employer and said that they (8)

> ". . . provide a means, perhaps rough and ready, of enabling a suffering workman to get compensation from some one certain, in respect of a disease contracted at a wholly uncertain time."

He said in a later passage (9):

> "The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident."

LORD WRENBURY said (10) that the Act

> ". . . says that the disease or suspension is to be considered as the personal injury by accident. Does this mean that the contraction of the disease is the accident, or does it mean that the ascertainment in a defined way of the fact of the disease having been contracted is the accident? On the whole from that which I have to say further, I think it must mean the latter."

Ellerbeck Collieries, Ltd. v. *Cornhill Insurance Co., Ltd.* (11) was, like the *Victoria Insurance Co.* case (6), an action under an insurance policy. The

(2) [1925] A.C. 354. (3) [1925] A.C. at p. 357.
(4) Workmen's Compensation Act (No. 71 of 1916, N.S.W.). (5) [1927] A.C. 461.
(6) [1925] A.C. 354. (7) [1927] A.C. at p. 467. (8) [1927] A.C. at p. 468.
(9) [1927] A.C. at p. 470. (10) [1927] A.C. at p. 478. (11) [1932] 1 K.B. 401.

A Court of Appeal followed the decision in *Blatchford* (12). SCRUTTON, L.J., was unable to reconcile this decision with that in the *Victoria Insurance Co.* (13); their Lordships cannot regard the attempt of GREER, L.J., to reconcile them as successful. *Richards* v. *Goskar* (14) and *Walder* v. *Mono Concrete Co., Ltd.* (15) dealt with a different question, the recurrence of a disease after the initial disability caused by it had ceased. They indicate that the date of the onset B of a disease may be relevant if ascertainable, but the argument in *Blatchford's* case (12) was not dealt with and their Lordships have derived little assistance from these two cases.

In considering these authorities, their Lordships note that two of the three members of the Board in the *Victoria Insurance Co.* case (13), LORDS ATKINSON and WRENBURY, concurred in the decision in *Blatchford's* case (12). Moreover, C it is impossible to apply the grounds of decision in the *Victoria Insurance Co.* case (13) without radical modification to a case, where owing to the gradual onset of a disease, no particular date can be held to be the date of its contraction. Accordingly, in their Lordships' view, the *Victoria Insurance Co.* case (13) cannot be regarded as establishing a principle of general application.

Their Lordships can deal more briefly with the other authorities cited. There D are many cases, Australian and British, a leading example being *Clement* v. *D. Davis & Sons, Ltd.* (16), where it has been held that an amending Act does not apply to cases where the injury or injury by accident occurred before the Act was passed. So, if the "injury" in this case occurred before 1946, the appellants must succeed. But these cases do not help in determining when the injury must be held to have occurred. The other authorities dealt with the E particular point in this case to which their Lordships must return after completing their consideration of s. 12. That point is whether it is fatal to the respondent's case that she was never in employment after the Act of 1946 was passed.

In their Lordships' judgment, s. 12 does not follow s. 5 in requiring that the injury must occur during the employment. It could only be held to do so if (first), notwithstanding the express provision that "the disablement shall be F treated as the happening of the injury", it could be held that contracting the disease is the injury, and (secondly) it could be assumed that the disease is always contracted while still in the employment. Their Lordships are unable to assume that, where a long interval has elapsed, as in this case, between the last inhalation of noxious material and the first manifestation of the disease, it is a medical fact that the disease was contracted before that inhalation ceased, G and then lay dormant for many years. They have no reason to exclude the possibility that the noxious material remaining in the claimant's body may only have brought on the disease after a long time. If that be a possibility, then it is quite unreasonable to suppose that the legislature intended the success of a claim for compensation to depend on whether or not the claimant could prove by medical evidence that his disease was in fact contracted before he left H the employment. But if s. 12 requires that the injury must occur during the employment, that would have to be proved. No one has said that the inhalation of the noxious material is itself the injury, and that is the only thing that certainly occurs during the employment.

The appellants submitted an argument to the effect that the requirement of compulsory insurance by s. 72 is unworkable if an injury can occur long after a I worker has left the employment. That requirement is in very general terms, and their Lordships express no opinion whether it could cover a case like the present. But, even if it could not, that is not, in their Lordships' view, a sufficient reason for giving to s. 12 an interpretation open to the grave objections which have been stated.

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(12) [1927] A.C. 461.
(13) [1925] A.C. 354.
(14) [1936] 3 All E.R. 839; [1937] A.C. 304.
(15) [1943] 2 All E.R. 306; [1943] 1 K.B. 683.
(16) [1927] A.C. 126.

The particular point in this case is whether the Act of 1946 can apply to a person who was not in employment after it was passed. That Act amended and has to be read with the earlier Act under which the respondent was a worker. The point must be considered in light of the conclusions already reached. Section 12 does not require that a person shall still be in employment when he sustains an injury arising out of his employment, and the respondent did sustain an injury arising out of her employment after the Act of 1946 was passed. Further, it is no answer to a claim to show that the real cause of the injury was inhaling noxious material before the Act was passed. In these circumstances, the presumption against a statute being retrospective can have little weight, if, indeed, it can apply at all. The question becomes one of construction of the Act of 1946. Their Lordships were referred to a majority decision of the Full Court of the Supreme Court of New South Wales, *Bellambi Coal Co., Ltd.* v. *Clark* (17), where the grounds of judgment of the majority were similar to those of the minority in the High Court in the present case. Their Lordships were also referred to a decision of the First Division of the Court of Session, *Greenhill* v. "*Daily Record*", *Glasgow, Ltd.* (18), in which the facts were not unlike those of this case. The man had left his employment disabled by disease before the Workmen's Compensation Act, 1906, came into operation, and died later. That Act for the first time made his disease, lead poisoning, a subject for compensation. The statutory provisions were rather different, but the reasoning of the short judgment of the Lord President, LORD DUNEDIN, would apply to the present case. He regarded the claim as an attempt to make the Act retrospective, but the considerations which have been developed at length in later cases and in the present case were not before him, and their Lordships, with all deference to the importance of any opinion of LORD DUNEDIN, are for that reason unable to accept it.

Their Lordships recognise the strength of the arguments adduced by the learned judges who have taken a different view and regard this as a narrow and difficult case. But, in the end, they must return to the words of the new s. 18 enacted by the Act of 1946. Those words apply exactly to the present case. The certificate and disablement were subsequent to its passing. The disease was "due to the nature of any employment in which the worker was employed at any time prior to the date of the disablement". In their Lordships' judgment, there is nothing in the context or in the circumstances to require that any restricted meaning should be given to the words of this section.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Nicholas Williams & Co.* (for the appellants); *Markby, Stewart & Wadesons* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(17) (1953), 53 S.R.N.S.W. 440.

(18) [1909] 1 S.L.T. 344.

A

HENRY ANSBACHER & CO. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), June 12, 13, 14, July 4, 1961.]

Stamp Duty—"Mortgage, bond, debenture, covenant"—"Only or principal or primary security"—Guarantee—Deed securing a payment under an agreement not under seal for sale of stock—Additional secondary or collateral security to agreement—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1, *Mortgage, bond, etc.*

B

By an agreement under hand, which was exempted from stamp duty as an agreement for the sale of stock under s. 35 (1) (a) of the Finance Act, 1949, the respondents agreed to buy the whole of the ordinary shares in a company for a price payable in two instalments, one of which was paid but the other of which remained outstanding because its amount depended on claims for compensation against the governments of Singapore and Malaya. Under a term of the agreement the purchasers procured the execution by a bank of a guarantee under seal, securing the payment of the second instalment to trustees for the shareholders up to £750,000. The Commissioners of Inland Revenue assessed the guarantee to stamp duty at £1,875 (being 5s. per £100 on £750,000) on the ground that the deed was chargeable under the head "Mortgage, bond, debenture, covenant . . . (1)" in Sch. 1 to the Stamp Act, 1891, and was "the only or principal or primary security", for payment of the £750,000.

C

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Held (DONOVAN, L.J., dissenting): the guarantee was not the "only or principal or primary security . . . for the payment . . . of money", but an additional, secondary or collateral security to the agreement, which was the first and primary security notwithstanding that the agreement itself did not fall within the heading "Mortgage, bond, debenture, covenant . . ." in Sch. 1, because the agreement was not under seal; accordingly the guarantee did not attract stamp duty at 5s. per £100.

F

British Italian Corpn., Ltd. v. *Inland Revenue Comrs.* (SERGEANT ON STAMP DUTIES (3rd Edn.), p. 334) followed.

Per LORD EVERSHED, M.R., and HARMAN, L.J.: the word "security" in the heads "Bond, covenant, or instrument of any kind whatsoever" and "Mortgage, bond, debenture, covenant" in Sch. 1 to the Stamp Act, 1891, means any written obligation for payment of money (see p. 213, letter F, post).

G

Jones v. *Inland Revenue Comrs.* ([1895] 1 Q.B. 484) applied.

Decision of DANCKWERTS, J. ([1960] 1 All E.R. 686) affirmed.

[As to stamp duty payable on a mortgage, bond, debenture, covenant, see 28 HALSBURY'S LAWS (2nd Edn.) 477, para. 1008.

H

For the Stamp Act, 1891, Sch. 1, Mortgage, bond, etc., see 21 HALSBURY'S STATUTES (2nd Edn.) 682.]

Cases referred to:

British Italian Corpn., Ltd. v. *Inland Revenue Comrs.*, [1921] W.N. 220; SERGEANT ON STAMP DUTIES (3rd Edn.) 334; 39 Digest 277, *615.*

I

Independent Television Authority v. *Inland Revenue Comrs.*, [1960] 2 All E.R. 481; [1961] A.C. 427; [1960] 3 W.L.R. 48; 3rd Digest Supp.

Jones v. *Inland Revenue Comrs., Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Comrs.*, [1895] 1 Q.B. 484; 64 L.J.Q.B. 84; 71 L.T. 763; 39 Digest 276, *607.*

Limmer Asphalte Paving Co. v. *Inland Revenue Comrs.*, (1872), L.R. 7 Exch. 211; 41 L.J. Ex. 106; 26 L.T. 633; 39 Digest 259, *433.*

National Telephone Co., Ltd. v. *Inland Revenue Comrs.*, [1900] A.C. 1; 69 L.J.Q.B. 43; 81 L.T. 546; 64 J.P. 420; 17 Digest (Repl.) 253, *571.*

Appeal. A

The respondents presented an instrument dated Dec. 9, 1957, to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for their opinion as to the stamp duty chargeable thereon. The instrument was called a deed of guarantee and was expressed to be supplemental to a contract of sale of stock in the Oriental Telephone and Electric Co., Ltd. Under it the National Bank, Ltd., guaranteed to the extent of £750,000 the payment to parties to the deed B who were described as trustees of whatever sum should become payable to them by the respondents as purchasers of the stock under a clause of the contract of sale. The commissioners were of opinion that the guarantee fell within the heading "Mortgage, bond, debenture, covenant . . . (1)" in Sch. 1 to the Stamp Act, 1891, and that it was "the only or principal or primary security . . . for the payment" of the sum of £750,000. They accordingly assessed it to duty at 5s. C for every £100 of the sum of £750,000, viz., £1,875. The respondents contended that the sale agreement was a security and "the principal or primary security" for the specified sum and accordingly that the guarantee was not a principal or primary security within the heading: and that it was a "collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance . . . where the principal or primary security is duly D stamped" within the same heading and as such should be liable to duty at the rate of 1s. for every £100 limited to a maximum of 10s. under s. 7 of the Revenue Act, 1903. The respondents required the commissioners to state and sign a Case for the opinion of the High Court. On Feb. 18, 1960, DANCKWERTS, J. ([1960] 1 All E.R. 686) allowed the respondents' appeal against the decision of the commissioners, holding that the agreement constituted the principal or primary E security though not subject to duty under the same head in Sch. 1 to the Stamp Act, 1891, through not being under seal, and that the guarantee constituted a secondary security chargeable to stamp duty at 10s. The Crown appealed to the Court of Appeal.

Peter Foster, Q.C., and *E. Blanshard Stamp* for the Crown.

J. G. Foster, Q.C., G. B. H. Dillon and *D. M. Burton* for the respondents. F

Cur. adv. vult.

LORD EVERSHED, M.R.: In this case I have had the advantage of reading in advance the judgment of HARMAN, L.J. I find myself entirely in agreement with his reasoning and conclusion and therefore do not desire to add anything in a separate judgment. G

July 4. The following judgments were read.

HARMAN, L.J.: This appeal raises a question as to the correct stamp to be impressed on a document under seal of Dec. 9, 1957, which is annexed to and sufficiently recited in the Case and has been called the guarantee. The other H relevant document is an agreement under hand dated Oct. 29, 1957, also annexed to the Case, and is referred to as "the agreement". By the agreement, the respondents, an unlimited corporation, agreed in effect to buy the whole of the ordinary shares in the Oriental Telephone and Electrical Co., Ltd. (called "the company"). It was a conditional agreement when made, but the conditions have been satisfied and can be ignored. The price payable for the purchase was I divided into a first and second instalment. The first has long been paid, but the second is still outstanding because its amount depends on certain complicated claims for compensation by the company against the governments of Singapore and Malaya. The agreement provided that the share certificates should be handed over to the purchasers on payment of the first instalment, and that in return the purchasers would procure the National Bank, Ltd., by way of securing the payment of the second instalment, to enter into a guarantee in the form of the draft set out in the schedule to the agreement. This was duly done. The

A guarantee is under seal and is expressed to be supplemental to the agreement and it guarantees to certain trustees for the shareholders in the company, to the extent of £750,000, the due and punctual payment by the respondents of the second instalment.

The question raised is what is the right stamp duty exigible on the guarantee. The commissioners decided that the guarantee should be stamped ad valorem B at the rate of 5s. per cent. on the maximum sum payable, viz., £750,000, which works out at £1,875. The respondents appealed to the court and DANCKWERTS, J., allowed the appeal on the ground that the guarantee is not the only or principal or primary security for the payment of the money. The Crown appeals.

Each of the two heads in Sch. 1 to the Stamp Act, 1891, the first of which begins, "Bond, covenant, or instrument of any kind whatsoever", and the C second with the words, "Mortgage, bond, debenture, covenant", and so on, talks of the instruments included in them respectively as being "(1) . . . the only or principal or primary security" and so on. Now it is clear, as I think, that the word "security" is used in the same sense in both those headings. This has been the law ever since *Jones* v. *Inland Revenue Comrs.* (1), in which WRIGHT, J., says (2):

D

> "The case of *Limmer Asphalte Paving Co.* v. *Inland Revenue Comrs.* (3) is, I think, an authority that the word 'security' in the 'bond' clause is to be construed in the same way as 'security' under the 'mortgage' clause: I do not see how the court could have arrived at the conclusion at which they did arrive unless that had been their view. It seems to me that we are bound by that decision; but even if we are not bound by it, it appears to me that it E puts the proper construction on the schedule, and that the word 'security' as used in these schedules does not mean as in popular language some obligation which is auxiliary to some other obligation, but means any obligation created by any instrument."

It appears from that passage not only that the word "security" must be construed in the same way in both headings, but that the word as used in Sch. 1 F has not its ordinary meaning, but means any written obligation for payment of money. Compare the speech of LORD RADCLIFFE in *Independent Television Authority* v. *Inland Revenue Comrs.* (4). It seems to me to follow that the agreement here in question is a "security" within the meaning of Sch. 1. It does not follow that it is stampable. To ascertain that one must look further into the G Schedule. The agreement is to my mind clearly the principal or primary security for the payment of the money constituting the second instalment of the price of the shares agreed to be sold. Nevertheless, the agreement will not fit into either of the headings, because, as to the first, the money payable is not an annuity nor a sum payable at stated periods nor for the term of life or any other indefinite period. Nor does it fit the second heading, because. in order to come within that, H the security must be properly described as a "mortgage, bond, debenture, covenant." It is settled law that "covenant" in this heading is confined to covenants under seal; see the opinion of the EARL OF HALSBURY, L.C., in *National Telephone Co., Ltd.* v. *Inland Revenue Comrs.* (5). Even if it were under seal, the amount secured was entirely unascertainable and therefore no stamp ad valorem could be affixed.

I The Crown's argument is that the guarantee is within para. (1) as being, in the circumstances, the only security for the repayment up to £750,000 of the second instalment. It is said that, because the agreement is not within the heading, it must be put out of account altogether and for Stamp Act purposes must be regarded as not a security at all. I can see no warrant for this. Each of these documents is, to my mind, a security. The first and primary security is the

(1) [1895] 1 Q.B. 484. (2) [1895] 1 Q.B. at p. 492.
(3) (1872), L.R. 7 Exch. 211.
(4) [1960] 2 All E.R. at p. 484; [1961] A.C. at p. 441. (5) [1900] A.C. at p. 2.

promise of the respondents, who are primarily liable as purchasers of the shares, and it is only on their default that there is any liability under the guarantee, which is therefore a collateral or additional security. The Crown's argument depends, I think, on the view that, unless an instrument is a security which comes within the whole of the conditions of the heading and is duly stamped as such, it is not a security at all and can be ignored, but this is to fly in the face of the authority I have cited.

In my judgment, *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.* (6) shortly reported in [1921] W.N. 220, but adequately only in SERGEANT ON STAMP DUTIES (3rd Edn.), p. 334, is pertinent in this connexion. There, the principal document, which was a document under hand, was exempt from stamp duty as being an agreement for the sale of a ship, there being a general exemption from duty for that transaction. There was also a guarantee for payment of part of the purchase price. The Crown sought to charge the guarantee with stamp duty as being the only security for that price on the ground that the agreement, being wholly executory, was not a security within either heading, and LORD STERNDALE, M.R., is found saying this (7):

> "But, of course, if the agreement of sale itself be not a security this [the guarantee] is not only the primary or principal, but it is the only security."

The Master of the Rolls then cited *Jones* v. *Inland Revenue Comrs.* (8) and discussed the point taken by counsel for the Crown that the agreement was not a security within the meaning of the Act because it was entirely executory.

The court held on the authorities that this point was not maintainable. LORD STERNDALE, M.R., ended with these words (9):

> "... I think here on the authority of these cases the original agreement was a security for the payment of these sums, and whether it was stampable or not, or whether it was exempted or not, does not seem to me to matter. If it were the principal or primary security which was exempt from stamp duty, the fact still remains that the guarantee was not the only or principal or primary security."

It has been objected that the heading under consideration in that case was the earlier one above set out (which includes, it will be remembered, documents under hand), but as "security" must have the same meaning in both cases I am not impressed by that argument. If this be right, it seems to me that we are not precluded from holding, according to the true facts of the case, that the guarantee is what in fact it is, secondary or collateral, and not the primary security, and that it does not matter that the primary security itself either is exempt as being an agreement for the sale of shares or as not being under seal or as securing an indeterminate sum or otherwise howsoever, and I would dismiss the appeal.

DONOVAN, L.J.: In my opinion the head of charge in Sch. 1 to the Stamp Act, 1891, reading "Mortgage, bond, debenture, covenant, . . . and warrant of attorney to confess and enter up judgment" is an exclusive description of the instruments to be stamped under this heading. Admittedly, the agreement of Oct. 29, 1957, is not within it, for that agreement is under hand only; and I accept that it follows from the House of Lords' decision in *National Telephone Co., Ltd.* v. *Inland Revenue Comrs.* (10) that the term "covenant" is here confined to a document under seal. Accordingly, whatever the meaning and scope of the word "security" in the Stamp Act, 1891, the agreement was never within this particular head of charge.

One turns, therefore, to the guarantee of Dec. 9, 1957. That document is under seal, and it is admittedly a security for the payment of a sum of money, viz., a maximum of £750,000. It is also true to describe it as a collateral, auxiliary, or additional security. The first question is whether it comes, as such, within

(6) [1921] W.N. 220; SERGEANT ON STAMP DUTIES (3rd Edn.) 334.
(7) SERGEANT ON STAMP DUTIES (3rd Edn.) at p. 338.
(8) [1895] 1 Q.B. 484.
(9) SERGEANT ON STAMP DUTIES (3rd Edn.) at p. 340.
(10) [1900] A.C. 1.

A para. (2) of this head of charge, so as to attract a stamp of 10s. only. In terms of para. (2), such a result ensues only where "the principal or primary security is duly stamped." The respondents say that such is the case here, because the principal or primary security is the agreement of Oct. 29, 1957, and it is duly stamped although exempt from stamp duty. Apart from the special point of construction which arises in this case, I would accept that the agreement is, B within the general meaning of the Stamp Act, 1891, a "security". Whether, as opposed to the bank guarantee, it is really "the principal or primary security", I should doubt, but for the purpose of the argument I will assume that it is. The circumstance that the agreement is exempt from stamp duty does not, on the authorities, prevent its being "duly stamped" for present purposes. But the special point of construction remains, and is this. This head of charge deals C exclusively with five specified instruments, and, because of that, the agreement is admittedly outside para. (1). Is it not, therefore, also outside para. (2)? In other words, when construing the expression in that paragraph, "where the principal or primary security is duly stamped", is it legitimate to travel outside the confines of the five specified instruments with which alone this heading deals and include some instrument with which the heading does not deal—i.e., the D agreement under hand only of Oct. 29?

Apart from authority I would answer that question in the negative. But counsel for the respondents says that the decision in *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.* (11) permits this. Having looked at that decision more than once, I am unable to accept this suggestion. It is true that the Commissioners of Inland Revenue in that case assessed the stamp duty under the head of charge E "Mortgage, bond, debenture, covenant", and also alternatively under the head of charge "Bond, covenant, or instrument of any kind whatsoever". But in the courts the problem debated was whether the instrument came under this second heading, where, if it did, the amount of the stamp duty would in the particular circumstance be the same as under the first alternative heading. No such question of construction as that I am now considering arose. What F was argued was whether the executory character of the agreement in that case deprived it of the status of "security" for the purpose of the Stamp Act. The answer was "No". It was the "principal or primary security" within para. (1) of the heading "Bond, covenant, or instrument of any kind whatsoever" and satisfied the condition in para. (2) of that heading, viz., "where the principal or primary instrument is duly stamped". Obviously no question could arise from G the fact that the agreement was under hand only, because the head of charge comprised such instruments. But in the present case it does not, and I therefore cannot treat the *British Italian Corpn.* case (11) as authority for the view that the words in para. (2) of the heading "Mortgage, bond, debenture, covenant", include an instrument under hand only, though the heading itself does not. I think the expression in para. (2) of this head of charge, viz., "where the . . . H primary security is duly stamped", refers as a matter of construction, and refers only, to securities which are themselves instruments of one of the five kinds alone dealt with in the heading. The agreement of Oct. 29, 1957, is not such a one.

That leads to this result, and this result alone, that the guarantee is not stampable under para. (2) of the heading for one of the conditions of coming I within that paragraph is not fulfilled. This does not mean that it therefore comes within para. (1). One now has to ask, as an independent question, is the guarantee the only or principal or primary security, being a mortgage, or a bond, or a debenture, or a covenant, for payment of this £750,000? The only other possible claimant for this distinction is the agreement, but that claim fails because the agreement is admittedly not a document of the kind specified, since it is under hand only. For that reason the guarantee, in my opinion, is the only document

(11) [1921] W.N. 220; SERGEANT ON STAMP DUTIES (3rd Edn.), p. 334.

which comes within para. (1) of this heading, i.e., as being a covenant *and* a security. A

The Crown also contends that the words "duly stamped" in para. (2) mean duly stamped under this particular head of charge, or, I suppose, specifically exempt from it. As a matter of construction I would agree. It fits in with what seems to be the obvious purpose of the Act in this particular head of charge, viz., that, where a primary document has suffered the full charge, an auxiliary document should suffer a lower one. With diffidence, therefore, I think the Crown should succeed. B

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue*; *Herbert Smith & Co.* (for the respondents). C

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re ST. JOHN-IN-BEDWARDINE, WORCESTER.

[Court of Arches (Dean of Arches, Sir Henry Willink, Q.C.), July 7, 26, 1960.] D

Ecclesiastical Law—Consistory court—Jurisdiction—Faculty proceedings for confirmation of re-siting—Disregard of faculty previously granted—Whether court had jurisdiction to make mandatory order to secure observance of faculty previously granted.

In 1920, in spite of the fact that the chancellor of the diocese had on two occasions refused a faculty for a war memorial of a particular design, containing a calvary above a cenotaph, a parish committee collected subscriptions for and ordered a war memorial of that design. In 1921 the chancellor was asked to sanction the erection of this monument, but he refused. It was accordingly placed in the vicarage garden, where in the course of time it became overgrown and neglected. In 1956 the then chancellor, who was not advised of the decisions of his predecessors, granted a faculty for placing the monument on a site in the churchyard. The proposed site was, however, adversely affected by a road-widening scheme and in September, 1957, the incumbent had the calvary separated from the cenotaph. He placed the calvary near the wall of the church and the cenotaph near the south-eastern end of the church. This conduct caused resentment from some parishioners, although in January, 1958, the parochial church council gave its approval to what had been done. A few weeks later the incumbent informed the parochial church council that, to avoid risk of damage, the calvary had been removed to a stonemason's yard. In February, 1958, the incumbent presented a petition asking for confirmation of the re-siting of the memorial and the removal of the calvary. In May, 1958, the chancellor refused the relief prayed for and ordered the cenotaph to be removed to the site contemplated by the 1956 faculty and further ordered the replacement of the calvary. On appeal by the incumbent, E F G H

Held: (i) the mandatory part of the chancellor's order was in excess of the jurisdiction of a consistory court and must be set aside.

(ii) on the evidence the cenotaph should remain where it was and the calvary should not be replaced, and a confirmatory faculty would be granted. I

[As to the enforcement of faculties, see 13 Halsbury's Laws (3rd Edn.) 419, para. 926; and for a case, see 19 Digest 361, *1790.*]

Appeal.

This was an appeal by the incumbent, the Rev. Thomas Malcolm Hart Richards, against an order of Chancellor Gray in Worcester Consistory Court, dated May 2, 1958. The facts appear in the judgment.

A *J. H. Ellison* for the incumbent.
D. H. M. Davies for the respondents.

Cur. adv. vult.

July 26. **THE DEAN** read the following judgment: For reasons which will appear later in this judgment on May 9, 1960, I acceded to an application for leave to appeal out of time and ordered that the incumbent should pay the costs of and occasioned by this application in any event. On my intimating that I would give leave, counsel for the incumbent and counsel for the respondents agreed to an order giving leave for evidence by affidavit and to my retaining the cause.

It is necessary that I should review an unhappy story extending over forty-one years. The subject-matter is a war memorial first projected in July, 1919, to the memory of men who fell in the first world war. Over the years there has been a series of blunders due in part to ignorance of the law of the Church of England, in part—I regret to say—to clear disregard of an order of the consistory court. The circumstances being as they are, should I conclude that the chancellor's order of May 2, 1958, cannot stand, it is my duty within the law so to exercise discretion as, if possible, to bring an unhappy situation to an end.

The first blunder was in November, 1920. In spite of the fact that the late Chancellor DUGDALE had on two occasions refused a faculty for a memorial including a figure of the Crucified Christ the committee appointed at a parish meeting of St. John-in-Bedwardine collected subscriptions for and ordered such a memorial. This is the monument now in question. It can be described as in its lower part a cenotaph, bearing the names of the fallen, with an upper part consisting of a gilded crucifix under a canopy. For the sake of brevity I shall refer to the two parts as the cenotaph and the calvary. In January, 1921, Chancellor AUBREY LAWRENCE was asked to sanction the erection of this monument. He refused to re-open the considered decision of his predecessor. It was, accordingly, impossible to erect the memorial in the churchyard and it was placed in the garden of the adjoining vicarage.

Apart from the inherent unsuitability of such a situation and of the fact that a memorial had been erected which had not been adjudged appropriate for the churchyard the monument was, at any rate at times, neglected and, moreover, became obscured and overgrown by trees. The incumbent who was instituted and inducted in September, 1952, had served as a chaplain to the Forces. He was very soon disturbed by its position and condition and in May, 1953, raised with his parochial church council the question whether it should not be moved to a position in the churchyard. By the autumn of 1955 the parochial church council had agreed on a site and on Feb. 20, 1956, on a petition by the incumbent and the then churchwardens, which was not opposed, a faculty was granted by Chancellor GRAY, valid for twelve months, a certificate of the work done to be rendered to the chancellor by Feb. 20, 1957. It was unfortunate that the learned chancellor was not advised of the decisions of his predecessors Chancellors DUGDALE and AUBREY LAWRENCE.

Not long after this date there were two fresh circumstances. In the first place the city corporation were minded to widen the road, a proposal which may go further than it has up to now: in the second place the city corporation formulated a scheme for the moving of gravestones and taking over the churchyard under the Open Spaces Act, 1906. For the second of these projects the corporation on June 2, 1957, obtained a faculty. The proposed setting for the war memorial was substantially changed in character, and there was a likelihood that the agreed position would have to be inconveniently close to the road. Instead of proceeding with regard to well-recognised principles both of law and parochial administration, the incumbent acted in a manner which he now recognises to have amounted to a contempt. In September, 1957, with little, if any, consultation with his churchwardens or consent he arranged for the calvary to be separated from the cenotaph

and deposited near the wall of the church and for the cenotaph to be erected close to the south-eastern end of the church. The position was, he says, convenient for Remembrance Day services, but the calvary would have obscured one of the church windows. He was influenced too, I think, by the fact that the tradition of St. John-in-Bedwardine is broadly evangelical and that to some the calvary was suggestive of Anglo-Catholic or Roman Catholic feeling. Whatever the incumbent's reasons such autocratic conduct was bound to lead to resentment not least from any who had subscribed to the memorial and also from his parochial church council. There was acrimonious correspondence with one of the respondents, who had been a subscriber, and at the parochial church council on Nov. 6 he was asked and agreed to explain in the parish magazine what he had done. He did not do so.

It is not possible to assess with certainty the feeling in the parish with regard to the calvary. There is substantial evidence that the original contributors greatly deplore the dismemberment of the monument. On the other hand, it is undisputed that the tradition of the parish is evangelical: I have the weighty evidence of the Archdeacon of Worcester that the interests of the parish will be best served by the memorial remaining as and where it now stands. Thirdly, it is noteworthy that on Jan. 28, 1958, the parochial church council, notwithstanding their feeling that they had not been treated with due consideration, gave their approval to the action of the incumbent, both as to the new position and as to the removal of the calvary, by a majority of twenty-seven to two, one member not voting. A few weeks later the incumbent reported to the council that to avoid risk of damage the calvary had been moved to the yard of Messrs. Ben Davis (Worcester), Ltd., the stonemasons who had moved the monument from the vicarage garden to its new position.

The incumbent's petition asking for confirmation of the re-siting of the monument and the removal of the calvary is dated Feb. 18, 1958. On Apr. 21 an appearance was entered on behalf of thirteen ladies as to whom it has now been admitted that not one had " locus standi " in the consistory court. On Apr. 23 an appearance was entered for Mr. Robert Henry Smith, a parishioner who had been vicar's warden from 1937 to 1953. Hearing of the petition was fixed for May 2 and took place in The Old Palace in the City of Worcester. It is with regret and some embarrassment that I find myself bound to say that the course of the hearing had unsatisfactory features. It is, I think, clear that the learned chancellor was affronted by the incumbent's complete disregard of the 1956 faculty. Furthermore, he was repelled by the suggestion that a calvary was in these days objectionable. But for these strong feelings he would not have omitted to take note of the fact that of fourteen respondents thirteen had no locus standi, nor would he have called of his own motion two representatives of the diocesan advisory committee to give evidence without the notice to the parties that is required by r. 6 of the Faculty Jurisdiction Rules, 1939 (S.R. & O. 1939 No. 771).

It is, however, to the order that he made that I am primarily bound to give consideration. The learned chancellor was not content to refuse the relief prayed for but went on to order the removal of the cenotaph to the area contemplated by the 1956 faculty and, furthermore, to order the replacement of the calvary. In my judgment such a mandatory order is clearly in excess of the jurisdiction of a consistory court and cannot stand.

It follows that I must consider whether merely to strike out these parts of the order and refuse the incumbent the confirmatory faculty for which he asks. Such a course would be in the highest degree unhelpful. I do not believe that it is the course that the learned chancellor would have adopted if the limits of his jurisdiction and his inability to make a mandatory order had been present to his mind. Retaining the cause, I have discretion to exercise on all the facts of the case, and on the evidence I come, without hesitation, to the conclusion that the cenotaph should remain where it is and that the calvary should not be replaced.

A It will now be appreciated that the ground on which I gave leave to appeal out of time was that there was a prima facie case of an excess of jurisdiction and of a resultant condition of unhappiness and confusion. During the six months that followed the learned chancellor's order there was much argument, the chancellor himself making most unusual personal efforts to secure performance of his order to the extent of directing the churchwardens to perform the order and B directing the parochial church council to instruct Messrs. Ben Davis to move the cenotaph and replace the calvary. At the same time Messrs. Davis expressed doubt whether a further move of the cenotaph, which had been grouted at the time of its move from the vicarage garden, could be again effected without risk of disintegration. I decide, therefore to grant the confirmatory faculty prayed for, but I do not think it appropriate to leave the matter there. I conceive it to be my C duty while making no formal order to make certain observations with regard to this calvary.

However unwise it may have been, on the part of those responsible, to order a war memorial of this design, and though no doubt many of those who subscribed are now no longer alive, I can appreciate the distress of those who are still alive and who may include a number closely related to the men commemorated when they D saw the memorial so fundamentally changed, and that without authority. They not unnaturally felt that the monument had been improperly dealt with and that they had been treated with a lack of consideration. It is not appropriate that the calvary should merely be deposited in a stonemason's yard.

It is not possible for me to give precise directions but I cannot but feel that with goodwill it should not be difficult to find a suitable position within the City of E Worcester on consecrated ground. The calvary could be re-erected on a low plinth inscribed with words indicating that it had been given in memory of men of Worcester who fell in the first world war, but without reference to the particular parish. I would urge that there should be consultation between the parochial church council, the diocesan advisory committee and the Archdeacon of Worcester with a view to the presentation of a petition to the consistory court of the F diocese.

As to costs, I have already stated that none of the original thirteen female respondents had any locus standi. I dismiss them from the suit. As between the incumbent and Mr. Robert Henry Smith, taking all the circumstances into account I think that it is equitable, save as to the application for leave to appeal out of time, to make no order and that is my direction.

Order accordingly.

Solicitors: *Livingstone, Wood & Son,* Worcester (for the incumbent); *Balderston, Warren & Co.,* agents for *Gordon Bancks & Co.,* Pershore (for the respondents).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

A

COOK *v.* NATIONAL COAL BOARD.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), July 10, 11, 1961].

Coal Mining –Statutory duty—Breach –Road—Obstruction –Duty to keep free from obstructions—Rope forming part of haulage system left in situ when haulage system not in use—Whether rope was an "obstruction"—Mines and Quarries Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 70), *s.* 34 (1) (*b*).

B

The main haulage and conveyor road of a coal mine contained a conveyor belt for the transfer of coal from the coal face and, parallel with it, a rail track. The road was on a slope. The rail track haulage system, whereon tubs were hauled by rope along the rails, was not used during a coaling shift, and, indeed, in view of s. 39* of the Mines and Quarries Act, 1954, and of transport rules† made under s. 37 for the mine, ought not to be used during such a shift. The plaintiff's duties included the removal of stones which, as frequently happened during coaling shifts, got fast between the centralisers of the conveyor belt conveying coal. On Nov. 26, 1959, when re-crossing the rail track after removing a stone from the conveyor belt during a coaling shift, the plaintiff tripped on the haulage rope running between the rails of the rail track and sustained injuries. The rope at the time of the accident was taut, as a number of tubs were attached to it and held by it against the slope of the road. The rope was some four inches above the ground. The tubs, with the rope attached, had been left on the rail track at the end of the previous haulage shift, as had happened on many occasions. The road was well lighted. In an action for damages for personal injuries based on negligence and breach of statutory duty under s. 34 (1) (b)‡ of the Act of 1954, it was found that the defendant mine owners were not negligent.

C

D

E

Held: it was not established on the evidence that the tubs and the rope attached to them, which was part of the haulage mechanism, should not have been where they in fact were during the coaling shift; that being so, the rope did not constitute an obstruction within s. 34 (1) (b) of the Mines and Quarries Act, 1954, and the defendants were not in breach of statutory duty under that enactment.

F

Alexander v. *Tredegar Iron & Coal Co., Ltd.* ([1945] 2 All E.R. 275) considered.

Appeal allowed.

G

[As to the duty to keep roads free from obstruction, see 26 HALSBURY'S LAWS (3rd Edn.) 650, para. 1259; and for cases on the subject, see 2nd DIGEST Supp.

For the Mines and Quarries Act, 1954, s. 34, see 34 HALSBURY'S STATUTES (2nd Edn.) 545.]

H

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* Section 39 (1) reads: "The following provisions shall have effect with respect to every length of road in a mine, being a length in which run vehicles moved otherwise than by hand or by animal traction (whether or not vehicles moved by those means also run therein):—(a) during any period during which vehicles are moving in that length of road otherwise than by those means, no person employed at the mine . . . shall, except in accordance with the provisions of regulations in that behalf, pass on foot along that length of road . . . unless the movement of vehicles in that length of road, other than vehicles moved by those means, is specially stopped for the purpose of allowing him to do so . . ."

I

† The terms of the relevant rule are stated at p. 223, letter D, post.

‡ Section 34 (1), so far as material, reads: "It shall be the duty of the manager of every mine to take, with respect to every length of road therein, being a length in which vehicles or conveyors run . . . such steps as may be necessary to secure that the following provisions are complied with, namely . . . (b) every such length of road . . . shall be kept free from obstructions and the floor thereof shall be kept in good repair and in such a condition that any persons or animals who use that length of road can tread it with safety and reasonable convenience."

A Cases referred to:

Alexander v. *Tredegar Iron & Coal Co., Ltd.*, [1945] 2 All E.R. 275; [1945] A.C. 286; 114 L.J.K.B. 377; 173 L.T. 113; 38 B.W.C.C. 94; 2nd Digest Supp.

Sanderson v. *National Coal Board*, [1961] 2 All E. R. 796; [1961] 3 W.L.R. 73.

Appeal.

B This was an appeal by the defendants, the National Coal Board, from a judgment of His Honour JUDGE OULD given at Rotherham County Court on Dec. 21, 1960. The plaintiff, Leonard Cook, sued the defendants for damages for personal injuries which he alleged to have been caused by the negligence of the defendants, their servants or agents, or by breaches of their statutory duty under s. 34 of the Mines and Quarries Act, 1954. The plaintiff was employed by the C defendants at Thurcroft Main Colliery, which was a coal mine to which the Act of 1954 applied, as a transfer point attendant. The locus of the accident was the main haulage and conveyor road, a steeply sloping road along which ran a rail track and a thirty-inch conveyor belt. The conveyor belt was used for transferring the coal from the coal face; the rail track was used to haul tubs carrying other things, such as pit props, to the coal face and waste materials D to the outbye. It was the duty of the plaintiff, among other things, to cross the rail track in order to remove any stones which got stuck between the centralisers of the conveyor belt. This was a common occurrence which might happen a dozen times in a shift. On Nov. 26, 1959, the plaintiff was on the coaling shift; the rail track was not in use but as frequently happened, some tubs had been left on the track, at the end of the previous haulage shift, with the rope attached E to and holding them. The rope was more or less taut some four or five inches above ground level. Transport rules made by the mine manager under s. 37 of the Act of 1954 provided that the haulage must not be run while the men were travelling to or from work. In stepping back across the rail track after freeing a stone from the centralisers, the plaintiff tripped on the rope and sustained injuries. The road was well lighted and there was no evidence of any similar F accident over a considerable period. The plaintiff by his statement of claim, alleged negligence and breach of statutory duty, and, in particular, alleged that the defendants in breach of s. 34 of the Act of 1954 (a) failed to keep the length of the main haulage and conveyor road where the plaintiff was free from obstructions, and (b) failed to keep the floor thereof in such a condition that the plaintiff in using it could tread it with safety and reasonable convenience. The county G court judge found that negligence was not established, that the defendants were in breach of their statutory duty under s. 34 to keep the road free from obstructions, that the plaintiff was guilty of contributory negligence to the extent of three-quarters. He gave judgment for the plaintiff accordingly. The defendants appealed; the plaintiff did not cross-appeal against the findings respecting negligence and contributory negligence.

H *Marven Everett, Q.C.*, and *G. Milner* for the appellants, the National Coal Board.

P. Stanley Price, Q.C., and *S. S. Gill* for the respondent, the plaintiff.

LORD EVERSHED, M.R., stated the facts, referred to s. 39 of the Mines and Quarries Act, 1954, reviewed the evidence and continued: The second part I of the case rests, in a sentence, solely on this: was the rope in the position which has been described an obstruction? It is not in doubt that a very recent decision, *Sanderson* v. *National Coal Board* (1) supports the view that the language of these sections of the Mines and Quarries Act, 1954, is strict. It is no answer to say, if this rope was an obstruction, that it was not much of an obstruction or that it was in some way excusable—apart from a possible defence based on s. 157 of the Act of 1954 that it was impracticable to get rid of it.

(1) [1961] 2 All E.R. 796, decided on s. 81 (1) of the Act of 1954.

I, therefore, approach the matter bearing in mind the view that Parliament has thought fit to place these stringent obligations on those responsible for the conduct of what is, after all, a somewhat dangerous trade. The word "obstruction" is, however, one of ordinary usage and has, I take it, to be applied in any given case to the circumstances of that case.

Here the situation was that at the end of the preceding shift certain tubs attached to this rope and held by the rope because of the slope in the roadway, had been left standing further to the inbye side of where the plaintiff was working. This part of the road, however, was a track for the conveyance of these tubs. It was not a flat and level pathway. It consisted of a basic floor in or on which were sleepers, on the sleepers rested the rails, and at the time in question between the rails was this taut rope supporting the tubs. The whole thing, sleepers, rails and the ropes, were part of the tramway mechanism; but I agree with counsel for the plaintiff that that does not necessarily mean that the rope was not an obstruction. He concedes that the rails, though in some sense they might be said to be an obstruction, could not be treated as such within the section because they were part of the track of the tramway.

I turn then to the basis on which the learned judge founded his conclusion in favour of the plaintiff. It is to be found in two paragraphs which contain these sentences: "In the ordinary run of affairs, there would be no haulage there". That means I take it, that in the ordinary way during this shift there would be no haulage operations going on.

> "There would be no need for the tubs there and no need for the rope there, and therefore I cannot find that by any necessary implication in the construction of this section there was any licence to have an unrequired haulage rope or any other unrequired obstruction of any kind in a position such as existed on the day of this accident."

Then later he said:

> "By reason of the stringency with which this section has been framed, I am not concerned with the size of the obstruction, the height of the obstruction, or other particulars of this nature. All I am concerned with is something which, to some degree, could militate against the free passage of people whose job it was to work in such confined conditions and clearly this rope could, and did, come within that definition—albeit greatly assisted by the contributory negligence of the plaintiff in this case. I am fortified in my view of the construction of this section by the view expressed by LORD WRIGHT in the case of *Alexander* v. *Tredegar Iron & Coal Co., Ltd.* (2) that what is envisaged as an obstruction is something out of the ordinary, not in its proper place in the road in the ordinary course of things. That rope should not have been there."

It will be convenient if I refer to the language of LORD WRIGHT to which the learned judge alluded. LORD WRIGHT said (3):

> "These are things which have no right to be left on the road. They are completely out of place. I put the stress of my opinion on the word 'obstruction'".

Earlier VISCOUNT MAUGHAM had said (4):

> "I would prefer to say that upon the true construction of the section, the presence on the line of tubs or other vehicles for the purpose of working the mine is being contemplated as normal, and accordingly that vehicles so employed are not within the scope or meaning of the words 'other obstructions' as used in that section. I have carefully considered the

(2) [1945] 2 All E.R. 275; [1945] A.C. 286.
(3) [1945] 2 All E.R. at p. 281; [1945] A.C. at p. 297.
(4) [1945] 2 All E.R. at p. 278; [1945] A.C. at p. 293.

A contrary view expressed by SCOTT, L.J. (5), but I find myself unable to agree with it. I do not feel it necessary to express an opinion on the question which might arise if a vehicle was temporarily not being used for the traffic of the mine and was left unattended on the rails; but I think it would not be difficult to distinguish that case from the present one."

B It should be observed that the section which was under review in the *Tredegar* case (6) was s. 47 of the Coal Mines Act, 1911, the language of which was somewhat more qualified than that of the present section (7). It read: "Every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions". None the less, accepting the general principles which can be derived from the speeches which I have mentioned, I think that the test is C satisfied here if there was something (i..e, this rope) not in its proper place in the ordinary course of things, something which should not have been there at all. Let me say at once that I am dealing with this case and the facts of this case and I must see what the evidence in this case proved. Section 39 of the Act of 1954 provides, in effect, that a length of road, such as that in this case, should be so managed that during a shift such as that with which we are con- D cerned the tubs are not moved at all along or over the rail track; and under s. 37 the management has made transport rules which say quite precisely and very properly that the haulage must not be run when men are travelling to and from work—again emphasising that during the shift with which we are concerned these tubs and this tramway must not be in use. Was it, however, wrong, was it something which should not have been done, that the tubs had been left where E they were on the inbye side with the rope attached to them and so being some four inches from the ground? The learned judge has concluded on the evidence that the answer which should be given is that the rope should not have been there and that the tubs should not have been left in that position attached to the rope. I regret to say, with all respect to him, that studying the evidence as best I can, I do not think that the evidence supports that conclusion. I feel F some assistance can be derived from the rejection by the learned judge of any cause of action founded on negligence. True, as counsel for the plaintiff pointed out, in order that there should be negligence the test is not quite the same as the one with which we are concerned. The question was rightly posed by the learned judge: in the circumstances should the employers as reasonable employers have appreciated that to leave tubs where they were in this way G might cause danger? Still, it is clear enough that it was a common occurrence for tubs to be left where the tubs were on this day with this rope four or five inches above the ground holding them. I have stated the evidence of Mr. Quinn, described, as I have already said, as "the best of a bad lot". He was the safety officer, and I cannot extract from his evidence anything which would lead me to the conclusion that there was here, in light of the transport rule which I H have read and s. 39, anything that was wrong—anything done which ought not to have been done—in the failure to draw the tubs up to the outbye side before the shift started. Nor can I get any similar assistance from the evidence given later by Mr. Hill, who was for the second time recalled. He said that there had never been a practice to take tubs outbye to a certain girder and that if they were taken to that position there would be an obstruction to ventilation. We are I not concerned with whether there was an excuse for doing something which was otherwise wrong, but whether on this evidence it can fairly be said that this rope, being where it was, was not in its proper place and should not have been there. I am not satisfied that that proposition is made good, and if that is so, then although I quite agree that a rope put across an ordinary plain pathway

(5) See [1944] 1 All E.R. at p. 455; [1944] K.B. at p. 397.
(6) [1945] 2 All E.R. 275; [1945] A.C. 286.
(7) I.e., s. 34 of the Act of 1954; the terms of the section, so far as material, are stated in footnote ‡, p. 220, ante.

four or five inches from the ground would plainly be an obstruction, it seems to me that this rope was being used as part of the tramway mechanism; and I do not think, even when stringency is to be applied to the construction of the section that it is in this case established that the rope in the position in which it was should be regarded as an obstruction within the section.

I therefore conclude accordingly, with all respect to the learned judge, that this claim should have failed and that this action should have been dismissed.

HARMAN, L.J.: I agree. In spite of the length to which the legislature goes to protect a workman in a mine, I think that this decision goes beyond anything that is reasonable. It is clear enough that the plaintiff's case here depended on his view that the object which tripped him up was a taut steel rope eighteen inches from the ground in a position which it never occupied and never ought to occupy in the road. On that he failed altogether to convince the court. In fact the thing which tripped him up was four inches or so from the ground, one inch above two railway lines which ran on each side of it. I do not say that a rope four inches from the ground in a clear passageway might not be a very serious obstruction because it would trip you up, but this rope, after all, was between two lines of railway, being just above the sleepers which held the track in position. It was an object which was often there. It is true that there were many times when it was not there and the learned judge, I think, based his view on the fact that it should not have been there. I do not think he was justified in that view. It seems to me that the rope where it was was quite reasonably in that position as an essential part of the mechanism for working these tubs on the railway. It was not in any unusual place or position. It was an object which he surmounted every day, five or six times, according to him, in a shift, when he crossed the line. It does seem to me that once it is found that the employers did not fall short of their duty, in other words, were not negligent either by themselves or by their other employees, then there is no room for finding that this was an obstruction so as to be a breach of s. 34 of the Mines and Quarries Act, 1954. That being so, as it was not an obstruction, the plaintiff ought not to succeed and this appeal ought to be allowed.

DONOVAN, L.J.: I agree. One starts with the admission, which must be made, that during haulage operations the rope was not an obstruction within the meaning of s. 34 of the Mines and Quarries Act, 1954. It is said, however, that if haulage is not in progress, and the rope is left in the road instead of being wound in with its attendant tubs, then the rope becomes an obstruction within the meaning of the section. This was the view taken by the learned county court judge, and I myself shared it for a time during the argument. Certain considerations have, however, displaced it. First, s. 34 is concerned with safety; and this rope had been left in situ on many occasions without anyone concerned thinking that it constituted a danger or being hurt by it. So that if criminal proceedings had been brought successfully against the manager under s. 152 of the Act of 1957, he would be punished not for leaving some recognised danger about, which anyone would regard as an " obstruction ", but really because of the laziness of the haulage boys, or for some defect in the organisation which left insufficient time for the rope and tubs to be taken in at the end of the haulage shift. The second and more persuasive consideration is this; that s. 39 of the Act of 1954 clearly envisages in para. (a) and para. (b) of sub-s. (1) that it will suffice for safety purposes if the trucks are stopped while men are working. It would be odd if, by complying with s. 39, the manager fell foul of s. 34 because the stationary trucks and rope, not being used, were then an " obstruction ". I think that this gives the clue to the meaning of that word in s. 34, at least to this extent; that a rope being part of the haulage system is not an obstruction simply because it is left in situ at a time when no haulage is taking place. There may well be a case where additional circumstances would make such a rope an

A obstruction, for example, if it was left well outside its normal position and in a place impeding foot passengers in the road. Indeed, that was the principal claim put forward here by the plaintiff, but the learned judge has found against him on the point. Otherwise the case might well come within the dicta quoted to us in *Alexander* v. *Tredegar Iron & Coal Co., Ltd.* (8).

For these reasons I also think that the appeal must be allowed.

B *Appeal allowed. Leave to appeal to the House of Lords refused.*

Solicitors: *D. H. Haslam*, agent for *C. M. H. Glover*, Doncaster (for the appellants, the National Coal Board); *Raley & Pratt*, Barnsley (for the respondent, the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

C

BREEN (otherwise SMITH) *v.* BREEN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), January 19, June 19, 20, 26, 1961.]

Nullity—Foreign marriage—Lex loci celebrationis not providing for divorce—Husband's first marriage in Eire dissolved by English court, parties being then domiciled in England—Second marriage of husband in Republic of Ireland—Whether second marriage void—Constitution of Ireland, art. 41, *s.* 3 (3).

D

The husband was married in Eire in 1944 to a Miss D. That marriage was dissolved by the English court in 1952, the husband being then domiciled in England. In March, 1953, the wife in the present suit, being then a widow, went through a ceremony of marriage with the husband in Dublin. At that date the husband's former wife (Miss D.) was still alive. After the ceremony the husband and wife came to live in England and became domiciled in England. In 1958 the parties separated and in 1959 the wife presented the present petition praying for a decree that the marriage in 1953 in Dublin was null and void on the ground that by reason of art. 41, s. 3 (3) of the Constitution of Ireland* the husband was incapable of contracting a valid marriage in Dublin in 1953 since the courts of the Republic of Ireland did not recognise the decree of divorce made by the English court in 1952 and that, therefore, in March, 1953, the husband's prior marriage was still subsisting according to the law of the Republic of Ireland.

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Held: the wife's petition would be dismissed since the decree of divorce in 1952 was granted by the court of the husband's domicil and would be recognised by the courts of the Republic of Ireland, art. 41, s. 3 (3), of the Irish Constitution on its true interpretation not interfering with the former law of that territory which recognised decrees of dissolution of marriage pronounced by foreign courts where the parties were domiciled within the jurisdiction of those courts.

G

Dicta of KINGSMILL MOORE, J., in *Mayo-Perrott* v. *Mayo-Perrott* ([1958] I.R. 343 et seq.) applied.

H

[As to the recognition and validity of decrees of divorce pronounced by the country of the domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 114, 115, para. 202; and for cases on the subject, see 11 DIGEST (Repl.) 481-483, *1079-1097.*]

Cases referred to:

Bater v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 11 Digest (Repl.) 482, *1087.*

I

Green v. *Green*, [1893] P. 89; 62 L.J.P. 112; 68 L.T. 261; 11 Digest (Repl.) 482, *1086.*

Keyes v. *Keyes and Gray*, [1921] P. 204; 90 L.J.P. 242; 124 L.T. 797; 11 Digest (Repl.) 467, *1003.*

Mayo-Perrott v. *Mayo-Perrott*, [1958] I.R. 336.

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(8) [1945] 2 All E.R. 275; [1945] A.C. 286.

* The Constitution of Ireland was enacted by referendum on July 1, 1937, and was in operation as from Dec. 29, 1937 (see p. 228, letter C, post).

McM. v. *McM.*, *McK.* v. *McK.*, [1936] I.R. 177. A

R. v. *Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwar-uddin*, [1917] 1 K.B. 634; 86 L.J.K.B. 210; 115 L.T. 882; 81 J.P. 49; 11 Digest (Repl.) 489, *1123*.

Russell's (Earl) Case, [1901] A.C. 446; 70 L.J.K.B. 998; 85 L.T. 253; 15 Digest (Repl.) 887, *8555*.

Sinclair v. *Sinclair*, [1896] 1 I.R. 603. B

Sinclair's Divorce Bill, [1897] A.C. 469; 36 Digest (Repl.) 392, *375*.

Petition.

By a petition dated Jan. 20, 1959, the wife alleged that on Mar. 27, 1953, she went through a form or ceremony of marriage with the husband at the Register Office in Dublin; that there were no children; that the parties were domiciled in England, alternatively that the wife had been ordinarily resident in England C for three years immediately preceding the presentation of the petition and continued:

"5. That on Aug. 7, 1944, the [husband] was lawfully married to Alice Breen, then Alice Dineen, spinster at the Roman Catholic Church of Blackrock . . . Dublin.

"6. That the said marriage has never been dissolved or annulled so as to D render valid the ceremony of marriage between [the wife] and [the husband] and at the date of the said ceremony of marriage the said Alice Breen was still alive."

The wife prayed for a decree that the marriage celebrated between herself and the husband was null and void.

The husband, by his answer, pleaded that the parties were and at all material E times had been domiciled in England and that the marriage between himself and Alice Dineen had been dissolved by the English court on Sept. 2, 1952, and prayed that the petition be dismissed. By her reply the wife admitted that a decree absolute had been pronounced on Sept. 2, 1952, and alleged

"2. That notwithstanding the said decree absolute the ceremony of F marriage referred to in para. 1 of the petition did not constitute a valid marriage by reason of the matters set out in paras. 5 and 6 of the said petition and the fact that the said decree absolute was not and would not be recognised by the courts of Eire where the said ceremony of marriage was performed on Mar. 27, 1953, as effective to dissolve the prior marriage of the [husband] which according to the laws of Eire was still subsisting on Mar. G 27, 1953."

The suit came before KARMINSKI, J., on Jan. 19, 1961, and after evidence had been called on behalf of the wife the suit was adjourned for argument by the Queen's Proctor under the Matrimonial Causes Act, 1950, s. 10 (1).

I. J. Black for the wife.

The husband appeared in person. H

Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

June 26. **KARMINSKI, J.,** read the following judgment: Mrs. Breen, the petitioner, and Mr. Breen, the respondent, went through a form or ceremony of marriage together on Mar. 27, 1953, at the Register Office, Dublin, in the Republic I of Ireland. At the time of this ceremony of marriage the wife was a widow, her former husband, Mr. Smith, having died in 1942. The husband was married in Ireland on Aug. 7, 1944, to a Miss Alice Dineen. That marriage was finally dissolved by this court on Sept. 2, 1952, on the grounds of the husband's desertion and adultery. It is conceded on behalf of the husband that he was then domiciled in England. The husband's former wife, Alice Breen, was alive on Mar. 27, 1953, and is said to be still alive. After the ceremony of marriage in Dublin the wife and the husband came to live in due course in England and finally at a

A hotel at Deddington in Oxfordshire, where they carried on business jointly as hotel proprietors. Difficulties having arisen between them they separated in June, 1958, and have not lived together since. I have used the word " separated " deliberately, as there is no evidence before me of the circumstances which led to the termination of their life together.

Soon after their separation the husband wrote to the wife referring to their B supposed marriage and alleging that by the terms of the Irish Constitution they were not lawfully married. The husband suggested to the wife that she should take advice, and in January, 1959, the present petition was presented to this court.

[HIS LORDSHIP referred to the pleadings and continued:] There is no dispute as to the domicil of the parties, and I find them to have been domiciled in England C at the inception of this suit. There is no question here as to any defect in the form of the marriage ceremony under Irish law. Nor is it suggested that either the wife or the registrar who performed the ceremony were deceived in any way as to the status of the husband. The wife herself was well aware of his earlier marriage to Alice Dineen and of its dissolution in England. The registrar cannot have been deceived as to the status of the husband, who is described in the D marriage certificate under the heading of condition as " divorcé ".

The wife bases her case on the provisions of art. 41, s. 3 (3) of the Constitution of Ireland of 1937. Article 41 deals generally with the family and its position in the state. Section 3 deals with the institution of marriage and its protection, providing in particular that no law shall be enacted providing for the grant of a dissolution of marriage. Subsection (3) is in the following terms:

E "No person whose marriage has been dissolved under the civil law of any other state but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the government and Parliament established by this constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

F I do not find the wording of sub-s. (3) easy to interpret, and I am relieved to find that these difficulties have been shared by the Supreme Court of Ireland itself in *Mayo-Perrott* v. *Mayo-Perrott* (1) to which I shall refer in detail in due course. In the present case I have had the advantage of expert evidence on Irish law from Mr. McEnery of the Irish and English Bars for the wife, and from Mr. McCreery of the Irish and English Bars for the Queen's Proctor. On their construction of G sub-s. (3) these witnesses differed substantially on the same lines, and certainly as completely, as the judges of the Supreme Court. Before I come to this question of construction, it is necessary to discuss briefly the history of the matrimonial jurisdiction of the Irish courts. Between the Act of Union of 1802 and the Constitution of the Irish Free State in 1922, it is clear that the Irish courts had no jurisdiction to dissolve a marriage a vinculo. The Matrimonial Causes Act, 1857, H applied to England only. It did not apply to Ireland, nor indeed to Scotland. For a person domiciled in Ireland until 1922, the only way to obtain a dissolution was by private bill presented to Parliament at Westminster (see *Sinclair's Divorce Bill* (2)).

The Constitution of the Irish Free State (3) was the first creation of the Irish Provisional Parliament sitting as a Constituent Assembly, and was designed to I implement the Treaty of 1921 between Great Britain and Ireland. It is unnecessary for the purposes of this case to examine that constitution in full, but by art. 12 it created a legislature of the King and two houses, to be known as the Oireachtas. Article 73 provided that, subject to the constitution, the laws in force in the Irish Free State at the date of the coming into force of the Constitution

(1) [1958] I.R. 336. (2) [1897] A.C. 469.

(3) This constitution, which is set out in Sch. 1 to the Irish Free State Constitution Act, 1922 (Session 2), was much amended and subsequently was superseded by the new constitution, voted on plebiscite, on July 1, 1937.

should continue to be of full force and effect until repealed or amended by the Oireachtas. So far as the matrimonial jurisdiction of the Irish courts was concerned, the position remained unchanged. The Irish courts had, as before 1922, no jurisdiction to dissolve marriages. In theory at least, private divorce bills would henceforward be presented to the new legislature in Dublin and no longer to Parliament at Westminster. When the 1922 Constitution came into force, three Irish divorce bills were due for presentation at Westminster. Their subsequent history is set out in the judgment of HANNA, J., in *McM.* v. *McM.*, *McK.* v. *McK.* (4). Between 1922 and 1937 I am satisfied that no divorces by Act of the Oireachtas were granted, and it does not appear that after the 1922 remanets disappeared, any new bills for divorce were presented.

On July 1, 1937, the new Constitution of Ireland was enacted by referendum, and came into force on Dec. 29, 1937. The Constitution is of the most comprehensive character, and was clearly drawn with great care and skill. Some of its provisions are statements of fundamental policies and rights. Article 29 on International Relations and art. 44 on Religion may be cited as examples of this class. Article 34 on the courts is an example of the legislative functions of the Constitution. But whatever the nature of the various articles, I am satisfied that the Constitution has the force of law, and indeed forms part of the law of Ireland.

It is in this context that art. 41 on the family has to be examined, and in particular the meaning of s. 3 (3). I now turn to *Mayo-Perrott* v. *Mayo-Perrott* (5), where a plaintiff who had been the successful petitioner for dissolution in this court sued in the High Court of Ireland for the unpaid balance of her costs awarded in that suit. It was held by MURNAGHAN, J., at first instance, and affirmed on appeal by the Supreme Court, that the order for costs could not be severed from the substantive order for divorce and could not be enforced in Ireland as creating a separate cause of action in personam. MURNAGHAN, J., remarked (6) that s. 3 (3) did not lend itself to easy interpretation, and finding that the order for costs could not be severed from the decree of divorce, refused to enforce a foreign law which he regarded as repugnant to the Republic's own distinctive policy on divorce. MURNAGHAN, J., did not make any decision with regard to the recognition of the English decree as valid to dissolve the marriage, nor was any such decision necessary for the disposal of that case. On appeal to the Supreme Court, two of the judges went further and discussed the question whether or not the English decree of divorce would be recognised as valid to dissolve the marriage in the Irish courts. The findings on this question were not in my view necessary in determining the question before the Supreme Court, and must therefore be treated as obiter. But, as this is the only reported case in Ireland in which the question of recognition seems to have been discussed since 1937, the observations of MAGUIRE, C.J., and of KINGSMILL MOORE, J., require careful consideration. Unfortunately their views differed completely, and I have been left with the difficult and delicate task of having to decide which view I must accept.

MAGUIRE, C.J., shared the difficulty of MURNAGHAN, J., in construing sub-s. (3). After referring to sub-s. (2), he expressed the view that sub-s. (3) was designed to double bar the door closed in sub-s. (2), and added these words (7):

> "Far from recognising the validity of a divorce obtained outside the country it seems to me expressly to deny to such a divorce any recognition for it prohibits the contracting of a valid marriage by a party who has obtained a divorce elsewhere. The subsection says as plainly as it could be said that a valid marriage which is dissolved under the law of another state remains in the eyes of our law a subsisting valid marriage. It may be that the constitution recognises that a decree of dissolution of marriage elsewhere may be valid in the country where it has been obtained, but to my mind as I have said it denies any validity here."

(4) [1936] I.R. at pp. 188, 189.
(5) [1958] I.R. 336.
(6) [1958] I.R. at p. 339.
(7) [1958] I.R. at p. 344.

A I differ with obvious hesitation from the Chief Justice in his construction of the Irish Constitution, but I am bound to say that I do not understand the section to say either plainly or at all that a valid marriage dissolved by the court of another state remains in the eyes of the Irish law a subsisting valid marriage. Indeed Mr. McEnery, who expressed the view that in other respects the views of the Chief Justice correctly expressed the law of Ireland, at once admitted that the B language used in the passage which I have just quoted was too wide.

KINGSMILL MOORE, J., expressed an exactly opposite view, and, indeed, approached the question by a different route. Pointing out that until 1921 the law of England and Ireland was the same in recognising the validity of a decree of the court of the domicil of the parties, he held that the law of Ireland as it stood in 1921 was expressly retained by art. 73 of the Constitution of 1922. C Discussing the effect of art. 41, s. 3 (3), he used the words (8):

> "It is submitted that the effect of this article is to refuse to recognise the validity of divorces a vinculo by a foreign court in any circumstances, inasmuch as our law does not permit a dissolution of marriage and regards the marriage as valid and subsisting despite a decree purporting to dissolve it; and that the article renders invalid any re-marriage of persons so divorced, D whenever such re-marriage is contracted, so long as the first spouse is alive. First it must be noted that the prohibition is *not* applicable to all cases of dissolution of marriage, but only to cases where, under the law for the time being in force within our jurisdiction, the original marriage is regarded as valid and subsisting, or in other words where, by that law, the divorce is regarded as not being effectual to put any end to the original valid marriage. No doubt E the Oireachtas could pass a law that no dissolution of marriage, wherever effected, even where the parties were domiciled in the country of the court pronouncing the decree, was to be effective to annul the pre-existing valid marriage. If it did so, then, by the law for the time being in force, the first marriage would still be valid and subsisting within our jurisdiction. But the Oireachtas has not done so, and the law as existing when the constitution F was passed was that a divorce effected by a foreign court of persons domiciled within its jurisdiction was regarded as valid in our jurisdiction. Such law was preserved unless inconsistent with the new constitution and, in the absence of any statement in the new constitution altering such law, inconsistency cannot be spelled out from the words now being interpreted for they are perfectly consistent with the preservation of the pre-existing G law which was the 'law for the time being in force.'
>
> "There were, indeed, divorces carried through under the law and by the courts of a foreign state which were not regarded as effectual to put an end to the marriage. The most obvious instance was where the parties were not for the time being domiciled in the country whose courts granted the divorce (*Keyes* v. *Keyes and Gray* (9); *Green* v. *Green* (10); *Earl Russell's* H *Case* (11)). But there may be other instances; *R.* v. *Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin* (12); suggests that our law would not recognise as valid a dissolution effected in a foreign country by persons domiciled in such country, where by the law of that country, divorce could be brought about without recourse to the courts; nor would it recognise as effective the dissolution of a marriage essentially monogamous I by a form suitable only to the dissolution of a polygamous marriage. It is unnecessary to examine all possibilities. It is, however, legitimate to suggest that it is highly unlikely that the constitution intended, without clear words, to reverse what is a practically universal rule of private international law, and to produce a state of affairs which was stigmatised by LORD PENZANCE and LORD WATSON in the words already quoted (13), words which

(8) [1958] I.R. at p. 348. (9) [1921] P. at p. 207. (10) [1893] P. 89.
(11) [1901] A.C. 446. (12) [1917] 1 K.B. 634.
(13) LORD PENZANCE in *Wilson* v. *Wilson*, (1872), L.R. 2 P. & D. at p. 442; LORD WATSON in *Le Mesurier* v. *Le Mesurier*, [1895] A.C. at p. 540.

were also adopted by WARREN, P., in *Sinclair* v. *Sinclair* (14). I cannot find anything in art. 41 (3) to suggest that the courts (in the absence of further legislation) are entitled to do otherwise than regard as valid and effectual a divorce a vinculo granted by the courts of a foreign country, where the parties at the time of the suit were domiciled in that country.

"The remaining words of art. 41, s. 3, are not without difficulty. They apply only to persons whose divorce in a foreign country is not recognised as effectual by our courts (e.g., where the divorced persons were not domiciled in that country), and where, therefore, the original marriage is considered to be still valid and subsisting. They say that a person whose marriage is thus considered by the law to be valid and subsisting 'shall not be capable of contracting a valid marriage within that jurisdiction (i.e., our jurisdiction) during the lifetime of the other party to the marriage so dissolved.' The words do not declare that such a person cannot *anywhere* contract 'a marriage valid within our jurisdiction,' but merely prohibit the contracting *within our jurisdiction* of a valid marriage. It is the contracting of the second marriage within the jurisdiction which is prohibited. There is nothing to make it invalid if contracted elsewhere.

"The general policy of the article seems to me clear. The constitution does not favour dissolution of marriage. No laws can be enacted to provide for a grant of dissolution of marriage in this country. No persons whose divorced status is not recognised by the law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law that dissolutions of marriage by foreign courts, where the parties are domiciled within the jurisdiction of those courts, will be recognised as effective here. Nor does it in any way invalidate the re-marriage of such persons. It avoids the anomalous, if not scandalous, state of affairs stigmatised in the passages which I have already cited whereby legitimacy and criminality could be decided by a flight over St. George's Channel."

The other three judges of the Supreme Court (15) did not discuss the problems created by sub-s. 3 but confined themselves to the narrower issue which the court was called on to decide. Indeed MAGUIRE, J., expressly held (16) that the facts did not call for the application of the subsection and that it was not relevant. I am, therefore, left to choose between the conflicting views of MAGUIRE, C.J., and KINGSMILL MOORE, J. I have approached the matter in this way. I have looked at the subsection unassisted by any expression of Irish judicial opinion and I have tried to construe its meaning. Doing this I find that I must come to the same construction and for the same reasons as KINGSMILL MOORE, J. The principle of recognising the validity of a decree pronounced by the court of the domicil has been long established, and indeed forms an essential part of the comity of nations. Any departure from this principle is likely, as Sir GORELL BARNES, P., pointed out in *Bater* v. *Bater* (17) to produce absurd results, which would be neither convenient nor logical. If the article intended to depart from this established principle, it could no doubt have done so; but it would have expressed the intention in clear and unequivocal terms.

I find, therefore, that Irish law in the present case recognises the validity of the English court in dissolving the marriage between the husband and his first wife and recognises the validity of the second marriage celebrated in Ireland between him and the petitioner. In the result the petition fails and must be dismissed.

Petition dismissed.

Solicitors: *Buller, Jeffries & Kenshole*, Birmingham, agents for *Aplin, Hunt, Thomas & Brooks*, Banbury (for the wife); *Queen's Proctor*.

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law*.]

(14) [1896] 1 I.R. 603.
(15) LAVERY, O'DALY and MAGUIRE, JJ.
(16) [1958] I.R. at p. 353.
(17) [1906] P. at p. 217.

A

CLIFFORD v. CLIFFORD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Cairns, J.), June 12, 13, 14, 15, 16, 1961.]

Divorce—Evidence—Cross-examination—Adultery—Petition on ground of cruelty—Cross-prayer on ground of desertion—No allegation of adultery in pleadings—Admissibility of cross-examination as to adultery—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 32 (3).

B

It is permissible in divorce proceedings which are not instituted in consequence of adultery (and to which, therefore, s. 32 (3) of the Matrimonial Causes Act, 1950, is not applicable) to ask questions, as part of cross-examination as to credit, tending to show that the party cross-examined has committed adultery.

C

Blunt v. *Park Lane Hotel, Ltd.* ([1942] 2 All E.R. 187) and *Lewis* v. *Lewis* ([1958] 1 All E.R. 859) considered.

[As to cross-examination as to adultery in a divorce suit, see 12 HALSBURY'S LAWS (3rd Edn.) 372, para. 812; as to evidence in cases of cruelty, see ibid., p. 278, para. 534; and for cases on cross-examination, see 27 DIGEST (Repl.) 524, *4661-4666.*

D

For the Matrimonial Causes Act, 1950, s. 32 (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 417.]

Cases referred to:

Blunt v. *Park Lane Hotel, Ltd.*, [1942] 2 All E.R. 187; [1942] 2 K.B. 253; 111 L.J.K.B. 706; 167 L.T. 359; 18 Digest (Repl.) 190, *1638.*

E

Lewis v. *Lewis*, [1958] 1 All E.R. 859; [1958] P. 193; [1958] 2 W.L.R. 747; 3rd Digest Supp.

Petition.

In this case the wife petitioned for divorce on the ground of the husband's cruelty. The husband by his answer denied the alleged cruelty and cross-prayed for divorce on the ground of the wife's desertion. In his answer the husband said that he had called the wife a prostitute, and that this was a reference to his suspicions concerning her unexplained absence from the matrimonial home for two months in 1956. There was, however, no allegation in the pleadings that the wife had committed adultery. At the hearing of the suit, counsel for the husband sought in cross-examination to ask the wife questions tending to show that she had committed adultery during her absence in 1956 and also during the period of her alleged desertion, and contended that the questions went to credit. The case is reported solely on the judge's ruling on this point.

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A. H. Tibber for the wife.

D. P. F. Wheatley for the husband.

H

CAIRNS, J., in the course of his judgment, said: In the course of his cross-examination of the wife counsel for the husband put certain questions directed to eliciting that after she had left the husband she had associated with another man, and to ascertaining whether she had committed adultery with him. These questions were objected to by counsel for the wife on the ground that there was no allegation of adultery on the pleadings. Counsel for the husband contended that the questions went to credit. I felt some doubt whether such a line of cross-examination was permissible. From inquiries which I have since made, it would appear that it has been the general, though not the invariable, practice in this Division to allow such cross-examination. There is, however, so far as counsel have been able to discover, no reported case deciding the point.

I

It is clear that s. 32 (3) of the Matrimonial Causes Act, 1950, which protects a witness in proceedings instituted in consequence of adultery from being asked questions tending to show that he or she has been guilty of adultery, unless he

or she has already given evidence in dispute of the alleged adultery, has no application when the proceedings are for cruelty only. It is also established by the authority of the Court of Appeal that there is no general protection against questions tending to prove adultery on the ground that such questions are in any sense incriminating: *Blunt* v. *Park Lane Hotel, Ltd.* (1). The Court of Appeal has also decided that in a divorce suit founded on cruelty a party may be cross-examined as to adultery where there is on the pleadings an allegation of philandering which is closely connected with the issue of cruelty: see *Lewis* v. *Lewis* (2). In the last-mentioned case HODSON, L.J., said (3):

> "It is unnecessary to go further and consider whether in any event the question might have been permissible as tending to go to shake the credit of the husband, to whom the question as to adultery was addressed."

It was argued in the present case on behalf of the wife that a question as to adultery does not go to credit because the fact that a person has committed adultery, if it be a fact, does not make him or her a less reliable witness. The range of permissible cross-examination as to credit is, however, very wide. It has never, I think, been doubted that a conviction for any offence could be put to a witness by way of cross-examination as to credit, even though the offence was not one of dishonesty. Furthermore, if a petitioner who has not filed a discretion statement has to admit adultery when questioned about it, it tends to show that in that respect he or she has not been frank with the court, which may well be considered relevant to credit. Looking at the matter more widely, counsel may have such instructions as enable him to put a series of questions to the witness which may cause the witness to prevaricate or hedge in an attempt to conceal adultery of which he or she has in fact been guilty, and the credit of the witness may be very much shaken by the way in which such questions are dealt with.

For these reasons I decided that the questions put by counsel for the husband were permissible. It is obvious that responsible counsel will not put such questions unless he had instructions which, if true, would in fact indicate a probability that adultery had been committed. If an admission of adultery were obtained then, whatever its effect on the credit of the witness, it would put a wholly fresh complexion on the suit, of which the court would have to take notice. If the witness denies matters put, his evidence must, of course, be accepted, and evidence cannot be led to contradict him. When, in accordance with my ruling, questions were put to the wife she firmly denied that she had had any such association as was suggested so, in the result, this line of cross-examination had no effect at all on her credibility, and I approach the case as if the questions had never been put at all. In some cases the fact of such a line of cross-examination being adopted might well reflect adversely on the party who had authorised it. In the present case I do not consider that the husband in allowing those questions to be put was doing anything reprehensible.

Rule accordingly.

[HIS LORDSHIP, after considering the evidence, granted the husband a decree nisi on the ground of the wife's desertion.]

Solicitors: *Cawdery, Kaye & Co.* (for the wife); *A. D. Vandamm & Co.*, agents for *J. P. Nolan & Janes*, Southend-on-Sea (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(1) [1942] 2 All E.R. 187; [1942] 2 K.B. 253.
(2) [1958] 1 All E.R. 859; [1958] P. 193.
(3) [1958] 1 All E.R. at p. 862; [1958] P. at p. 200.

A

EAVES v. MORRIS MOTORS, LTD.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), June 19, 20, 21, July 5, 1961.]

Factory—Dangerous machinery—Duty to fence—Horizontal milling machine—Machine comprising traversing table carrying block in nature of vice—Bolts to be milled affixed to block—Whether block, when moving and carrying bolts, dangerous part of machinery—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

B

The plaintiff was employed by the defendants to operate a horizontal milling machine which was used for milling bolt heads and comprised a traversing table (or traverse) which, in the course of the operation of the machine, moved forward and then backward, carrying a block in the nature of a vice. Before each operation, the operator had to insert two bolts vertically in the vice, the bolts being held in place by the tightening of a nut. By moving a lever in front of the machine, the operator set in motion the traverse, which then went forward, carrying the bolts with it under the rotating cutting wheels. The traverse reversed itself automatically and stopped when it had returned to the former position. The operator would then remove the bolts, insert two more bolts, pull the starting handle and the operation would be repeated. During the operation, the cutting wheels were guarded by bars, the bolts in the vice passing between them. While the plaintiff was operating the machine, the block traversed forward and backward and then stopped in the normal way, but, as he was about to remove the two bolts from the vice, the machine "repeated", that is, the block started forward again without the plaintiff having pulled the starting handle. He hastily withdrew his hand to avoid its being drawn towards and against the guard, and in so doing cut his hand on a tiny burr or irregularity on the bolt head. The trivial cut became septic and he lost a finger. There was no evidence that the repeating of the machine could have been reasonably foreseen. The plaintiff claimed damages against the defendants for (among other grounds) breach of their statutory duty under s. 14 (1) of the Factories Act, 1937, to fence securely a dangerous part of machinery.

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Held: there was no breach of statutory duty under s. 14 (1) of the Factories Act, 1937, because—

(i) distinction must be drawn between material (viz., the bolts in the present case), which was dangerous when in motion in a machine, and machinery itself which was dangerous when in motion, and the obligation under s. 14 (1) to fence securely did not require that material should be fenced (see p. 241, letter B, p. 239, letter I, p. 236, letter C, and p. 237, letter C, post).

G

Bullock v. *G. John Power (Agencies), Ltd.* ([1956] 1 All E.R. 498); *Nicholls* v. *Austin (Leyton), Ltd.* ([1946] 2 All E.R. 92); and *Close* v. *Steel Co. of Wales, Ltd.* ([1961] 2 All E.R. 953) applied.

H

(ii) (per HOLROYD PEARCE and PEARSON, L.JJ.) the part of machinery in the present case was not dangerous as the "repeating" was not reasonably foreseeable (see p. 238, letter D, and p. 241, letter F, post); (per WILLMER, L.J.) s. 14 (1) did not extend to dangers due to abnormal and unexpected behaviour of a machine, such as the "repeating" in the present case (see p. 240, letter A, post).

I

Dictum of DU PARCQ, J., in *Walker* v. *Bletchley Flettons, Ltd.* ([1937] 1 All E.R. at p. 175); and *Close* v. *Steel Co. of Wales, Ltd.* ([1961] 2 All E.R. 953) applied.

Per HOLROYD PEARCE, L.J.: in deciding whether machinery is dangerous within s. 14 (1), it is permissible to consider whether the juxtaposition of material placed in the machine and the machinery when in normal motion gives rise to danger (see p. 238, letter C, post).

Decision of WINN, J. ([1960] 3 All E.R. 656) reversed. A

[As to the statutory duty to fence dangerous parts of machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 74, para. 126; and for cases on the subject, see 24 DIGEST (Repl.) 1049-1055, *180-218*.

For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.] B

Cases referred to:

Bolton v. *Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 36 Digest (Repl.) 18, *79*.

Bullock v. *G. John Power (Agencies), Ltd.*, [1956] 1 All E.R. 498; [1956] 1 W.L.R. 171; 3rd Digest Supp.

Carroll v. *Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 24 Digest (Repl.) 1056, *221*. C

Close v. *Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. 657; [1960] 2 Q.B. 299; [1960] 3 W.L.R. 401; *affd.* H.L., [1961] 2 All E.R. 953; [1961] 3 W.L.R. 319; 3rd Digest Supp.

Dickson v. *Flack*, [1953] 2 All E.R. 840; [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; 24 Digest (Repl.) 1051, *194*. D

Hindle v. *Birtwistle*, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; sub nom. *Birtwistle* v. *Hindle*, 66 L.J.Q.B. 173; 24 Digest (Repl.) 1053, *207*.

Hoare v. *M. & W. Grazebrook, Ltd.*, [1957] 1 All E.R. 470; [1957] 1 W.L.R. 638; 3rd Digest Supp.

Johnson v. *J. Stone & Co. (Charlton), Ltd.*, [1961] 1 All E.R. 869; [1961] 1 W.L.R. 849. E

Kilgollan v. *William Cooke & Co., Ltd.*, [1956] 2 All E.R. 294; [1956] 1 W.L.R. 527; 3rd Digest Supp.

Lenthall v. *Gimson & Co. (Leicester), Ltd.* (Leicester Assizes, May 24, 1956), unreported.

Lewis v. *High Duty Alloys, Ltd.*, [1957] 1 All E.R. 740; [1957] 1 W.L.R. 632; 3rd Digest Supp. F

Newnham v. *Taggart Morgan & Coles, Ltd.*, (July 19, 1956), unreported.

Nicholls v. *Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 24 Digest (Repl.) 1091, *419*.

Rutherford v. *R. E. Glanville & Sons (Bovey Tracey), Ltd.*, [1958] 1 All E.R. 532; [1958] 1 W.L.R. 415; 3rd Digest Supp.

Sparrow v. *Fairey Aviation Co., Ltd.*, [1961] 1 All E.R. 216; [1961] 1 W.L.R. 844. G

Summers (John) & Sons, Ltd. v. *Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; [1955] 2 W.L.R. 203; 24 Digest (Repl.) 1055, *217*.

Walker v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, *212*.

Appeal. H

This was an appeal by the defendants from a judgment of WINN, J., at Birmingham Assizes, given on Oct. 12, 1960, and reported ([1960] 3 All E.R. 656) whereby he awarded the plaintiff the sum of £1,851 10s. 2d. as damages for the defendants' negligence and breach of statutory duty under s. 14 (1) of the Factories Act, 1937. The appeal is reported only on the question of breach of statutory duty. I

John Thompson, Q.C., and *R. H. Tucker* for the appellants, the defendants.

A. E. James, Q.C., and *G. F. I. Sunderland* for the respondent, the plaintiff.

Cur. adv. vult.

July 5. The following judgments were read.

HOLROYD PEARCE, L.J.: The plaintiff was engaged on piece-work in the task of putting bolts, two at a time, through a milling machine driven by hydraulic

A power. The speed of the operation is shown by the fact that he could normally hope to deal with three thousand bolts during the night shift. He stood at a metal table on which was a vice or block into which he inserted two bolts standing upright. He made them secure by tightening a nut. He then pulled the starting handle, whereupon the metal table together with the block traversed a few inches towards the cutting knives of the machine, moving fairly fast. The knives had a B guard of vertical bars which allowed the block to pass underneath them and the projecting bolts to pass between them. Thus there was no danger of his hand coming into contact with the knives. While the bolts were being milled by the knives the block momentarily halted. The block (and table) then reversed, the block still holding the bolts emerged once more from within the guard, and returned to the position whence it started. The metal table and block would then C halt. The plaintiff would then loosen the nut and remove the bolts. He would insert two fresh bolts, pull the starting handle again, and the whole operation would be repeated. On the occasion of the accident the machine "repeated" or "performed an uncovenanted stroke". Instead of remaining stationary on the completion of its task it suddenly for no apparent reason started off on its journey again without the plaintiff pulling the starting handle. He was just in D the act of removing the finished bolts when this happened. He hastily withdrew his hand to avoid its being drawn towards and against the guard and in so doing cut his hand on a tiny burr or irregularity on the bolt head. This trivial cut became septic and he lost his finger.

The two questions that arise are: First, was there a failure to fence within s. 14 of the Factories Act, 1937, and secondly, was there at common law a failure E to use reasonable care to see that the machine was properly maintained in consequence of which failure it "repeated"? On both those questions the judge found in the plaintiff's favour.

It is conceded that the block without the bolts in it was not a dangerous part of the machinery. The learned judge said this (1):

> "There can be no doubt, in my judgment, that the block is part of the F machinery, and, at the material moment, a moving part of the machinery. I cannot, for my part, believe that it is right to take the view, and I refuse to take it, that the bolts standing in that block were not themselves part of the block. If the block itself had had a sharp edge and, by moving forward, had cut the plaintiff's finger, then it would have been a moving part of the machinery which was dangerous, moving as it was and giving motion to G the bolts which were then physically in it. The block comprised the bolts, and the bolts in the block were part of the machinery. It may be only playing with words, but I put my thoughts a little differently when I say that the block itself was a dangerous part of the machinery when it moved, because it carried with it those bolts."

H Section 14 (1) of the Factories Act, 1937, reads:

> "Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

Section 14 (3) provides:

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> "Any part of a stock-bar which projects beyond the head-stock of a lathe shall be securely fenced unless it is in such a position as to be as safe to every person employed or working on the premises as it would be if securely fenced. The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine."

(1) [1960] 3 All E.R. at p. 659.

Regulations have been made under that section with regard to fencing particular classes of machinery and when so made they take the place of and to that extent modify the absolute duty to fence under s. 14 so far as concerns those particular classes of machinery. No regulations, however, have been made with regard to fencing the material used in machinery.

I feel sympathy with the learned judge's view of the matter and I would gladly accept it, were it not for s. 14 (3) and authorities which are in my judgment inconsistent with that view. Section 14 (3) would be completely pointless if the true meaning of s. 14 (1) was that materials or articles which are dangerous while in motion in the machine can be regarded as part of the machinery and, therefore, have to be fenced under that section. For s. 14 (3) expressly gives the Secretary of State power to make regulations requiring them to be fenced. Moreover, it expressly provides for the fencing of a stock-bar which projects beyond the head-stock of a lathe—a typical example of material which is dangerous while in motion in the machine. It is, therefore, difficult to construe "machinery" in s. 14 (1) as including the "materials or articles" which are "in motion in the machine".

I cannot accept counsel for the plaintiff's ingenious suggestion that the words of sub-s. (3) are intended to give the Secretary of State power to modify the rigid requirements of sub-s. (1) by making regulations which will supersede them, and which by being in some respects less strict (as, e.g., the Horizontal Milling Machines Regulations, 1928 (S.R. & O. 1928 No. 548)) will give practical help to problems caused by the rigidity of fencing requirements. The words of sub-s. (3) do not tolerate such an argument. They are plainly directed to the making of regulations requiring the fencing of materials or articles and not to regulations modifying the fencing requirements of s. 14 (1).

In *Hindle* v. *Birtwistle* (2), it was decided that there had been a failure to fence a dangerous part of machinery when the shuttle flew off a weaving machine and injured the plaintiff. WILLS, J., said (3):

> ". . . machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection."

It is urged by counsel for the plaintiff that the learned judges were there considering danger as it should be considered, namely, as danger to the workman for whose protection the Act was passed, without restriction on how the danger is caused, provided that the danger emanates from the machinery and can reasonably be anticipated. That is an attractive and sensible approach if the wording of the Act of 1937 and the authorities allow it. But in *Nicholls* v. *Austin (Leyton), Ltd.* (4) the House of Lords on a consideration of the wording of s. 14 concluded that the obligation under it was an obligation to guard against contact with machinery and not to guard against dangerous materials ejected from it—an obligation to "fence out" and not an obligation to "fence in".

In *Carroll* v. *Andrew Barclay & Sons, Ltd.* (5) the House of Lords held that there was no breach of s. 14 where a broken belt (part of the transmission machinery) lashed out at the plaintiff and injured him. But doubts were expressed by some of the noble and learned Lords whether, in spite of what was said in *Nicholls'* case (4), machines which were dangerous because they ejected loose parts of the machinery (as opposed to materials in it) might not require to be fenced. In *Dickson* v. *Flack* (6) this court, having considered those dicta, held that there was a breach of s. 14 when a cutter thrown off (as was not unusual) from a spindle in a woodworking machine injured the plaintiff. The same view was taken by this court in *Newnham* v. *Taggart Morgan & Coles, Ltd.* (7) and *Rutherford* v. *R. E. Glanville & Sons (Bovey Tracey), Ltd.* (8).

(2) [1897] 1 Q.B. 192. (3) [1897] 1 Q.B. at p. 195.
(4) [1946] 2 All E.R. 92; [1946] A.C. 493.
(5) [1948] 2 All E.R. 386; [1948] A.C. 477.
(6) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464. (7) (July 19, 1956), unreported.
(8) [1958] 1 All E.R. 532.

A In *Bullock* v. *G. John Power (Agencies), Ltd.* (9) this court decided that a plaintiff could *not* recover in respect of injury caused by a loose end of wire which was being wound on an electric drum. The ratio of the case is in certain respects conclusive of the present case. The court founded itself on *Nicholls'* case (10) and on the distinction there drawn between the machinery and the materials in it.

B Counsel for the plaintiff argued that that case would not now be so decided since this court was then largely relying on the view in *Nicholls'* case (10) that the purpose of fencing under s. 14 was to keep out the body of a workman and not to fence in flying objects, and that, since subsequent cases such as *Dickson* v. *Flack* (11) have held that this view did not apply in respect of flying pieces of machinery, the natural force of *Bullock* v. *Power* (9) is abated. Therefore, he C urged us to return to the broad common-sense view expressed by WILLS, J., and WRIGHT, J., in *Hindle* v. *Birtwistle* (12). But *Nicholls'* case (10) decided that material is a separate thing from the machine which controls it and that the section does not require material to be fenced. It was on that aspect of *Nicholls'* case (10) that this court decided *Bullock* v. *Power* (9). Judicial opinion on that matter has never changed and in view of the wording of s. 14 (3) it is difficult to D see how it could do so.

Moreover, since counsel for the plaintiff's argument was put before us, the House of Lords decided by a majority in *Close* v. *Steel Co. of Wales, Ltd.* (13) that fencing is not required even against flying pieces of machinery, and that, therefore, the three Court of Appeal decisions (14) which decided otherwise were wrong. In the Court of Appeal in that case LORD EVERSHED, M.R. (15), E giving the judgment of the court, had pointed out the lack of logic or common sense in the distinction between danger from flying pieces of materials and danger from flying pieces of machinery. Since this recent decision of the House of Lords has disapproved of the extension of the section by this court (in *Dickson* v. *Flack* and the two other cases (14) cited earlier) to cover flying pieces of dangerous machinery, the illogical distinction between flying pieces of machinery and flying F pieces of material has disappeared. But the unprotected gap between the actual dangers of dangerous machinery and the dangers against which fencing is required is correspondingly increased.

Bullock v. *Power* (9) forbids us to hold that the danger (if any) created by sharpness of the bolts themselves with which this block is normally armed can constitute it dangerous machinery within s. 14. The learned judge was, therefore, G not entitled to equate the bolts to the block or to hold that the sharp burr on the bolt made the machinery dangerous in the present case.

Counsel for the plaintiff argues before us that although the foregoing authorities have held that dangerous machinery need not be fenced if the dangers that they create come from flying machinery or material, yet machinery that is dangerous by reason of some juxtaposition with its normal material (for instance, when it H creates a nip between the machinery and the material) is required to be fenced under s. 14, and that in this case such danger caused the accident.

On the question how far machinery may be said to be dangerous within s. 14 through conjunction with or juxtaposition with the materials on which it was working, ASHWORTH, J., in *Lewis* v. *High Duty Alloys, Ltd.* (16), and STREATFEILD, J., in *Sparrow* v. *Fairey Aviation Co., Ltd.* (17), have favoured the view I that the presence of the material is not relevant for the purpose of considering

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(9) [1956] 1 All E.R. 498. (10) [1946] 2 All E.R. 92; [1946] A.C. 493.
(11) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464. (12) [1897] 1 Q.B. 192.
(13) [1961] 2 All E.R. 953.
(14) *Dickson* v. *Flack*, [1953] 2 All E.R. 840; [1953] 2 Q.B. 464; *Newnham* v. *Taggart Morgan & Coles, Ltd.* (July 19, 1956), unreported; *Rutherford* v. *R. E. Glanville & Sons (Bovey Tracey), Ltd.*, [1958] 1 All E.R. 532.
(15) [1960] 2 All E.R. at p. 668; [1960] 2 Q.B. at p. 317.
(16) [1957] 1 All E.R. 740. (17) [1961] 1 All E.R. 216.

whether machinery is dangerous. On the other hand, a different view has been taken by FINNEMORE, J., in *Lenthall* v. *Gimson & Co. (Leicester), Ltd.* (18); by LYNSKEY, J., in *Hoare* v. *M. & W. Grazebrook, Ltd.* (19); and by HINCHCLIFFE, J., in *Johnson* v. *J. Stone & Co. (Charlton), Ltd.* (20). Each case must, of course, depend on its facts and in industrial cases the facts vary greatly. But that variation does not conceal an unfortunate divergence of view.

Although *Bullock* v. *Power* (21) does not allow us to equate dangers from the nature of the material (i.e., the sharp edge of the bolts) to dangers from the machinery, it does not compel us when deciding whether machinery is dangerous to disregard the nature of the machine when it is doing its normal appointed task or from holding it to be dangerous if that task clearly involves danger from its juxtaposition with its normal materials. If a moving arm of the machine does not project, and is, therefore, safe when the machine is empty, but projects dangerously when the machine is supplied with its proper material, it can obviously be labelled as dangerous machinery. And if it creates a dangerous nip when supplied with its normal material and when working normally (or in a foreseeable manner) I see no reason in principle why the court cannot consider the machinery dangerous, even if that nip is only created by the juxtaposition of material and machinery. For in that case it is not the nature of the material and it is not the material itself which causes the danger. The danger is caused by the design of the machine itself working normally with harmless material. Therefore, if the block in the present case when armed with the bolts for which it was intended and when working normally (or in a foreseeable manner), created a nip between the bolts and the guard which might take the operator unawares, we could in my view hold that this machine was dangerous. But it would only be dangerous if it were shown that the " repeating " was reasonably foreseeable. The evidence here does not establish that a repeat was foreseeable.

Counsel for the plaintiff's able argument by which he seeks to rely on the law as it was laid down in *Hindle* v. *Birtwistle* (22) cannot prevail in the light of more recent authorities and of the wording of the Act of 1937. The argument has shown how technical and artificial the question of protection under s. 14 has become and how illusory in certain respects the words " Every dangerous part of any machinery . . . shall be securely fenced " have now become. One may venture, perhaps, to express regret that an important part of the protection accorded to the workman by the Factory and Workshops Act, 1878 and 1891, has been destroyed by the wording of the Factories Act, 1937, and the authorities based on that wording. Under the former Act dangerous machinery had to be fenced if danger might reasonably be anticipated from it (*Hindle* v. *Birtwistle* (22)). Now dangerous machinery is only required by s. 14 to be fenced against danger of a particular and limited kind, namely, danger from workmen coming into contact with the machine. There is no protection under s. 14 against a class of obvious perils caused by dangerous machinery, namely, perils which arise from a dangerous machine ejecting at the worker pieces of the material or even pieces of the machinery itself. Thus, there is now left a gap which neither logic nor common sense appears to justify.

At common law the learned judge held, after some doubt, that there had been negligence under certain of the particulars pleaded in the statement of claim, namely: The defendants (a) failed to guard every dangerous part of the machine; (b) failed to maintain the said machine in proper working order; (c) failed to pay any or any sufficient heed to a similar complaint made to the tool setter and to the foreman by another workman shortly before the said accident.

It is conceded that the judge simply equated a negligent failure to guard at common law to a breach of s. 14 and gave no separate consideration to it, and that, therefore, it must stand or fall with the defendants' liability under s. 14.

(18) (Leicester Assizes, May 24, 1956), unreported. (19) [1957] 1 All E.R. 470.
(20) [1961] 1 All E.R. 869. (21) [1956] 1 All E.R. 498. (22) [1897] 1 Q.B. 192.

A There remain only (b) and (c), which may be taken together as an allegation of failure to maintain, emphasised by disregard of warnings.

[HIS LORDSHIP considered the evidence and concluded that the plaintiff had not proved either that the machine had repeated before the accident or that the repeating resulted from insufficient maintenance or that it could have been discovered beforehand or prevented in any way. HIS LORDSHIP continued:]

B No accident of this kind had happened before. The chain of events leading to the injury is quite extraordinary. The machine repeated in this inexplicable way for which the judge tried to account by an ingenious practical theory which may be right but does not on the evidence indicate negligence on the defendants' part. The result of an unusual burr was to cut the plaintiff's finger slightly. The result of that was an injury out of all proportion to it.

C In my judgment, the plaintiff has not established that the defendants have failed to use reasonable care, and loath as I am to differ from a learned judge of wisdom and experience I would regretfully allow the appeal.

WILLMER, L.J.: I have reached the same conclusion. In so far as the plaintiff's claim is based on breach of s. 14 (1) of the Factories Act, 1937, I have D not felt much difficulty, and I do not think that the learned judge's decision on that part of the case can be supported. The alternative claim in negligence seems to me to present a more difficult problem, and I confess that my mind has wavered during the hearing of the appeal. In the end, however, I am not prepared to dissent from the view expressed by HOLROYD PEARCE, L.J., and like him have reached the conclusion that negligence has not been established.

E I will deal first with the claim based on breach of s. 14 (1) of the Act. By their recent decision in *Close* v. *Steel Co. of Wales, Ltd.* (23), the House of Lords has, by a majority, laid down once and for all that the duty of an employer under s. 14 (1) of the Act is limited to such fencing as will prevent the workman coming into contact with moving parts of the machinery. Here, therefore, the plaintiff can succeed only if he shows that his injury was due to the defendants' failure F so to fence the machine in question as to prevent him from coming into contact with its moving parts. He can only do this if he is right in his contention that, in the circumstances of this case, the bolts on which he caught his finger are properly to be regarded as parts of the machine. The learned judge thought that they were, and I need not take time by referring again to the relevant part of his judgment, which HOLROYD PEARCE L.J., has already read.

G With all respect to the view of the learned judge, I do not think that it is a view which is open to us. Section 14 (3) of the Act of 1937 draws the clearest possible distinction between the machine and materials or articles which may be in motion in the machine. The subsection would be unnecessary, and indeed nonsensical, if it were permissible to regard the latter as themselves forming part of the machine. Moreover, the view of the learned judge seems to me to be in H direct conflict with the decision of this court in *Bullock* v. *G. John Power (Agencies), Ltd.* (24), the authority of which must in my view be regarded as reinforced, albeit indirectly, by the decision of the House of Lords in *Close* v. *Steel Co. of Wales, Ltd.* (23). Having regard to the guidance which we have now received from the House of Lords, I do not think it necessary to refer to the numerous authorities which were cited to us on this aspect of the case. I content myself with saying I that in my judgment we are precluded by authority from holding that the bolts which caused the plaintiff's injury were part of the machine, so as to call for fencing to prevent injury from contact with them.

But there is, I think, another and broader ground for holding that there was no breach of the statute in the present case. The provisions relating to fencing of dangerous machinery in Part 2 of the Act are designed, as I see it, to prevent dangers arising in the course of the normal operation of the machinery. I do not

(23) [1961] 2 All E.R. 953. (24) [1956] 1 All E.R. 498.

think that dangers due to the machinery breaking down or behaving in some abnormal and unexpected way are within the purview of the Act. I think that this is implicit in the provisions of the Act itself. Thus it seems to me that the "motion" referred to in s. 15, and the "motion" and "use" referred to in s. 16, must in their context refer to motion and use in the course of normal operation. It is not without significance that every single one of the numerous cases brought to our attention has been concerned with dangers arising from machinery in the course of its normal operation. Moreover, it is obvious from the dicta of the various judges who have dealt with these cases that they have regarded the provisions of the Act as applicable only to such dangers. Thus in *Hoare* v. *M. & W. Grazebrook, Ltd.* (25) LYNSKEY, J., though I do not agree with his decision, stated the question correctly in my view, when he said that it was "whether a machine becomes dangerous in the operation which it is intended to perform". In *Carroll* v. *Andrew Barclay & Sons, Ltd.* (26) LORD PORTER said:

> "Even in the case of the flying spindle it was not a breaking of a part of the machine, but an accident which might have been anticipated from its ordinary working which had to be guarded against."

In the same case LORD NORMAND was, I think, contemplating the normal working of the machine when he referred (27) to the possibility that detachable or broken parts might be thrown off in working. LORD GODDARD, C.J., in *Newnham* v. *Taggart Morgan & Coles, Ltd.* (28) (referred to in *Close* v. *Steel Co. of Wales, Ltd.* in the Court of Appeal (29)) while holding, as it would now appear erroneously, that the law requires fencing of a machine which it is known may cause danger by reason of its breaking, went on to add,

> ". . . if that breaking is a risk which is, as I would put it, inherent or likely to occur in the working of the machine."

This view of the scope of the Act certainly accords with common sense. An employer may reasonably be expected to foresee and guard against dangers likely to arise in the course of the normal operation of machinery. But no man could be expected to foresee and guard against the almost unlimited possibilities of danger that might arise from a machine going wrong or operating in a way that it was never designed to do. If an employer were required to provide fencing to guard against all such possibilities of danger, this would, as it seems to me, impose an intolerable burden, and one which I cannot think Parliament can have intended to impose in the absence of any clear provision to that effect. The fact of a machine going wrong in such a way as to cause injury to a workman may, of course, and commonly will, provide evidence of negligence against the employers. It is so alleged, for instance, in the present case. Here, on the findings of the learned judge, the machine certainly did go wrong. It did something which it was never designed to do—for, to use counsel for the defendants' picturesque phrase, it "performed an uncovenanted stroke". This may be a ground for imputing negligence to the defendants or their servants, but it does not in my judgment provide any ground for saying, ex post facto, that they were in breach of their duty under the Act in not foreseeing it and in not providing fencing to guard against the danger of injury resulting therefrom. On this ground also I am satisfied that no case of breach of statutory duty was made out against these defendants.

[HIS LORDSHIP considered the alternative claim in negligence and continued:] Taking the evidence as a whole, I think that it does sufficiently show that the defendants had not, prior to this accident, been lacking in reasonable care in and

(25) [1957] 1 All E.R. at p. 474.
(26) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 485.
(27) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 490.
(28) (July 19, 1956), unreported.
(29) [1960] 2 All E.R. at p. 666; [1960] 2 Q.B. at p. 315.

A about the maintenance of this machine. On the whole, I come to the conclusion that the charge of negligence was not made out against them. Accordingly, I agree that this appeal should be allowed.

PEARSON, L.J.: The construction of s. 14 of the Factories Act, 1937, has been considered in a number of cases, and three propositions, derived from B the general subject-matter of the section and its detailed provisions, have been established, which are relevant for the present case.

(i) A distinction is drawn between dangerous parts of machinery and materials or articles which are dangerous in motion in the machine. The dangerous parts of machinery are dealt with by s. 14 (1) and are, subject to certain exemptions, required to be fenced. The dangerous materials or articles (which are sometimes, C as in this case, conveniently referred to as " components " because they are destined to become components of other machines) are not required by the section itself to be fenced, but there is a power under the concluding words of the section to make regulations requiring them to be fenced. No relevant regulations have been made, and one can see the difficulty of drafting general provisions for the fencing of things so variable as components. *Nicholls* v. *Austin (Leyton), Ltd.* (30); D *Carroll* v. *Andrew Barclay & Sons, Ltd.* (31); *Bullock* v. *G. John Power, Ltd.* (32); *Kilgollan* v. *William Cooke & Co., Ltd.* (33); *Close* v. *Steel Co. of Wales, Ltd.* (recently decided in the House of Lords) (34).

(ii) The nature of the danger envisaged by s. 14 (1) is that a workman may suffer injury directly by coming into contact with a dangerous part of the machinery, and indirect causation is not envisaged. *Nicholls* v. *Austin (Leyton), Ltd.* (30); E *Carroll* v. *Andrew Barclay & Sons, Ltd.* (31); *Bullock* v. *G. John Power, Ltd.* (32); *Kilgollan* v. *William Cooke & Co., Ltd.* (33); *Close* v. *Steel Co. of Wales, Ltd.* (34). Those cases were largely concerned with the meaning and effect of the words " securely fenced ", but they also show the nature of the danger envisaged.

(iii) As regards the degree of danger envisaged, a part of machinery is " danger- F ous " within the meaning of the section if it is a reasonably foreseeable cause of injury to anybody acting in a way in which a human being may be expected to act in circumstances which may reasonably be expected to occur. *Walker* v. *Bletchley Flettons, Ltd.* (35) per DU PARCQ, J.; *John Summers & Sons, Ltd.* v. *Frost* (36), per LORD REID. In *Carroll* v. *Andrew Barclay & Sons, Ltd.* (37) LORD PORTER, referring to previous cases, said:

G

> " In each case, however, it was injury caused by the working of the machine and the danger which might reasonably be anticipated from its working. Even in the case of the flying spindle it was not a breaking of a part of the machine, but an accident which might have been anticipated from its ordinary working which had to be guarded against. The machine was found to be a dangerous H one because of the liability of spindles to fly out, and it was that danger which was liable to occur in the course of its ordinary working, not its abnormal action in breaking, for which a fence had to be provided."

In *Close* v. *Steel Co. of Wales, Ltd.* (38), LORD EVERSHED, M.R., said:

> ". . . a part of a machine should not be regarded as ' dangerous ' within I the language of the section unless the risk of injury can be fairly described as reasonably foreseeable in the ordinary course."

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(30) [1946] 2 All E.R. 92; [1946] A.C. 493.
(31) [1948] 2 All E.R. 386; [1948] A.C. 477.
(32) [1956] 1 All E.R. 498.
(33) [1956] 2 All E.R. 294.
(34) [1961] 2 All E.R. 953.
(35) [1937] 1 All E.R. at p. 175.
(36) [1955] 1 All E.R. at p. 882; [1955] A.C. at p. 765.
(37) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 485.
(38) [1960] 2 All E.R. at p. 667; [1960] 2 Q.B. at p. 317.

On the question of what is reasonably foreseeable, reference can be made to the speech of LORD PORTER in a negligence case, *Bolton* v. *Stone* (39), where he said: A

> "Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."

B

In my opinion, the plaintiff has failed to prove that any relevant part of the machine was "dangerous" within the meaning of s. 14. The combination of the table, the block and the bolts or other components would not cause any injury so long as it was operating properly. If it made an unintended movement, such as has been referred to as a "repeat" or an "uncovenanted stroke", the operator would be taken by surprise, and if he was handling the components his hand might be caught by the moving components and suffer some injury, although nothing more than a very slight injury would be likely to occur. Even if that were likely to happen, it would not render any part of the machinery "dangerous" within the meaning of the section, because the contact causing the injury would not be with the machinery but with the components in motion in the machine. On the facts of this case the distinction seems technical and artificial, but it is clearly drawn by the section, and any theory of indirect causation, for example, that the traverse is a dangerous part when some fault in it causes ultimately the movement of the components, is untenable under the section. Secondly, although it was proved that there was a "repeat" on the night shift of Mar. 31, 1958, and there were "uncovenanted strokes" on the following morning, there was no proof that any such thing had ever happened to this machine or similar machines in this factory before or since, or that there was any liability or tendency or propensity for any such thing to happen. The foreman had heard of such machines repeating but had never seen it apart from this case, and Mr. Haddon, the expert fitter, had been able to make the machines repeat by alteration of the controls in the course of testing and adjustment, but otherwise had apparently no experience of it. The plaintiff said in cross-examination "I can get you twelve chaps who it did it on", but did not call any witness who had had that experience except Mr. Hall. Mr. Hall said he had the experience on Apr. 1, 1958, and there are several passages in his evidence showing that that was the only occasion. In view of Mr. Hall's own evidence, the unexpected statement by Mr. Cole in re-examination, to the effect that Hall made a complaint of his machine "repeating" some time before this accident happened, must be regarded as not only hearsay but also inherently unreliable. The necessary proof that the machine had a propensity to repeat is lacking.

C D E F G

[HIS LORDSHIP reviewed the position at common law, and continued:] In this troublesome case I have been reluctant to differ from the learned judge's decision in favour of the plaintiff, but feel impelled by the evidence to the conclusion that the plaintiff did not prove that his accident was caused by any breach of statutory duty or negligence on the part of the defendants. I agree that the appeal should be allowed.

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Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Herbert & Gowers & Co.* (for the appellants); *Alan, Edmunds & Phillips*, agents for *Hewitt & Walters*, Birmingham (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(39) [1951] 1 All E.R. at p. 1081; [1951] A.C. at p. 858.

A

R. v. ATTFIELD.

[COURT OF CRIMINAL APPEAL (Ashworth, Thesiger and Megaw, JJ.), July 10, 1961.]

Criminal Law—Trial—Summing-up—Evidence—Whether fatal defect if evidence not reviewed by judge in summing-up.

B *Criminal Law—Burden of proof—Standard of proof required—Summing-up—Direction that jury should be satisfied and sure of prisoner's guilt.*

The proper form of direction to the jury on onus of proof in criminal cases is for them to be told that the burden is on the prosecution, and that the standard of proof required before a verdict of guilty can be returned is that the jury should be satisfied, that they should feel sure (see p. 247, letter A, post).

C

The appellant was charged on two counts with indecently assaulting two boys and on two counts with committing acts of gross indecency with the same two boys. After the boys had given evidence and the accused had been examined in chief, the recorder, after counsel for the Crown at the court's invitation had put to the court in summary form the matters of corroboration on which he relied, invited the jury to stop the case, suggesting to them that, having regard to the discrepancies of the boys' stories and the accused's good character, it would be unsafe to convict. The jury, however, indicated that they wished to hear the case to its end and the court thereupon rose for the Easter recess, on the Thursday, resuming the trial on the following Tuesday. The evidence was then concluded and, after counsel had addressed the court, the recorder summed up, directing the jury as to the law, but did not deal with the evidence except in regard to the appellant's character, and, on the burden of proof, though he told them over and over again that they must be satisfied as to the appellant's guilt or else acquit, he did not use the word "sure". The jury convicted the appellant. On appeal against conviction,

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Held: although in a complicated and lengthy case it was incumbent on the court to deal with the evidence in summing-up, yet where, as in the present case, the issues could be simply and clearly stated, it was not a fatal defect for the evidence not to be reviewed in the summing-up (see p. 245, letter I, to p. 246, letter D, post); further, although the jury were not directed on the burden of proof as indicated at letter B above, nevertheless in the present case the defect was not such as would justify the court in interfering with the conviction (see p. 247, letter B, post).

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R. v. *Stoddart* ((1909), 2 Cr. App. Rep. 217) followed.

Appeal dismissed.

[As to a judge's summing-up and contents thereof, see 10 HALSBURY'S LAWS (3rd Edn.) 423-425, paras. 779. 780, especially notes (g) and (h), and Supplement; and for cases on the subject, see 14 DIGEST (Repl.) 330-332, *3197*, *3198*, *3202-3205*, *3222*, 333, *3224*, 334, *3242-3245*, 335, *3249*, *3253* and 3rd DIGEST Supp.

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As to burden of proof, see 10 HALSBURY'S LAWS (3rd Edn.) 436, para. 809.]

Cases referred to:

Abrath v. *North Eastern Ry. Co.*, (1883), 11 Q.B.D. 440; 52 L.J.Q.B. 620; 49 L.T. 618; 47 J.P. 692; *affd.* H.L., (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 657; 33 Digest 506, *492*.

I

R. v. *Stoddart*, (1909), 73 J.P. 348; 2 Cr. App. Rep. 217; 14 Digest (Repl.) 330, *3202*.

Appeal.

This was an appeal by Joseph Albert Attfield against his conviction at Portsmouth Quarter Sessions on Apr. 4, 1961, before the recorder and a jury on two counts of indecent assault on two young boys and two counts of gross indecency with the same two boys. He was sentenced by the recorder to nine months'

imprisonment on each count, the sentences to run concurrently. The offences were said to have occurred between Mar. 1, 1959, and Nov. 30, 1960. The facts are set out in the judgment of the court. A

The appellant applied for leave to appeal against his conviction on two main grounds—(i) that the recorder failed to instruct the jury correctly on the burden of proof in that (a) he failed to direct the jury that the prosecution had to prove the guilt of the appellant beyond reasonable doubt or that guilt had to be proved so that they were sure of the appellant's guilt; and (b) he wrongly told the jury they could convict if they were satisfied of his guilt; and (c) he wrongly told the jury that the standard of proof was that which they would apply in some serious matter in their own affairs; and (ii) that the recorder failed to put the defence to the jury and failed to instruct them as to what evidence in law could be regarded as corroboration. His application came before the court (ASHWORTH, PAULL and ELWES, JJ.) on May 19, 1961, when the court, granting leave, also allowed the appellant bail. The authority and cases cited below were quoted in argument in addition to those in the judgment*. B C

H. J. M. Tucker for the appellant.
J. H. Inskip for the Crown.

D

ASHWORTH, J., delivered the following judgment of the court: This appellant, Joseph Albert Attfield, was convicted on two counts of indecent assault on two boys, and two counts of gross indecency, at Portsmouth Quarter Sessions, and was sentenced by the learned recorder to nine months' imprisonment. He appeals to this court by leave of the court.

The two substantial grounds of appeal on which he relies are as follows: First, he says that the learned recorder failed to instruct the jury correctly on the burden of proof, and secondly, and perhaps with more force so far as the appellant is concerned, he says that the summing-up was wholly defective and amounted to a misdirection in that throughout its course the learned recorder omitted to discuss any of the evidence except that as to the accused's character. E

It is desirable to state shortly the calendar in regard to the trial itself. The case was called on late in the afternoon of Wednesday, Mar. 29, 1961. On Mar. 30, after a late start, witnesses were called, including the present appellant. The hearing went on until about six o'clock, and the learned recorder then invited counsel for the prosecution to summarise for him the points on which he relied in regard to corroboration and, having heard argument on that, the learned recorder then delivered to the jury what is accepted before us as an invitation to them to stop the case and acquit the accused. It is quite unnecessary to read that invitation, which was lengthy, but it is plain from a study of it that the learned recorder was suggesting to the jury that having regard to the discrepancy in the boys' evidence, the accused's good character and the like, it would be unsafe for them to convict; but the jury withdrew and after a six minutes' retirement they returned, and the foreman said this—" We all feel that we cannot return a verdict now. We must hear the case to the end ". That was the Thursday before Easter, and the court rose at seven o'clock in the evening. On Easter Tuesday the trial was resumed. Two witnesses were called on behalf of the appellant, and then counsel, first for the defence, and then for the Crown, addressed the jury, and the learned recorder came to sum up to the jury, as he says in his opening sentence, at 3.20 in the afternoon. The summing-up took him twenty-five minutes. F G H I

It is unnecessary except in the briefest summary, to mention the facts of the case. The period over which the offences were said to have been committed was considerable. The boys, if the prosecution were right, were assaulted by this man, so to speak, in succession, and one of the points made on behalf of the

* ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE (34th Edn.), paras. 565, 927; *R.* v. *Finch*, (1916), 12 Cr. App. Rep. 77; *R.* v. *Hepworth*, *R.* v. *Fearnley*, [1955] 2 All E.R. 918; *R.* v. *Blackburn*, (1955), 39 Cr. App. Rep. 84.

A defence was that this was a fabricated story by the first boy, and a case of revenge by the second. The details as to the indecencies were unpleasant and precise. The accused himself gave evidence, and protested more than once in answers in cross-examination that he was in love with these boys. Without citing his evidence in any detail, it is sufficient for this court to say that any jury hearing those answers might well take the view that they were the answers of B a most unpleasant man.

It is convenient to deal first with the point that the summing-up was defective on the ground that the evidence was not dealt with at all except in regard to the appellant's character. No doubt it is right to say that probably in nine cases out of ten that come before the courts, the trial judge, whether he be a judge or recorder or chairman of quarter sessions, in summing-up goes through C the evidence. It would be quite wrong to suggest that it is the trial judge's duty to read out the whole of the evidence, and that is not suggested. Indeed, many would take the view that a mere recitation of evidence which the jury themselves have heard does not assist them at all. In most cases what the trial judge endeavours to do is by reference to the evidence to direct the jury's attention to what may be called the salient features for and against the accused D man. No case has laid down, so far as we are aware, that it is essential for the validity of a summing-up that there should be a reference to the evidence, but equally there is no case that, so to speak, absolves a court from what is normally its function of assisting the jury by dealing with the evidence. Some assistance is to be gained from a passage cited in *R.* v. *Stoddart* (1). In that case a trial had taken place over a period of twenty days, and there was an omission to E direct the jury on many of the no doubt complex issues which had been considered in the course of it, but this court cited the words of SIR WILLIAM BRETT, M.R. (2) in *Abrath* v. *North Eastern Ry. Co.* (3), as follows:

> "It is no misdirection not to tell the jury everything which might have been told them: there is no misdirection, unless the judge has told them something wrong, or unless what he has told them would make wrong that F which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood."

That is the end of the quotation, and this court then went on:

> G "Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have H been dealt with on other occasions should be introduced. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice (4)."

Nothing that this court is saying today is intended to put forward the suggestion that a judge is entitled to refrain from discussing the evidence if the circumstances of the case and the conduct of the trial demand that he should. The I words that are important in *R.* v. *Stoddart* (5) are that each case must depend on its own facts. Clearly, in a complicated and lengthy case it is incumbent on the court to deal with the evidence. Conversely, in a case which has not occupied a great deal of time and in which the issue, guilt or innocence, can be simply and

(1) (1909), 2 Cr. App. Rep. at p. 246. (The appeal was heard before LORD ALVERSTONE, C.J., DARLING, PHILLIMORE, BRAY and LAWRENCE, JJ.)
(2) Later LORD ESHER, M.R. (3) (1883), 11 Q.B.D. at p. 453.
(4) Cf. *R.* v. *Cohen and Bateman*, (1909), 2 Cr. App. Rep. at p. 207.
(5) (1909), 2 Cr. App. Rep. 217.

clearly stated, this court is not prepared to hold that it is a fatal defect to the summing-up that the evidence has not been discussed. A

In the present case, if one reflects on what had transpired before the jury, while it is true that the jury had seen the witnesses five days before they gave their verdict, none the less the impression created by those witnesses, the boys against the man, the police officers against the man, must, one may well think, have created an impression on the jury and, accordingly, on the Tuesday after Easter, having heard the addresses of counsel pointing out the pros and cons, and then listened to a direction on the law, we think that they were in a position adequately to discharge their duty of deciding which side they were to believe. It is true, as counsel for the appellant has said, that there were points which could be made on behalf of the present appellant. No doubt they were made by him in addressing the jury, but it is equally true to say that there were points which no doubt were cogently made by the prosecution against him, and what the learned recorder did was to carry out what appears to have been his intention on the previous Thursday to leave the jury to decide, as was their duty, the issue of fact for themselves. Accordingly, this court would not be prepared to set aside this conviction on that ground. B C

The other ground depends on the wording of the summing-up in regard to the burden of proof. It is fair to say that over and over again appeals are brought to this court, or applications are made for leave to appeal, based on alleged inadvertencies in direction as to the burden of proof, and this court finds itself in the position of having to apply, so to speak, two parallel principles. In the first place, the direction as to the burden of proof and as to the standard of proof is undoubtedly of cardinal importance. That is a point in favour of the appellant, and if the direction fails in that respect then indeed the appeal is all the more cogent. On the other hand, there is a counterbalancing principle that this court has said that the words of a summing-up are not to be weighed in too nice scales provided that the substance of the summing-up presents to the jury the issue in a form in accordance with law. It is in the application of those two counterbalancing principles that this court fulfils its function. D E F

In the present case the complaint is made that nowhere from first to last in this summing-up was there any reference either to reasonable doubt or to the current word " sure ". So far as the wording itself is concerned, that is true. Throughout the summing-up over and over again the learned recorder used the word " satisfied ", but it would not be fair to the learned recorder to leave the matter as if that was all that he had said. In more than one place he had directed the jury to considerations which would have been perfectly appropriate if they had been coupled with the words " reasonable doubt ". In effect, he was indicating to them that if they had such a doubt, if in their judgment as men of good sense they were not satisfied, then they should not convict. In one place the learned recorder said this: G

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> " You will pay such attention to the arguments that they have advanced to you: On the one hand whether prosecuting counsel has proved the defendant's guilt by evidence which he has called or which has been called before you and, on the other hand, whether counsel for the defence has indicated that the evidence leaves you in such a doubt that it would be unsafe for you to convict."

I

Then, after referring to the accused's good character, he said this:

> ". . . if, looking at his good character, you think he is a witness of truth, then of course, that would have proved his innocence because you accept his evidence and obviously he is entitled to a verdict of not guilty. Members of the jury, if because he is a man of good character, having heard his evidence, having observed him in the witness-box, you think that it is extremely unlikely that a man of his reputation would commit these offences

A then that is another reason why you should be doubtful about the proof of his guilt."

This court would wish to reiterate what has been laid down now in several cases, that the proper form of direction is that the jury should be directed that the burden of proof is on the prosecution, and that the standard of proof required before a verdict of guilty can be returned is that the jury should be satisfied, B that they should feel sure. If that simple formula is used, no criticism can be made. In the absence of the use of that formula, in this case when one considers the summing-up as a whole, it is not in our view such a defect as would justify this court in interfering with the conviction.

Before parting with the case, it might be desirable to mention again that while dismissing this appeal, this court does not approve of the course that was C taken in this case. It would have been very much better if the learned recorder on the Tuesday afternoon had summarised the evidence by directing the jury's attention to the salient points. Equally, it would have been much better if he had coupled with the word "satisfaction" the word "sure". None the less, in spite of those points of criticism, which have been most ably put forward by counsel for the appellant, this appeal must be dismissed.

D *Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Town clerk,* Portsmouth (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

E

G. v. G. (otherwise H.).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), June 28, 1961.]

Divorce—Maintenance—Application—Leave of judge—Claim not included in wife's answer—Answer claiming costs but no specific matrimonial relief— F *Whether leave needed—Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3).

Divorce—Petition—Form of petition—Prayer for such further and other relief as may be just—Whether needed—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 4 (4).

The wife, in her answer to the husband's petition, included in the prayer G of her answer, merely a claim for costs and "such further and other relief as may be just". After the decree granted to the husband had been made absolute the wife applied by summons for a declaration that no leave was required to make an application for maintenance, or alternatively for leave pursuant to r. 3 (3)*, proviso (ii), of the Matrimonial Causes Rules, 1957.

Held: (i) the wife did not require leave to make an application for H maintenance since her answer did not claim "relief" within the meaning of the words "where an answer claiming relief is filed" in r. 3 (3).

(ii) the practice of including a prayer for "such further and other relief as may be just" was no longer necessary and should be discontinued.

[As to an application for maintenance where no prayer is included in the petition or answer, see 12 HALSBURY'S LAWS (3rd Edn.) 432, para. 971; and for I cases on the subject, see 3rd DIGEST SUPPLEMENT.

For the Matrimonial Causes Rules, 1957, r. 3 (3), and proviso (ii), see 10 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 218.]

Summons adjourned into open court.

The wife applied for a declaration that she did not require leave to make an application for maintenance, alternatively for leave pursuant to the Matrimonial Causes Rules, 1957, r. 3 (3), proviso (ii), to make an application for maintenance.

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* The relevant terms of r. 3 (3) are printed at p. 248, letter E, post.

On Mar. 2, 1959, the husband presented a petition for nullity. On Mar. 11, 1959, the wife entered an appearance and in the memorandum of appearance she stated that she wished to make application for alimony and maintenance. On Mar. 13, 1959, the wife gave notice of application for ancillary relief and on Apr. 27, 1959, Mr. Registrar WILKINSON made an order for alimony pending suit. On May 13, 1959, the wife filed an answer in which she denied the allegations in the petition and prayed for costs and for "such further and other relief as may be just" but did not include a prayer for maintenance. On May 18, 1960, the husband was granted a decree nisi which was made absolute in August, 1960.

On Mar. 21, 1961, the wife issued the present summons for a declaration that she was entitled to claim maintenance in the suit without leave of the judge, alternatively applying for leave to make an application for maintenance

> "notwithstanding the fact that no such application appeared in the prayer of her answer filed herein and that the decree nisi in this suit has been made absolute."

N. C. Lloyd-Davies for the wife.
A. H. Bray for the husband.

MARSHALL, J., stated the facts and continued: The matter falls to be considered under the terms of r. 3 (3) of the Matrimonial Causes Rules, 1957, as amended in 1958, and the first and only point that has to be considered is whether or not under the terms of that rule the wife is under any obligation to seek the leave of the court to bring a claim for maintenance. Rule 3 (3), in its relevant parts, reads as follows:

> "Every application for ancillary relief, being an application . . . (c) for the payment . . . of . . . sums by the husband for the maintenance . . . of his wife . . . shall be made in the petition or, where an answer claiming relief is filed, in the answer: Provided that . . . (ii) a judge may give leave for an application for ancillary relief which should have been made in the petition or answer to be made subsequently, either by notice in accordance with Form 2 issued out of the Divorce Registry or at the trial."

The point that I have to decide is whether the particular answer which was filed in this suit is an answer claiming relief within the meaning of r. 3 (3).

In my judgment, the word "relief" as used at the end of r. 3 (3) means "relief of a matrimonial kind", which (to use the words that counsel for the wife has used) is intended to change the matrimonial status of the parties, and having considered the use of the word "relief" in conjunction with the words "ancillary relief" in another part of this same rule and in other rules to which my attention has been drawn, I have come to the conclusion that the argument of counsel for the wife is right and that it is not necessary for him to have any leave to bring a claim for maintenance. In my judgment, the answer which was filed, which contained merely the prayer that the husband "be condemned in the costs of this suit" and also a general prayer" that she may have such further and other relief as may be just", is not an answer which claims that matrimonial relief which is intended by the word "relief" in the context of this rule.

I need only add that for a considerable time now it has been clear that the addition of the words "such further and other relief as may be just" is quite unnecessary, for the rules now clearly provide for what must be included in a petition or answer by way of relief and the long-standing practice of adding this omnibus relief prayer is one which in my judgment is no longer necessary and one which it would be better to discontinue.

A In those circumstances I declare that in the circumstances of the present case no leave of the judge under the proviso to r. 3 (3) of the Matrimonial Causes Rules, 1957, is necessary.

Order accordingly.

Solicitors: *Candler, Stannard & Co.* (for the wife); *Alec Woolf & Turk* (for the husband).

B [*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

C

CLAYTON *v.* WOODMAN & SON (BUILDERS), LTD. AND OTHERS.

[QUEEN'S BENCH DIVISION (Salmon, J.), June 19, 20, 21, July 5, 1961.]

Negligence—Duty to take care—Proximity of relation—Statements—Careless statements causing damage to persons or property—Statements actionable under principle in M'Alister (or Donoghue) *v.* Stevenson—*Instructions negligently issued by architect to bricklayer resulting in bricklayer's personal injuries.*

D

The plaintiff was a bricklayer employed by builders, the first defendants, who had contracted with a regional hospital board, the second defendants, to instal a lift in their hospital. The third defendants were a firm of architects employed by the hospital board to prepare a specification and working drawings for the construction of the lift shaft and a motor room. The building contract between the builders and the hospital board provided for the works to be carried out in accordance with the architect's directions. A stone gable was to be incorporated into the wall of the motor room and, for this purpose, a chase or groove had to be cut into the side of the gable. The gable wall was two feet thick and had a filling of rough rubble and loosely bound stones. This was the usual construction for similar walls and should have been well known to an architect. On Jan. 15, 1959, B., a qualified architect employed by the firm of architects, having inspected the gable, gave instructions on the site direct to the bricklayer to cut the chase in the gable. B. knew that the bricklayer would carry out his instructions promptly on that day without shoring or strutting the gable which B. considered was unnecessary. In fact it was unsafe and dangerous to cut the chase without shoring or strutting the gable as an architect or builder using reasonable care and skill should have realised, but knowledge of the danger was not to be expected of a bricklayer. While the bricklayer was cutting out a small piece of stone, after the chase had been cut, the gable fell inwards injuring him. In an action for damages for personal injuries the bricklayer alleged negligence and breach of statutory duty against his employers, the builders, negligence as against the firm of architects, and vicarious responsibility for that negligence against the hospital board.

E F G H

Held: (i) the architects were liable to the bricklayer in negligence for the following reasons—

I

(a) in accordance with the principle in *Donoghue* v. *Stevenson* the architects owed a duty of care to the bricklayer in regard to instructions given to him owing to the close relation between him and them in the circumstances of this case, viz., in particular, the subject-matter was one on which the architects were entitled to issue instructions to the builders by virtue of the building contract, and the architects, knowing that the instructions would be carried out promptly, chose to give them directly to the bricklayer who, by reason of his trade, would not have reason to suppose that danger would be involved in carrying them out (see p. 255, letters A and B, post).

M'Alister (or Donoghue) v. *Stevenson* ([1932] All E.R. Rep. 1) applied. A

(b) the duty so owed was to take reasonable care for the safety of the bricklayer, and, as the architects should have realised that the carrying out of the instructions to cut the chase would probably lead to serious injury to him, they were negligent in issuing the instructions to him.

(c) orders and instructions carelessly issued were different in their nature from mere statements or representations carelessly made, and only such careless misstatements as led to financial loss, as distinct from damage to persons or property, were outside the principle of *Donoghue* v. *Stevenson* (see p. 255, letter I, and p. 257, letter C, post); therefore, it was only careless (but not fraudulent) statements leading to financial loss that could not be actionable in the absence of contractual or fiduciary relationship. B

Le Lievre v. *Gould* ([1893] 1 Q.B. 491) and *Candler* v. *Crane, Christmas & Co.* ([1951] 1 All E.R. 426) considered. C

(ii) the builders were liable to the bricklayer, their employee, in negligence and also for breach of statutory duty under reg. 94 (2) of the Building (Safety, Health and Welfare) Regulations, 1948, but the hospital board were not liable for the negligence of the architects who were independent contractors.

[As to the nature of negligence and the duty to take care, see 28 HALSBURY'S LAWS (3rd Edn.) 3, para. 1; 7, para. 4. For cases on the duty to take care, see 36 DIGEST (Repl.) 12-18, *34-79*. D

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 94 (2), see 8 HALSBURY'S STATUTORY INSTRUMENTS 245.]

Cases referred to: E

Candler v. *Crane, Christmas & Co.*, [1951] 1 All E.R. 426; [1951] 2 K.B. 164; 36 Digest (Repl.) 17, *75*.

Denny v. *Supplies & Transport Co., Ltd.*, [1950] 2 K.B. 374; 36 Digest (Repl.) 16, *73*.

Derry v. *Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 9 Digest (Repl.) 127, *685*.

George v. *Skivington*, (1869), L.R. 5 Exch. 1; 39 L.J. Ex. 8; 21 L.T. 495; 39 Digest 441, *705*. F

Haseldine v. *Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 36 Digest (Repl.) 29, *125*.

Le Lievre v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 36 Digest (Repl.) 9, *27*.

M'Alister (or Donoghue) v. *Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*. G

Old Gate Estates, Ltd. v. *Toplis & Harding & Russell*, [1939] 3 All E.R. 209; 161 L.T. 227; Digest Supp.

Wallis v. *Robinson*, (1862), 3 F. & F. 307; 176 E.R. 139; 7 Digest (Repl.) 394, *224*. H

Action.

This was an action by John William Clayton, a bricklayer, for damages for personal injuries, loss and expense sustained and incurred as the result of an accident on Jan. 15, 1959, at Wonford House Hospital, Exeter, in the county of Devon, when a bell tower collapsed and struck the plaintiff while he was engaged in building a lift shaft at the hospital. The plaintiff brought the action against his employers, Woodman & Son (Builders), Ltd. (the first defendants), against the building owner, the South Western Regional Hospital Board (the second defendants) and against the firm of architects employed by the building owner, Charles E. Ware and Son (the third defendants), alleging (inter alia) breach of statutory duty and negligence against the first defendants, negligence and failure to comply with their duties under the Occupiers' Liability Act, 1957, against the second defendants and negligence against the third defendants. The particulars of I

A negligence alleged against all three defendants were causing or permitting the plaintiff to cut a chase in the bell tower when they knew or ought to have known that it was dangerous to do so; failing to warn the plaintiff of the danger of cutting a chase in the tower; failing to heed a warning that the tower was unsafe; failing to make any or proper investigation into the brickwork supporting the tower or into the security of the tower before interfering with it; failing to B take any precautions by shoring or otherwise to prevent danger to the plaintiff from the collapse of the tower when work was being carried out which was likely to reduce the security or stability of the tower. In addition, as against the third defendants, the plaintiff alleged that they were negligent in failing to inform the first defendants that the bell tower was unsafe and dangerous; in failing to instruct or advise the first defendants to take precautions by shoring or C otherwise to prevent danger to the plaintiff from the collapse of the tower, and in failing to appreciate that the operation of cutting the chase which they had instructed the plaintiff to carry out might seriously weaken the structure of the tower.

The facts appear in the judgment.

J. F. F. Platts-Mills for the plaintiff.

D *John Stephenson, Q.C.*, and *A. K. Allen* for the first defendants.

N. J. Skelhorn, Q.C., and *F. C. Williams* for the second defendants.

Maurice Lyell, Q.C., and *H. G. Garland* for the third defendants.

Cur. adv. vult.

July 5. **SALMON, J.**, read the following judgment: In 1958 the second E defendants, the South Western Regional Hospital Board, were minded to instal a lift in Wonford House Hospital at Exeter. They accordingly instructed the third defendants, a firm of architects, to prepare a specification and working drawings for the construction of a lift shaft and motor room. When the specification and drawings had been prepared tenders were invited and ultimately the first defendants, who are builders, entered into a written contract F with the second defendants dated Sept. 18, 1958. This contract is in the appropriate R.I.B.A. form.

Wonford House Hospital was built about a hundred years ago in the Gothic style. A stone gable about seven or eight feet wide projected about eight feet above the roof close to the site of the proposed lift shaft. This gable had at one time carried a bell, but long before 1958 the bell had been removed. The gable G wall was two feet thick and had a filling of rough rubble or lightly bound loose stones. This filling was contained by a "skin" of blue limestones of various sizes on the outer side, and a "skin" of stone and random rubble facing on the inner side of the gable. This is the usual construction for all similar walls and should have been well known to any builder or architect. The amount of filling varies from case to case as does the thickness of the "skins". The "skin" on H the inner side of this gable wall was somewhat thinner than usual, but I find that the gable was properly and safely constructed, and in no way dangerous until the chase to which I will presently refer had been cut in it by the first defendants. The specification and drawings called for demolition of part of the roof adjacent to the gable so that a motor room might be built there and the gable incorporated into the wall of the motor room. By Jan. 15, 1959, the lift shaft had been con- I structed inside the building and the appropriate portions of the roof had been removed. The reinforced concrete floor of the motor room remained to be laid, and the brick walls (one of which would incorporate the gable) constructed, and ultimately a concrete roof added. The drawings and specification made it plain that before the floor was laid a chase or groove would have to be cut into the side of the gable, since the concrete floor was to be supported in the walls of the motor room. The brick walls above the floor were to be constructed after the floor had been laid. Unless, however, a chase were cut at the floor level along the side of the gable which was to form part of the inner wall of the motor

room, the floor would be unsupported for a length of about seven feet. The cutting of a chase in the gable wall would necessarily so weaken it that, if left unsupported, it would fall and injure anyone working nearby. This should have been obvious to any competent builder or architect. There has been some conflict of evidence whether shoring or strutting was necessary or likely to have been effective.

I find that it was unsafe to cut the chase without shoring or strutting the gable, and that if the gable had been properly strutted or shored, the chase would have been cut without any real danger of the gable falling.

On the morning of Jan. 15, 1959, the plaintiff, who is a senior bricklayer in the first defendants' employ, was on the site with Mr. Gaiment, another bricklayer. After some conversation with Mr. Berry, a qualified architect in the employ of the third defendants, to which conversation I shall presently have to refer in some detail, the plaintiff told the other bricklayer to cut the chase in the gable wall on its inner side, and he did so. The chase was about three inches square, and was completed by 1 p.m. No strutting or shoring was erected. Mr. Lord, an employee of the first defendants, who was in charge of the work on their behalf, arrived at the site at about 4 p.m. and had a conversation with the plaintiff on the scaffolding close to the gable. Shortly afterwards the plaintiff was cutting into a stone on one side of the gable when, after cutting out a piece of stone about the size of a walnut, the whole gable toppled inwards and fell, seriously injuring the plaintiff and Mr. Gaiment. It is suggested that the fall was triggered off by the action of the plaintiff himself. Even if this be so (and I am far from satisfied that it is) it seems to me to be immaterial. I have no doubt that the gable was so weakened by the chase that it became most unsafe and unless supported by strutting or shoring, would inevitably, without any further interference, have fallen within a short time of the chase being cut.

The plaintiff originally brought this action against the first defendants alone, claiming that the injury and damage which he suffered were caused by the negligence or breach of statutory duty of these defendants. Having regard to the allegations made in the defence of the first defendants, the plaintiff joined the second and third defendants. It will be convenient to consider the case against each of the defendants separately.

In my view the first defendants have no defence to this action. It was their duty as the plaintiff's employers to take reasonable care for his safety. They knew that the work had reached a stage when a chase was about to be cut in the gable. They should have appreciated that this would be a highly dangerous operation unless the gable were supported by strutting or shoring, but they allowed this work to be carried out without any such strutting or shoring. Mr. Lord was an exceptionally frank witness. He has many years' experience and is familiar with the normal construction of stone walls and the danger of cutting chases in them without strutting or shoring. I have no doubt that he is usually a very careful man and takes all necessary precautions for the safety of workmen under his control. On this occasion, however, he never applied his mind to the question, and he frankly admits that he should have done so. In my judgment the first defendants were clearly negligent in that they did not shore or strut this wall when they knew that the chase was about to be cut in it. This negligence was a cause of the accident.

They are also liable under reg. 94 (2) of the Building (Safety, Health and Welfare) Regulations, 1948 (1) which reads as follows:

> "Where any work is carried on which is likely to reduce so as to endanger any person employed the security or stability of any part of an existing building or of a building in course of construction all practicable precautions shall be taken by shoring or otherwise to prevent danger to any person employed from the collapse of the building or the fall of any part thereof."

(1) S.I. 1948 No. 1145.

A The statutory duty cast on the first defendants does not, however, in the circumstances of this case, differ, in my view, from the duty of care imposed on them under the common law. The first defendants have rightly made no allegation of contributory negligence against the plaintiff, for the plaintiff is by trade a bricklayer and not a stonemason, and did not know and had no reason to suspect that the cutting of a chase without shoring or strutting was likely to render the wall B unsafe.

The plaintiff was clearly an invitee of the second defendants, and his claim against them is based on alleged breaches of their duty as occupiers to take reasonable care for his safety. The plaintiff contends that the second defendants are vicariously liable for the negligence of their architects, the third defendants. In my judgment this contention is scarcely arguable. It is true that for certain C purposes an architect is the agent of the building owner, e.g., for the purpose of ordering materials (*Wallis* v. *Robinson* (2)). Nevertheless, an architect is clearly an independent contractor. The building owner has no control over the manner in which the architect does his work (indeed, for certain purposes the architect is in the position of a quasi arbitrator). Accordingly, providing that the building owner engages an architect whom he reasonably believes to be competent, he is D not in general responsible for the architect's negligence. When the second defendants engaged the third defendants they rightly believed the third defendants to be competent architects of high repute. Accordingly, the second defendants cannot be vicariously liable for any negligence on the part of the third defendants.

An argument has also been addressed to me on the basis that quite apart from E vicarious liability, the second defendants are liable under the Occupiers' Liability Act, 1957. I must confess that I have found this argument very difficult to follow. The gable was perfectly safe at the time when the architects and builders were called in. The second defendants wanted this gable incorporated in a wall of the proposed motor room if this could safely be done. Whether the gable could be retained, and, if so, how this should be done was essentially a technical F matter for the architects and builders to decide, and very sensibly the second defendants left this matter to them. I am quite unable to find that the second defendants in any way failed in their duty of care to their invitees.

The claim against the third defendants raises a point of law of considerable importance and no little difficulty. The contract of Sept. 18, 1958, between the first and second defendants called for completion by Dec. 1, 1958. The third G defendants' letter of Jan. 9, 1959, makes it plain that the date of completion was postponed, but that it was agreed that the roof should be completed and the lift shaft clear by Feb. 1, 1959. The opening words of cl. 1 of the contract provide that

> "The contractor shall carry out and complete the works in accordance with this contract and in every respect in accordance with the directions . . . H of the architect."

The specification also provides that

> "the works are to be carried out in strict accordance with the drawings and specification and with the instructions given by the architect from time to time during the progress of the works."

I Counsel for the third defendants, in the course of his most able argument, submitted that the wide meaning of the words in the specification and of the opening words in cl. 1 of the contract is cut down by what follows in cl. 1, so that the architect can give instructions only in relation to the matters specified in cl. 1. These, however, include instructions in relation to

> "The variation or modification of the design . . . or the addition or omission or substitution of any work and the postponement of any work . . ."

(2) (1862), 3 F. & F. 307.

On the morning of Jan. 15, 1959, Mr. Berry (3) visited the site for the purpose, amongst other things, of examining the gable, which he had not previously done. He had to decide whether it was safe to incorporate it in the wall of the motor room in accordance with the specification and design, or whether it should be demolished. The plaintiff was clearly anxious that the design and specification should be modified by eliminating the gable, partly because of the difficulty he felt in marrying the brickwork to the stone gable, and partly because he had heard a rumour (in my view unfounded) that the gable was then unsafe. I am quite satisfied that he asked Mr. Berry if the gable might be demolished, and urged the difficulty and the rumour to which I have referred as reasons for this modification. Mr. Berry explained to the plaintiff how in his view the brickwork could be married to the stone gable, and intimated that he was satisfied that the gable was safe and must be retained as part of the motor room wall in accordance with the design and specification. He does not remember that part of the conversation relating to safety, but I accept the plaintiff's recollection on this matter. Mr. Berry knew that the motor room had to be completed by Feb. 1, 1959, and that it had reached the stage on Jan. 15, 1959, when the chase was about to be cut in the gable. I find that during the conversation to which I have referred Mr. Berry, as he admits, in effect instructed the plaintiff to carry on and cut the chase. He admits also that he knew that the chase would be cut that day without shoring or strutting. He took the view, and still does, that it was unnecessary to shore or strut. In this he was mistaken. There are, of course, many mistakes that a professional man can make without failing to exercise reasonable skill or care; but not an elementary mistake of this kind. I have no doubt at all that any ordinary architect using reasonable care and skill would certainly have realised the extreme danger of cutting the chase without shoring or strutting the gable. Mr. Berry says that he assumed that the chase would be cut in small sections, each section being chocked before the next section was cut. I do not believe that this method would have substantially reduced the danger of the gable falling or that any reasonably careful and competent architect would have thought so. Moreover, I very much doubt whether any such thought passed through Mr. Berry's head at the time on Jan. 15, 1959. A chase had been cut in the chimney wall which was to be incorporated in another wall of the motor room. There was the open chase in the chimney wall for Mr. Berry to see, and a mere glance would have shown that no chocks had been used in cutting that chase. Mr. Berry's recollection is that on Jan. 15, 1959, he thought that the plaintiff was a foreman stonemason. I do not accept his recollection, for the plaintiff was obviously on the site as a bricklayer.

Counsel submitted that the third defendants had no right to instruct the first defendants as to either the manner in which the work was to be done or the safety precautions to be taken. He contended that the form of specification and contract make it plain that it is for the first defendants to decide what safety precautions are necessary and to make provision for them in their tender. He further submitted that there is no contractual nexus between the architects and the builders, and that the law imposes no duty on the architect to advise the builders or their servants about their safety. So far as the law is concerned, Mr. Berry would be within his rights were he to stand by and without protest or warning watch the plaintiff doing something which Mr. Berry knew to be highly dangerous. Still less could Mr. Berry be liable if through lack of care or knowledge he failed to appreciate the risks involved in the plaintiff's acts.

I agree substantially with all these submissions. I further agree that had the third defendants issued instructions direct to the first defendants to cut the chase, and as a result of those instructions being obeyed, the plaintiff had been injured, the third defendants would have been under no liability to him. The first defendants would in such circumstances have been interposed between the

(3) The architect in the employ of the third defendants.

A instructions and the doing of the work, and the proximity between the plaintiff and the third defendants would not have been sufficiently close to impose any duty of care on them. But the instructions were in fact given direct to the plaintiff. They concerned a subject-matter, i.e., the cutting of the chase, about which, as between the third defendants and the second defendants, the third defendants had a duty to decide, and as between the third defendants and the B first defendants, the third defendants had a right to issue instructions. The architect chose to give the instructions direct to the bricklayer, who had no reason to suspect that any danger was involved. The architect certainly knew that these instructions would be promptly obeyed and equally certainly should have realised that in the existing circumstances they would probably lead to the bricklayer's serious injury or death. Having regard to the exceptionally close C relationship between the architect and the bricklayer on the particular facts of this case, the law to my mind imposed a duty on the architect to take reasonable care for the safety of the bricklayer. Had he exercised any such care, he would not have issued the instructions.

In *M'Alister (or Donoghue)* v. *Stevenson* (4) LORD ATKIN laid down the celebrated principle:

D "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

E Can anyone doubt that the bricklayer was so closely and directly affected by the instructions that the architect ought to have had him in contemplation as being so affected when the architect was directing his mind to the instructions? LORD MACMILLAN says (5):

"What then are the circumstances which give rise to this duty to take F care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows, and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human G errancy, and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed."

Can anyone doubt that the reasonable man would conclude that the particular relation between this architect and this bricklayer gave rise to a duty to take care?

H Counsel for the third defendants submitted that the instructions amounted to no more than a statement, and that in law a careless as distinct from a fraudulent statement is not actionable in the absence of a contractual or fiduciary relationship between the parties, for in the absence of such a relationship there is no duty to take care, and in the absence of such a duty there can be no actionable negligence. He relies on the well-known cases of *Derry* v. *Peek* (6), *Le Lievre* v. I *Gould* (7), and *Candler* v. *Crane, Christmas & Co.* (8).

On the whole I have come to the conclusion that those authorities are not in point, for in my view orders and instructions are different in their nature from mere statements or representations. To make a statement or representation believing that someone will probably act on it is not, in my view, equivalent to

(4) [1932] All E.R. Rep. at p. 11; [1932] A.C. at p. 580.
(5) [1932] All E.R. Rep. at p. 29; [1932] A.C. at p. 619.
(6) (1889), 14 App. Cas. 337. (7) [1893] 1 Q.B. 491.
(8) [1951] 1 All E.R. 426; [1951] 2 K.B. 164.

issuing orders or instructions which one knows will certainly be obeyed. But even if this distinction be not valid, in my judgment the third defendants were still under a duty of care to the plaintiff. It is to be observed that *Donoghue* v. *Stevenson* (9) has frequently been applied, but only where the damage complained of was physical, i.e., damage to persons or property; see e.g., *Haseldine* v. *Daw & Son, Ltd.* (10), *Denny* v. *Supplies & Transport Co., Ltd.* (11). On the other hand, in *Derry* v. *Peek* (12), *Le Lievre* v. *Gould* (13) and *Candler* v. *Crane, Christmas & Co.* (14), the damage complained of was not physical but financial. May it be that the latter cases can be read as authorities for excluding from the ambit of *Donoghue* v. *Stevenson* (9) only careless misstatements resulting in financial loss, but not those causing physical damage?

It appears from the judgment of DENNING, L.J., in *Candler* v. *Crane, Christmas & Co.* (15) that it was not seriously disputed by the respondents in that case that a careless statement resulting in physical damage to persons or property is actionable. ASQUITH, L.J., however, appears to take a different view, for he says (16):

> "The inference seems to me to be that LORD ATKIN continued to accept the distinction between liability in tort for careless (but non-fraudulent) misstatements and liability in tort for some other forms of carelessness, and that his formula defining 'who is my neighbour' must be read subject to his acceptance of this overriding distinction."

In the same sense are the references of ASQUITH, L.J. (16) to *George* v. *Skivington* (17). On the other hand, he does appear to find support for the decision at which he arrives from the fact that the formula in *Donoghue* v. *Stevenson* (9) "has never been applied to injury other than physical" (18). COHEN, L.J., expresses no concluded view whether a careless misstatement resulting in physical damage may be actionable, but he does cite (19), apparently with approval, the following passage from the judgment of WROTTESLEY, J., in *Old Gate Estates, Ltd.* v. *Toplis & Harding & Russell* (20):

> "The exceptions laid down by *Donoghue* v. *Stevenson* (9)—the exceptions to the rule that a man is obliged to be careful only to those to whom he owes a duty by contract—are, as I understand the decision in that case, confined to negligence which results in danger to life . . . limb, or . . . health, and, this being no one of those, I think that the plaintiffs have no cause of action on the analogy of *Donoghue* v. *Stevenson* (9)."

The inference seems to be that had the case been one of those exceptions, WROTTESLEY, J., would have concluded that there was a cause of action notwithstanding that the claim was based on a careless misstatement.

Although the dicta of ASQUITH, L.J., must carry the greatest weight, I do not consider that the decision in *Candler* v. *Crane, Christmas & Co.* (14) excludes careless statements causing physical damage from the ambit of *Donoghue* v. *Stevenson* (9). It may be difficult to think of a logical reason why there should, in some circumstances, be a duty to take care in making a statement causing physical damage but never such a duty in making a statement causing only financial loss. Logic and common sense, however, are uncertain guides in this branch of the law, and the distinction between the two classes of careless

(9) [1932] All E.R. Rep. 1; [1932] A.C. 562.
(10) [1941] 3 All E.R. 156; [1941] 2 K.B. 343.
(11) [1950] 2 K.B. 374.
(12) (1889), 14 App. Cas. 337.
(13) [1893] 1 Q.B. 491.
(14) [1951] 1 All E.R. 426; [1951] 2 K.B. 164.
(15) [1951] 1 All E.R. at p. 433; [1951] 2 K.B. at p. 179.
(16) [1951] 1 All E.R. at p. 439; [1951] 2 K.B. at p. 190.
(17) (1869), L.R. 5 Exch. 1.
(18) [1951] 1 All E.R. at p. 439; [1951] 2 K.B. at p. 189.
(19) [1951] 1 All E.R. at p. 444; [1951] 2 K.B. at p. 197.
(20) [1939] 3 All E.R. at p. 216.

A misstatement may have its roots in the historical development of the law of torts. ASQUITH, L.J., at the conclusion of his judgment in *Candler* v. *Crane, Christmas & Co.* (21) says:

> "I am not concerned with defending the existing state of the law or contending that it is strictly logical. It clearly is not—but I am merely recording what I think it is."

B Clearly there is no logical distinction between liability for careless misstatements and liability for other forms of carelessness. Indeed, it is obvious that where there is the closest proximity between the parties concerned, the financial loss caused by a careless misstatement may have catastrophic consequences for the person to whom it is made, whereas in cases such as that of the snail in the gingerbeer C bottle (had it been there) the damage resulting from the careless act may be comparatively trivial. It is curious and perhaps logically indefensible that the law affords a remedy in the latter case but not in the former. Yet so it is, for some forms of careless misstatement are clearly excluded by the existing authorities from the ambit of *Donoghue* v. *Stevenson* (22) however close the degree of proximity between the parties concerned. I read the authorities as excluding not all forms D of careless misstatement, but only those resulting in financial loss. I accept that this view adds illogicality to illogicality, but that seems to me to be preferable to enlarging the class of those to whom a remedy is unjustly denied. The decision in *Candler* v. *Crane, Christmas & Co.* (23) rests solely on the narrow ground that *Le Lievre* v. *Gould* (24) was not overruled by *Donoghue* v. *Stevenson* (22) and is still binding on the Court of Appeal.

E I reach the conclusion that since neither *Le Lievre* v. *Gould* (24) nor *Candler* v. *Crane, Christmas & Co.* (23) was concerned with a careless statement causing physical damage, they cannot exclude the application of the principle enunciated in *Donoghue* v. *Stevenson* (22) to the particular facts of the present case. Applying that principle, I hold that Mr. Berry was under a duty to the plaintiff to use reasonable care, that he failed in that duty and that his negligence was a cause of the plaintiff's damage. There will, accordingly, be judgment for the plaintiff F against the first and third defendants for the agreed sum of £2,352 10s. 9d., and judgment for the second defendants against the plaintiff.

Judgment accordingly.

Solicitors: *O. H. Parsons* (for the plaintiff); *Stanley & Co.* (for the first defendants); *Bevan, Hancock & Co.*, Bristol (for the second defendants); *Sydney Redfern & Co.* (for the third defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(21) [1951] 1 All E.R. at p. 442; [1951] 2 K.B. at p. 195.
(22) [1932] All E.R. Rep. 1; [1932] A.C. 562.
(23) [1951] 1 All E.R. 426; [1951] 2 K.B. 164.
(24) [1893] 1 Q.B. 491.

LITTLEWOODS MAIL ORDER STORES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

A

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), June 19, 20, 21, 22, 23, 1961.]

Stamp Duty—Exchange—Freehold estate exchanged for leasehold interest in same land—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54, *Sch.* 1.

B

Stamp Duty—Conveyance on sale—Lease—Whether a "conveyance"—Exchange of dissimilar legal estates—Whether an exchange or conveyance on sale—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1—*Finance Act,* 1930 (20 *&* 21 *Geo.* 5 *c.* 28), *s.* 42—*Finance Act,* 1938 (1 *&* 2 *Geo.* 6 *c.* 46), *s.* 50 (1) (b).

As part of a series of transactions between freeholders as lessors, their lessees and a wholly owned subsidiary company of the lessees, which was designed to save payment of greater stamp duty, the lessors accepted surrender of the lease (eighty years' unexpired) and granted to the lessees a new lease of the same property for twenty-two years and ten days at a rent of £6 a year. The lessees assigned this lease to their subsidiary company. The subsidiary company granted an underlease to the lessees for twenty-two years at a rent of £42,450 a year, which considerably exceeded the rent formerly reserved by the surrendered lease. The freeholders and the subsidiary company then executed a deed of exchange, by which the freehold was transferred to the subsidiary company and the lease for twenty-two years and ten days with the benefit of the underlease was transferred to the freeholders.

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Held: (i) the deed of exchange was not liable to ad valorem duty as a "conveyance or transfer on sale" within the meaning of Sch. 1 to the Stamp Act, 1891, since, whether or not it was an exchange within the meaning of s. 54 and Sch. 1 (see p. 262, letter I, and p. 270, letter B, post), it was not a sale of the freehold (see p. 264, letter D, and p. 270, letter D, post), sale connoting a sale at common law with a buyer, a seller, something sold and a price in money (see p. 264, letter D, p. 269, letter H, to p. 270, letter A, and p. 271, letter E, post).

F

(ii) the assignment was liable to ad valorem stamp duty, because the words "previously conveyed" in s. 50 (1) (b) of the Finance Act, 1938, comprehended the grant of a lease and the assignment was therefore excluded by s. 50 (1) (b) of the Finance Act, 1938, from the exemption from voluntary disposition duty under s. 74 of the Finance (1909-10) Act, 1910, enacted by s. 42 (1) of the Finance Act, 1930 (see p. 268, letter I, to p. 269, letter A, and p. 271, letter H, post).

G

Per HARMAN, L.J.: the principle that different statutes, passed at different times, should when forming a long series of enactments in pari materia, be construed together as explanatory of each other must not be pressed too far; in the present case the distinction between "lease" and "conveyance" drawn in the Stamp Act, 1891, ought not to be carried into the construction of the word "conveyance" in s. 50 of the Finance Act, 1938 (dictum of VISCOUNT SIMONDS in *Fendoch Investment Trust Co.* v. *Inland Revenue Comrs.*, [1945] 2 All E.R. at p. 144, applied; see p. 271, letters A to D, post; cf., p. 267, letter F, and p. 271, letter G, post).

H

Decision of DANCKWERTS, J. ([1961] 1 All E.R. 195), affirmed.

I

[For stamp duty on conveyance or transfer on sale or exchange, see 28 HALSBURY'S LAWS (2nd Edn.) 457-465, paras. 972-986 and 466, para. 989; and for cases on the former subject, see 39 DIGEST 278-285, *621-670.*

For the Stamp Act, 1891, s. 54 and Sch. 1 "conveyance or transfer on sale" and "exchange", see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 667, 673; and for the Finance Act, 1930, s. 42, and the Finance Act, 1938, s. 50, see ibid., 959 and 1196.]

A Cases referred to:

Coats v. *Inland Revenue Comrs.*, [1897] 1 Q.B. 778; *affd.* C.A., [1897] 2 Q.B. 423; 66 L.J.Q.B. 732; 77 L.T. 270; 61 J.P. 693; 9 Digest (Repl.) 420, *2718.*

Escoigne Properties, Ltd. v. *Inland Revenue Comrs.*, [1958] 1 All E.R. 406; [1958] A.C. 549; [1958] 2 W.L.R. 336; 3rd Digest Supp.

B *Fendoch Investment Trust Co.* v. *Inland Revenue Comrs., Alporteno Investment Trust Co.* v. *Inland Revenue Comrs.*, [1945] 2 All E.R. 140; sub nom. *Alporteno Investment Trust Co.* v. *Inland Revenue Comrs., Fendoch Investment Trust Co.* v. *Inland Revenue Comrs.*, 114 L.J.K.B. 291; 173 L.T. 35; 27 Tax Cas. 53; 28 Digest (Repl.) 371, *1625.*

G.H.R. Co. v. *Inland Revenue Comrs.*, [1943] 1 All E.R. 424; [1943] K.B. C 303; 112 L.J.K.B. 311; 169 L.T. 206; 23 Digest (Repl.) 395, *4658.*

Goldsmiths' Co. v. *Wyatt*, [1907] 1 K.B. 95; 76 L.J.K.B. 166; 95 L.T. 855; 71 J.P. 79; 42 Digest 685, *992.*

Great Western Ry. Co. v. *Inland Revenue Comrs.*, [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 39 Digest 280, *646.*

Kemp v. *Inland Revenue Comrs.*, [1905] 1 K.B. 581; 74 L.J.K.B. 112; 92 D L.T. 92; 39 Digest 285, *672.*

Portman (Lord) v. *Inland Revenue Comrs.*, (1956), 35 A.T.C. 349; 50 R. & I.T. 35.

Appeal and Cross-Appeal.

The respondents presented six deeds to the Commissioners of Inland Revenue E for adjudication of stamp duty under s. 12 of the Stamp Act, 1891. They did not object to the assessments of duty in respect of four of the deeds, but were dissatisfied with the assessments made in respect of the other two, viz.: (i) an assignment dated Dec. 9, 1958, ad valorem voluntary disposition duty under s. 74 of the Finance (1909-10) Act, 1910, on the estimated value of £400,000 of the leasehold interest assigned, £8,000; the respondents did not object to the valuation of the property assigned at £400,000, but contended that the assign- F ment was exempt from stamp duty under s. 42 of the Finance Act, 1930; (ii) a deed of exchange dated Dec. 11, 1958, as a conveyance on sale of the fee simple by reference to the head of charge "Conveyance or transfer on sale" and to s. 56 (2) of the Stamp Act, 1891, ad valorem duty at the rate of £1 per £50 on £42,444 x 20, £16,978; the respondents contended that the deed was liable to the duty of 10s. only, under the head of charge "Exchange or excambion— G instruments effecting" in Sch. 1 to the Stamp Act, 1891. They appealed by way of Case Stated to the High Court. On Nov. 17, 1960, DANCKWERTS, J. ([1961] 1 All E.R. 195) held that the former document attracted ad valorem stamp duty but that the latter document was liable to 10s. stamp duty as a genuine exchange within the meaning of Sch. 1 to the Stamp Act, 1891. The Crown appealed against the decision and the respondents cross-appealed.

H

B. L. Bathurst, Q.C., and *E. Blanshard Stamp* for the Crown.

Peter Foster, Q.C., and *K. B. Suenson-Taylor* for the respondents.

LORD EVERSHED, M.R.: We have heard two appeals, and this judgment is my judgment on both. The appeals have raised problems under the stamp I duty legislation of no little difficulty, and we are much indebted to learned counsel for their assistance and, on some points, for interesting historical references; but in the end I have come to the conclusion that we should not differ from the decision of DANCKWERTS, J., on either appeal.

In 1958 the Independent Order of Odd Fellows, the lessors, were the freehold owners of premises in Oxford Street, London, known as Jubilee House. The premises were subject to a lease made in 1947 for ninety-nine years in favour of Littlewoods Mail Order Stores, Ltd., the respondents. The lease would therefore expire in 2046. The rent payable under the lease was £23,444. It is not in

doubt that the rent was considerably less than the rent which the premises would have commanded in the market, if vacant, in 1958. Negotiations, therefore, began in the early part of that year, and their nature is stated in a letter written by the respondents' solicitors on May 1, 1959. It is a letter addressed to the Controller of Stamps, in answer to his question what the transaction was, and is as follows:

> " In actual fact, however, the ' proposed transaction ' which you mention in your letter was one discussed at a meeting between our clients and the said [lessors] which took place [in] March, 1958. At that meeting, it was suggested by the [lessors] that the lease of 1947 for a term of ninety-nine years at a rental of £23,444 should be surrendered by operation of law and that a new lease be granted for a term of twenty-two years only at a rental of £42,444, i.e., an increase of £19,000 per annum.
>
> " At that meeting, it was also suggested that the said [lessors] should cease to receive rent at the expiration of the proposed new lease for twenty-two years and that our clients [the respondents] should be entitled to complete possession of the property thereafter without any further payment of rent."

Put otherwise, then, and very briefly, the nature of the arrangement was that the lessors were to get a much larger rent for a shorter period and, subject thereto, that the property would belong exclusively to the respondents. In answer to a question which we put to him, counsel for the Crown was kind enough to find out and tell us that the monetary value of the remaining eighty-eight years' payments of £23,444 at that time could be taken to be £460,000 after discounting in the usual way, and that similarly the then present monetary value of twenty-two years' payments of £43,444 was £560,000 or £100,000 more. The figures are of some interest as showing that the transaction proposed was not as unfavourable to the lessors as at first blush it might have appeared. At that stage, the matter was sent to conveyancing counsel of agreed selection. The instructions to conveyancing counsel were never produced, and this was a matter of a little criticism. In fairness, however, to the respondents I feel clear in my own mind that nothing more would have emerged which is significant had those instructions been produced; in other words, that there never was anything more behind the transaction than the statement of it which I have already made. Conveyancing counsel proceeded to draw the necessary documents in forms which I shall presently mention, and having no doubt an eye on liability to stamp duty. So long, however, as the instruments in question really effected what they purported to do, there is nothing wrong, as is well established, in so contriving them that they minimise the liability to duty. In *Escoigne Properties, Ltd. v. Inland Revenue Comrs.* (1), VISCOUNT SIMONDS gave expression to the well-known principle (2) ". . . I would remind your Lordships that instruments, not transactions, are liable to stamp duty ". It is none the less proper for the court to see what in truth the instruments do effect.

At this stage a change was introduced into the proposed transactions. Instead of the lessors remaining freeholders for twenty-two years, they parted with their freehold interest at once, and took a lease themselves for twenty-two years and ten days, the respondents becoming their sub-lessees at the proposed enhanced rental of £43,444 net, i.e., after deducting the £6 per annum payable under the head lease. To effect that change another company known as Fork Manufacturing Co., Ltd., a subsidiary company wholly owned by the respondents, was introduced into the matter. Although only two of the twenty thousand shares of the subsidiary company were ever issued, it was not then and there formed for the purpose. We were informed by counsel for the respondents that it had been in existence for some ten years and was, in fact, a trading company. On Monday,

(1) [1958] 1 All E.R. 406; [1958] A.C. 549.
(2) [1958] 1 All E.R. at p. 409; [1958] A.C. at p. 558.

A Dec. 8, 1958, and the five succeeding days, documents were executed, one each day, six in all. On Monday, Dec. 8, a lease was granted by the lessors to the respondents for twenty-two years and ten days at the rent of £6 per annum. It has been conceded (and authority was referred to in 23 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 686) that that instrument operated in law to effect a surrender of the outstanding term of ninety-nine years' lease. On Tuesday, B Dec. 9, the new lease was assigned by the respondents to the subsidiary company. On Wednesday, Dec. 10, the subsidiary company granted an underlease of twenty-two years (i.e., ten days less than the term of the head lease) to the appellants at a rent of £42,450 per annum. On Thursday, Dec. 11, was executed what is called a deed of exchange between the lessors and the subsidiary company, the effect of which was that the lessors assigned to the subsidiary company the C freehold reversion and the subsidiary company assigned to the lessors the new lease of Dec. 8, with the benefit of the underlease.

On Friday, Dec. 12, was executed a deed of guarantee whereby the subsidiary company guaranteed the payment by the respondents of the rent of £42,450, and charged its own freehold reversion as security for the performance of that covenant. Finally, on Saturday, Dec. 13, by deed of indemnity, the respondents D indemnified the lessors against any stamp duties that might be exigible in respect of any of the instruments. It is, therefore, the respondents who appear as the appellants in the second appeal, and as respondents in the first. We are concerned in the two appeals with the instruments of Tuesday, Dec. 9 (the assignment of the new lease to the subsidiary company) and Thursday, Dec. 11 (the so-called deed of exchange) which are exhibits respectively B and D to the Case.

E I come now to the first appeal, which is related to document D, viz., the deed of exchange, of Thursday. The parties to it were certain individuals being the then trustees of the lessors of the one part, and the subsidiary company of the other part. It recited the lease of the previous Monday, Dec. 8, and then further recited that the trustees, i.e., the lessors, were entitled to the premises comprised in and demised by the lease for the estate in fee simple expectant on the F determination of the term. It further recited the assignment of the Tuesday from the respondents to the subsidiary company, and the underlease of the preceding day, the Wednesday. The final recital is expressed,

> "The parties hereto have mutually agreed to exchange their said respective estates and interests in the said property. . ."

G The first clause of the operative part of the deed is:

> "In consideration of the assignment hereinafter made by [the subsidiary company to the lessors] the parties of the first part as trustees hereby transfer to [the subsidiary company] all that land and property comprised in the titles above referred to subject to and with the benefit of the lease, but to the intent that any leasehold estate of the [subsidiary] company H comprised in title No. LN 58308 of which the company is the registered proprietor shall merge and be extinguished in the freehold estate . . ."

Those last lines appear to have been inserted in error. The title mentioned shows it to be a reference to the original ninety-nine years' lease which had, in fact, been surrendered and ceased to exist, and in which the subsidiary company never had had any interest.

I

> "(2) In consideration of the transfer hereinbefore made by the [lessors to the subsidiary company] [the subsidiary company] as beneficial owner hereby assigns unto the lessors the lease (of Dec. 8) to hold the same unto the [lessors] for all the residue now unexpired of the term granted by the lease subject henceforth to the payment of the said yearly rent, . . . etc."

but with the benefit of the underlease. Then there is a covenant by the lessors with the subsidiary company, that the lessors would pay the head rent of £6 per annum.

On the face of it, the document is stated to be a deed of exchange. But it is the essential argument of the Crown that it was in truth, for the purposes of stamp duty legislation at any rate, a conveyance on sale. The view of DANCKWERTS, J., was that it was a deed of exchange as that phrase is used in Sch. 1 to the Stamp Act, 1891. In a business sense it is no doubt true that it was an exchange, and it is indeed so described. However, that is not the end of the matter. It is necessary to refer to Sch. 1 to the Stamp Act, 1891. By s. 1 of the Act of 1891 it is provided that

> "From and after the commencement of this Act the stamp duties to be charged . . . upon the several instruments specified in Sch. 1 to this Act shall be the several duties in the said Schedule specified . . ."

There is found in Sch. 1 a long list of headings or titles descriptive of various types of instrument. It includes at p. 173 of the Queen's Printer's copy, "Conveyance or transfer", and there follow some sub-headings to which I must later return, but at p. 176 there is:

> "Exchange or excambion—Instruments effecting. In the case specified in s. 73 *see* that section."

It is not in doubt that excambion is a term of Scots law, and may be taken to be equivalent to exchange, although its exact significance is not a matter on which we have any expert opinion, and it is not, therefore, one on which I shall say anything. There is little doubt, however, that in its origin the word "exchange" as applied to property transactions may relate to exchanges of freehold, or at least to exchanges of property of a like estate or character. Counsel for the Crown referred us to BLACKSTONE'S COMMENTARIES (21st Edn.), vol. 2, at p. 323, where it is stated:

> "An *exchange* is a mutual grant of equal interests, the one in consideration of the other . . . The estates exchanged must be equal in quantity: not of *value*, for that is immaterial, but of *interest*; as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like."

There is a note which in some degree, but not substantially, may be said to qualify that statement. In the present case the estates exchanged were not similar in interest; on the one side there was freehold, on the other a leasehold interest. Counsel for the Crown also referred us to earlier stamp duty legislation, beginning with the Act of 1815, from which it appears at the least highly probable that at that date exchange was used in the limited sense which is stated in BLACKSTONE'S COMMENTARIES. I add two other references. In Sch. 1 the reference to s. 73 applies to the case of an exchange of real or heritable property for other real or heritable property where additional consideration by way of equality of exchange is given. Of course, if the word "exchange" extended to exchanges of other than real or heritable property, it would appear that there would be a hiatus in the statutory scheme, for there is no express provision for the case of an exchange of other interests where a sum of money is paid by way of equality.

Finally, some century and a half after Sir William Blackstone's day, WILLS, J., in *Coats* v. *Inland Revenue Comrs.* (3) said this:

> "But certainly, looking at the history of the matter as disclosed to us in the Act of 55 Geo. 3 [i.e. the Act of 1815] and subsequent Acts, there is considerable ground for arguing that 'exchange' really was intended to apply to real property and not to go beyond it."

He then refers to the Scottish term excambion, as probably having a similar limitation.

In the view that I have formed it is unnecessary for me to express an opinion whether in the Stamp Act, 1891, this word "exchange" should be taken as

(3) [1897] 1 Q.B. at p. 784.

A limited in the sense used by Sir William Blackstone. It would appear to follow from the Crown's argument, taken to its full logical conclusion, that every exchange would be also a conveyance on sale, since it could always be said that there was a consideration for the transfer by party A, consisting of the property transferred by party B. Indeed, counsel for the Crown said that, if the instrument here in question was a conveyance on sale, he was not concerned that it B might also be an exchange, since (and there is established authority for this proposition) it would be open to the Crown to charge the greater of the duties applicable. The real question for us to decide is, however, did this document effect a conveyance on sale? If the answer to that question be in the negative, it is sufficient to justify the conclusion which I have already stated; for the result would be the same whether the document is then treated as a conveyance C or transfer other than a conveyance on sale, or as an exchange.

Although the Stamp Act, 1891, contains a definition of "conveyance on sale" (in s. 54, to which I shall have to return) there is nowhere any definition of the word "sale". I apprehend, therefore, that, in deciding whether there is a sale, the court must apply the ordinary standards of sense and language to the transaction under review. The question then here is who was selling what, to whom, D and for what price or consideration?

The answer of the Crown, put forward by Mr. Bathurst with great force, is that the lessors were selling the freehold to the subsidiary company and the consideration was the payment to the lessors by the respondents of twenty-two annual payments of £43,444, a figure arrived at by deducting the rent of £6 under Monday's lease from the rent under the sub-lease. Counsel for the Crown E also conceded in reply that, as an alternative, the price or consideration might properly be stated as twenty-two annual payments of £19,000, being the difference between £43,444, the net rent under the new sub-lease, and £23,444, the rent under the original long lease. Thirdly, and again alternatively, counsel for the Crown contended that the consideration for the sale of the freehold by the lessors was the value of the lease transferred by the subsidiary company to the F lessors which, for the purposes of these appeals, is to be taken as agreed, in accordance with the Case Stated. at the sum of £400,000.

In my judgment these submissions do not represent what the Thursday's instrument, the so-called deed of exchange, in truth effected. I refer again to VISCOUNT SIMONDS' statement that the duty is leviable on the instrument (4). One must see what was the transaction which in truth the instrument effected. G I refer again to the facts earlier stated, and my conclusion that no other bargain behind these instruments was effected by this document. At its highest from the Crown's point of view, as it seems to me, this so-called deed of exchange represents an essential stage in the arrangement made, whereby the lessors received the benefit of the underlease with a rent nearly twice as high as the old lease rent, but parted altogether with their freehold interest, so that that interest H vested in the respondents' subsidiary company.

Counsel for the Crown did concede in reply that, if it was proper (and I take it that it is) to have regard to what was the transaction which these deeds really effected, and to look behind them to find that transaction, one could not go beyond the evening of Monday, because until that evening the subject-matter transferred by the subsidiary company had not come into existence. But in I my judgment the lessors cannot fairly be said to have been selling the freehold for twenty-two annual payments either of £43,444 or of £19,000 or, indeed, of any other such sum. I do not think it can be said to be any more true that the lessors were selling the freehold for annual sums than it would be true to say that the subsidiary company was selling its twenty-two years' and ten days' lease for the value of the freehold.

That brings me at once to the alternative submission of counsel for the Crown,

(4) [1958] 1 All E.R. at p. 409; [1958] A.C. at p. 558—see p. 260, letter G, ante.

that this was a sale of the freehold, the consideration being the value of the lease. Again I have to say that I do not think that that is what the instrument effected. If it were otherwise, it might indeed seem to follow that here there were two sales, on the one side a sale by the lessors of the freehold for the value I have stated, £400,000, and at the same time a sale of the lease by the subsidiary company for the value of the freehold reversion, whatever that might be. If that were the truth, the case might be then said to be parallel to one of the cases to which we were referred, *Lord Portman* v. *Inland Revenue Comrs.* (5). But that case had this clear distinction from the present one, that Lord Portman had entered into a firm and binding contract for the sale of certain property for £1,460,000 and also, at an interval of some four days, had entered into another binding contract to buy from the other party, an estates company, other property for £1,280,000. It was sought to say that this was an exchange, and that duty was only leviable on the difference of the two sums I have stated. But the learned judge held that there were there two sales at these figures, and that stamp duty was leviable on the total of the two sales. In my judgment that case has no application to the present.

Many other cases were referred to, and I hope that I shall not be thought disrespectful of counsel if I do not now allude to them. The matter is one not admitting of great elaboration; applying what I have hoped to be the ordinary standards of sense and language I conclude that this document was not a conveyance or transfer on sale. Looking fairly at it, it seems to me that document D, the so-called deed of exchange, as an instrument does not either in terms or in effect satisfy the necessary requirement of a sale. I cannot find or divine the essential characteristics of a sale, viz., the presence of a buyer, a seller, something sold and a price or consideration for what is sold.

I turn accordingly to the cross-appeal by the respondents. By this instrument in question there was assigned by the respondents to their subsidiary company, as a voluntary assignment the lease granted the day before of twenty-two years ten days, subject to the rent of £6 per annum. The document is quite short. It recites the lease; it recites that the respondents are the beneficial owners of the whole of the issued share capital of the subsidiary company; it recites that the respondents have requested the subsidiary company to accept the transfer of the property, and the operative part is to the effect that the respondents as beneficial owners assigned to the subsidiary company the premises comprised in and demised by the lease of Dec. 8, 1958, to hold the same unto the subsidiary company for the residue of the term, subject to the payment of the rent.

The point again is an exceedingly short one, for it turns on the construction of a few words in s. 50 of the Finance Act, 1938. I shall have to refer to the whole of the relevant part of the section, but the particular words which are involved in the appeal are these:

> "... whereunder ... (b) the beneficial interest in the property was previously conveyed or transferred directly or indirectly by such a person as aforesaid."

It is the case of the respondents that those vital words "conveyed or transferred" in the sentence which I have read, in that context—i.e., the context of that Act and other stamp duty legislation—mean conveyed or transferred by instrument called, or defined as, a conveyance or transfer in Sch. 1 to the Stamp Act, 1891, wherein such instruments are distinct from leases. It will be recalled that here the subject-matter transferred by the sale was the lease which had been granted—i.e., created—the day before. It cannot, I conceive, be at all in doubt that the words "conveyance" or "convey" will, to a lawyer at any rate, include prima facie, a lease or the grant of a lease. In modern times that construction may be said to be enshrined in the definition to be found in s. 205 (1), para. (ii) of the Law of Property Act, 1925, but it is indeed of much older significance.

(5) (1956), 35 A.T.C. 349.

A Counsel for the Crown again referred us to SIR WILLIAM BLACKSTONE'S COMMENTARIES (21st Edn.), vol. 2, and at p. 317 I find the statement, "A lease is properly a conveyance of any lands or tenements". Reference was also made to the old conveyancing practice by way of lease and release. But it was the submission of counsel for the respondents that none the less this section is part of the stamp duty legislation and, so treated, "convey" or "transfer" must be B construed in the limited sense used in Sch. 1 so as to exclude a lease.

In Sch. 1 to the Stamp Act, 1891, leases, or rather the heading "Lease or tack" is a separate head or description of instrument from conveyance or transfer. As I am referring to Sch. 1, I note also, since it will be relevant to something which I shall say later, that another separate head or series of heads bears the name or word "Agreement", either alone or in conjunction with C contracts and, in one instance, memorandum of agreement. Counsel for the respondents says it is not merely that there is this dichotomy in Sch. 1 which is introduced into the scheme of the Act by s. 1. He has referred also to other parts of the Act which, he says, emphasise that dichotomy. Thus, a group of sections beginning with s. 54 and ending with s. 61 is headed "Conveyances on sale". There follows s. 62, "Conveyances on any occasion except sale or D mortgage"; and then, a little further on, there is a group of sections beginning with s. 75, bearing the title, "Leases". So, again, says counsel for the respondents, Parliament is emphasising this essential dichotomy between two types of instrument for stamp duty purposes, conveyances or transfers on the one hand, leases on the other.

Section 54, which gives the meaning of conveyance on sale, and s. 62, which E gives a definition of conveyances other than those on the occasion of a sale or mortgage, according to their ordinary language and the understanding of the word "conveyance", etc., would appear to comprehend also a lease. I will illustrate this by reading from s. 62:

> "Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion except a sale or F mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property . . ."

The language follows closely that of s. 54. Prima facie the language would cover the grant of a lease, since a lease is an instrument whereby property (viz., the term of the lease) is vested in some person (viz., the lessee). But in *Kemp* v. *Inland Revenue Comrs.* (6), PHILLIMORE, J., expressed the view, in G reference to s. 62, that it was necessary that the rule of construction sometimes called reddendo singula singulis should be applied, with the result that the word "transferred" in the phrase "transferred to or vested in", is related exclusively to the word "instrument", and the words "vested in" exclusively to decrees or orders of a court. The result of that view would be to exclude necessarily from s. 54 and equally from s. 62 the grant of a lease, since it could H not be said that the subject-matter of the grant of a lease was "transferred". It is indeed created, and, although the estate created would undoubtedly be vested in the lessee, the words "vested in" are, on the view of PHILLIMORE, J. (6), confined to the effect of decrees or orders. Again, it is not necessary to express a conclusion on this point, but I would like to record that I must by no means be taken as assenting to the view expressed by PHILLIMORE, J. (6), and I prefer, as at present advised, the doubts later expressed by MACNAGHTEN, J. (7).

Some other sections were properly referred to, but I turn first to the headings relating to conveyance or transfers in Sch. 1. The first is "Conveyance or transfer . . ." of certain stocks. The second is one which was fundamental to the appeal of counsel for the Crown, viz. "Conveyance or transfer on sale of any

(6) [1905] 1 K.B. at p. 587.
(7) *G.H.R. Co.* v. *Inland Revenue Comrs.*, [1943] 1 All E.R. at p. 425; [1943] K.B. at p. 305.

property " except the stocks above mentioned, and there follows a reference to a number of sections, including s. 55 and s. 57. Then comes " Conveyance or transfer by way of security ", and there is a reference back to the heading " Mortgage ", and finally " Conveyance or transfer of any kind not hereinbefore described ". A

Under the second heading, conveyance or transfer on sale, there is the important line (it was important to the argument of counsel for the Crown) " where the amount or value of the consideration for the sale " either does not exceed and or does exceed certain stated figures. Section 6 deals with the case which arose in the course of the argument, where the consideration, though monetary, was not by way of English currency. It deals in those circumstances with foreign currency. Section 55 provides how, for the purpose of calculating the duty one values what is called in sub-s. (1) " stock or marketable security ", and in sub-s. (2) " security not being marketable security ". It may well be that a case will hereafter arise when the exact meaning of the word " security " will have to be considered. Section 57 deals with the case where the consideration is by way of a debt. B C

I think it unnecessary to refer to other sections, but there was some argument about the proper effect on the general conspectus of the Act of those sections. It clearly cannot be said, I think, that the subject-matters which are dealt with in s. 6, s. 55 and s. 57 by any possibility comprehend all possible types of consideration on a sale. It was therefore said on the one hand that, when one is concerned with conveyances on sale within Sch. 1, and has to consider the value as distinct from the amount of consideration, these sections limit the cases to which the heading " Conveyances on sale " applies at all. On the other side it is said that the sections which I have quoted have a much more limited significance, only indicating how in particular cases particular types of consideration are valued. D E

It may well be something of a criticism of the Act, if I may say so, that these problems are left somewhat in the air. It is one of the difficulties to which the Stamp Act gives rise. I add this final word, however, that, although s. 54 contains a definition of a conveyance on sale, a definition picked up, in a sense, by s. 62 in the way of definition, in the group of sections headed " lease " any definition of lease at all is nowhere to be found. So much for the Act of 1891. F

The next step in the legislative history is s. 74 of the Finance (1909-10) Act, 1910. The section has the cross-heading, " Stamp duty on gifts inter vivos ". Subsection (1) as far as relevant states that any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable as if it were a conveyance or transfer on sale, and provides what is to be substituted for the consideration. G

Now, it was not doubted by counsel for the respondents, I think, that, if this case had come before the court after the Act of 1910 had come into operation and before the coming into operation of the later Act of 1930, the assignment would have fallen within s. 74 and have been charged for stamp duty as a conveyance or transfer within the comprehension of that section. But it is said by counsel that, although voluntary gifts by way of transfer were brought into the scope of that section, it was otherwise in the case of a gift in the form of a lease. That would be a strange omission if it were right. It would appear anomalous that, if Parliament was concerned to say that transactions would attract duty if by way of gift or if made for a consideration, it should confine its attention to conveyances and transfers (as counsel for the respondents construes those terms) and say nothing about leases. Such a result is unlikely. If the anomaly is to be avoided, it must be said that Parliament in 1910 had not in mind the rigid dichotomy between conveyance and transfer on the one hand and lease on the other which is the foundation of the argument of counsel for the respondents. H I

Section 42 of the Act of 1930 proceeded to exempt from duty certain conveyances and transfers. In this case there is no doubt that Parliament had in

A mind the dichotomy, because the reference is to duty under the heading conveyance or transfer on sale in Sch. 1 to the Act of 1891. The operation of Sch. 1 is expressly confined to cases otherwise falling under that heading. Subsection (1) states that stamp duty shall not be charged on an instrument to which the section applies, and sub-s. (2) applies the section to any instrument which satisfies the two conditions, (a) that its effect is to convey or transfer the bene-
B ficial interest in property from one company with limited liability to another, and (b) (so far as relevant to this case) that not less than ninety per cent. of the issued share capital of one company is owned by the other.

The section, which is in Part 4 of the Act, is also by the express terms of s. 53 to be construed as one with the Stamp Act, 1891. We are here concerned with a transfer of property for the consideration from the respondents to a wholly
C owned subsidiary. If, therefore, this case had come before the court after 1930 but before 1938, there would appear to be little doubt that the assignment would be exempt from duty. Section 50 (1) of the Finance Act, 1938, refers in terms to s. 42 of the Act of 1930, and states its purpose as having been to relieve from stamp duty any instrument the effect whereof is to convey or transfer the beneficial interest in property from one associated company to another. The sub-
D section provides that s. 42 of the Act of 1930 shall not apply to any such instrument unless it is shown to the satisfaction of the Commissioners of Inland Revenue that the instrument was not executed in pursuance of or connected with an arrangement whereunder—and we are concerned with (b)—the beneficial interest in the property was previously conveyed or transferred directly or indirectly to such a person as aforesaid. "Such a person as aforesaid" means
E some person not associated with transfer or the transferee—someone who has been conveniently called a stranger.

Here there was a grant of a lease by the lessors to the respondents, and then a transfer of that subject-matter by the respondents to the subsidiary company. There is no doubt that the lessors are a "stranger"; they are "such a person as aforesaid" within the meaning of the subsection. Parliament on this occasion
F for some reason did not provide that s. 50 of the Act of 1938 (unlike the Act of 1930) should be read and construed as one with the Stamp Act, 1891. I accept, however (although the omission is not entirely without significance), as a general well established proposition that in an Act of Parliament which amends existing legislation on a particular subject-matter the court will construe the terms of the amending Act in the sense which they bear, or have been held to bear, in
G the main legislation.

Observe, then, what the Act demands. It must be shown to the satisfaction of the commissioners (the onus being on the respondents as their counsel concedes) that the transaction was not executed as part of an arrangement. That is the first condition. It is here conceded that the words in para. (b), "previously conveyed", are limited by reference to the arrangement earlier
H referred to. There is no question here that, if the grant of the lease can be treated as a conveyance or transfer, it was within the phrase "previously conveyed" because it was all part of a single arrangement. But there remains the second condition contained, for present purposes, in para. (b), under which arises the vital question: in this paragraph do the words "conveyed or transferred" comprehend a lease, or do they not?

I I think again the point is one of no little difficulty. If counsel for the respondents is right, it would seem to be a somewhat strange anomaly, a casus omissus. It would seem strange to exclude from the benefit of s. 42 (1) of the Act of 1930 the transfer of something granted by way of conveyance or transfer, as counsel for the respondents defines these words, but not to exclude the transfer of something created by way of lease. It would certainly leave an easy loophole for avoiding the impact of s. 50 of the Act of 1938. But in the end on this matter, as on the other, I have come to the conclusion which commended itself to DANCKWERTS, J. The essential words are "the beneficial interest in the property was

conveyed or transferred ". There is nothing in the section or elsewhere in the Act which in terms compels one to refer to Sch. 1 to the Stamp Act, 1891. The section does not say " was conveyed or transferred by an instrument called a conveyance or transfer in Sch. 1 to the Act of 1891 ". As it seems to me, bearing in mind the meaning of the word " convey " in the ordinary legal sense, the argument of counsel for the respondents requires the ordinary sense of this sentence to be qualified by adding, in effect, the qualification I have mentioned, " conveyed or transferred by an instrument called a conveyance or transfer in Sch. 1 to the Act of 1891 ".

Again, I feel that much elaboration will not be of assistance, but I have been assisted in reaching this conclusion by the reference made to the argument and decision in the *Escoigne Properties* case (8). A Mr. Cohen had in his lifetime agreed to sell to company A property for a consideration consisting of shares in the company. The shares were allotted to Mr. Cohen, but the property was never conveyed by way of completion of the bargain, and Mr. Cohen died. Thereafter, company A proceeded to agree to transfer the property to company B, which was indubitably an associated company within the meaning of the sections we are debating. The completion of the whole matter took the form of a conveyance by Mr. Cohen's executors to company B, company A joining in as beneficial owner in order to convey or transfer their outstanding beneficial interest. It was contended that the transaction was excluded from duty because it could not be said in that case, inter alia—there were other arguments—that a beneficial interest in the property had been previously conveyed to company A; and the basis of that argument, as appears from the contentions of counsel for the appellants as reported in the case (9), was that there was no conveyance or transfer thereof, properly so called; there was merely an agreement. As I have earlier observed, an agreement, an agreement or contract, a memorandum of agreement, etc.—these are separate headings from conveyance or transfer in Sch. 1 to the Act of 1891.

I find then, at the end of counsel's reported submission (10):

> " As to s. 50 (1) of the Act of 1938, the words ' conveyed or transferred ' should not here be given a different meaning from that which they bear in the whole of the stamp duty legislation. They should be given their literal meaning and not an extended meaning. The words ' directly or indirectly ' do not widen the meaning of the words ' conveyed or transferred '. They merely indicate that a conveyance or transfer is within the section if it is either directly or indirectly the act of such a person as is therein mentioned."

The argument on the other side was that, although there was that agreement, nevertheless there had been a conveyance or transfer of the beneficial interest in the property by virtue of the contract made by Mr. Cohen, and the issue to Mr. Cohen of the share consideration. VISCOUNT SIMONDS said (11):

> " It was, however, urged that the section did not apply, inasmuch as the beneficial interests in question were not previously conveyed or transferred directly or indirectly by a stranger. I lay no stress on the words ' directly or indirectly ', but I cannot avoid the conclusion that, when Mr. Cohen entered into the contract of 1950 and received the consideration therefor, and the beneficial interest in the property accordingly passed to the old company, it was his act by which it passed and it would be too narrow a construction to say that, nevertheless, it was not conveyed or transferred by him."

I get comfort from that opinion, because it seems to me to support the view that the words " conveyed or transferred " in s. 50 of the Act of 1938 should not be given the narrow construction dependent on the strict dichotomy between the

(8) [1958] 1 All E.R. 406; [1958] A.C. 549. (9) [1958] A.C. at p. 552.
(10) [1958] A.C. at p. 555. (11) [1958] 1 All E.R. at p. 411; [1958] A.C. at p. 560.

A two classes of instrument, a conveyance or transfer as defined in Sch. 1 on the one hand, and a lease on the other. The result is that in my judgment both appeals fail.

HARMAN, L.J.: I concur with LORD EVERSHED, M.R., in thinking that both appeal and cross-appeal should be disallowed. The transaction here, which B my Lord has described, struck the mind of at least one reader when he first saw it with astonishment and dismay; it seemed so artificial. Familiarity has bred not contempt but, I hope, an understanding of the process which was gone through in the course of the six documents spread over the days of that week. Whether, as counsel for the Crown hoped, the parties rested the seventh day remains to be seen.

C Now, in stamp duty cases it is the substance of the case which has to be looked at; authority for that is to be found in the observations of LOPES, L.J., in *Great Western Ry. Co.* v. *Inland Revenue Comrs.* (12). His Lordship says:

> "It is an established rule in cases under the Stamp Acts that the substance of the transaction is alone to be looked at in determining the question whether an instrument is liable to stamp duty."

D Here, there is no doubt, there must have been an arrangement or agreement between the parties, viz., the respondents and the lessors, which preceded its working out by counsel. For some reason which I do not appreciate the respondents were most unwilling to disclose what this arrangement was. Counsel must have been instructed to bring about the result or he could not have set to work. The method of bringing it about was his invention and the six deeds, or rather E the first four of them, were merely machinery ingeniously invented by him for doing that as inexpensively as possible—a perfectly legitimate device.

What then, in substance, was the arrangement? The lessors had a freehold, saddled with a long lease, having eighty years to run, at a rent which, if it ever had been a rack rent, had long fallen far below it. They were anxious to obtain a rack rent and willing to pay for it by accepting a much shorter term of F years, and giving up the freehold reversion. On their side the respondents were anxious for their own purposes to obtain the freehold and willing to pay for it in the form of a greatly increased yearly rent for a shorter period. The method adopted brought about the desired result. The question for this court is what stamp duty did the several documents so doing involve.

Controversy, so far as this appeal is concerned, centres round No. 4, the G so-called deed of exchange. By this time, Thursday morning, the position was that the respondents' wholly owned subsidiary company held the property as lessee of the lessors for a term of twenty-two years ten days at a nominal rent, and had created an underlease in favour of the respondents for a term of twenty-two years, at a rent of £44,000 odd. The original ninety-nine years' lease had vanished by operation of law on the Monday.

H By Thursday's document the subsidiary company assigned the lease to the lessors with the benefit of the underlease, and in return the lessors transferred the freehold reversion to the subsidiary company. This is said by the Crown to be a conveyance on sale by the lessors. Certainly it does not look like one. A sale prima facie is a transfer for money. For that purpose I quote from BENJAMIN ON SALE (8th Edn., at p. 2) of which one of the editors is FINNEMORE, J. I The sidenote is this:

> "Bargain and sale defined: By the common law a *sale* of personal property was usually termed a 'bargain and sale of goods'. It may be defined to be a transfer of the *absolute* or *general* property in a thing for a price in *money*. Hence it follows that to constitute a valid sale, there must be a concurrence of the following elements, viz.: (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property

(12) [1894] 1 Q.B. at p. 513.

in which is transferred from the seller to the buyer; and (d) a price in money paid or promised." A

For Stamp Act purposes this meaning is no doubt extended in three respects, viz., by s. 6, to foreign currencies which are a commodity in this country; by s. 55, which deals with stock or securities, and by s. 57 in the case where the consideration is the forgiveness of a debt. But none of these is applicable here. I accept the argument that the proper meaning of the word ought not to be extended further without some very cogent reason. This document is in a popular sense of that word an exchange. There is much to be said for the view that it does not come within the meaning of that expression in Sch. 1 to the Act of 1891, but it is not necessary to decide that point. All we need to decide is that it is not a conveyance on sale within the definition in s. 54 of the Act and in Sch. 1. B

Again, the Crown calculated the amount of duty on the wording of s. 56 (2) of the Act, which of course depends on the document being a conveyance on sale, but it does produce what is admittedly an amount very far in excess of the true consideration, when one considers the transaction as a whole. The respondents had at an earlier stage, on the Monday, given up a leasehold term (the original ninety-nine years' lease) of which the rent was about half the rack rent. The Crown would have us treat the document as a sale of the freehold for twenty-two yearly instalments of purchase-money. Neither party contemplated any such thing, nor does the machinery carry out the arrangement in that way. In my judgment this was not a conveyance on sale. C D

The cross-appeal raises a separate point. By Tuesday's deed the respondents assigned the lease created in their favour on Monday to the subsidiary company without consideration. If executed between 1910 and 1930, this deed would have attracted voluntary disposition duty created by s. 74 of the Finance (1909-10) Act, 1910, the duty being equal to that on a conveyance on sale. The value was agreed at £400,000, and the duty would, therefore, have been £8,000. This duty was abolished by the Finance Act, 1930, in cases of transfers between associated companies. This exemption was abused, however, and was by the Finance Act, 1938, withdrawn in cases where someone outside the ring had supplied the subject-matter. E F

Here the lessors were outsiders, and had by Monday's lease done that very thing, so that at first sight the exemption would not seem to apply. However, the respondents take the point that the 1938 section only applies where there has been a conveyance by the other side, and that this word does not apply to the creation of a lease. If this be so, it is a casus omissus from the Act, for Parliament cannot have intended this section to be avoided by so simple an expedient as the creation of a long term of years instead of an assurance of the freehold. The judge decided that a lease was a conveyance within the meaning of the section, and in my judgment he is right. It was conceded that in ordinary parlance a lease is a conveyance, and that this is also true in general in legal parlance. I feel no doubt that this concession was inevitable. BLACKSTONE'S COMMENTARIES, for instance, has the passage cited by LORD EVERSHED, M.R., and appearing at p. 316 of my edition of that work, and the definitions in the Conveyancing Act, 1881, and the Law of Property Act, 1925, confirm it. G H

It was argued, however, that in matters connected with the Stamp Acts this is not so, and I confess that the argument is attractive. In the Act of 1891 and Sch. 1, lease and conveyance are carefully distinguished, and it was said that the success of the Crown's claim would mean that, notwithstanding this, every lease would be stampable with conveyance duty. The Act of 1930 is to be read with the Act of 1891, and, though this is not true of the Act of 1938, s. 50 is dealing with matter in pari materia, and words in it ought, therefore, so runs the argument, to be construed in the same way. This has the authority of LORD MANSFIELD, quoted in *Goldsmiths' Co.* v. *Wyatt* (13). In his judgment in that case FARWELL, L.J., cites this (14): I

(13) [1907] 1 K.B. 95. (14) [1907] 1 K.B. at p. 105.

A "LORD MANSFIELD (15) says: 'Where there are different statutes in pari materia, though made at different times or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other.'"

Nevertheless, this must not be carried too far, and a reminder of that was given by LORD SIMONDS in his speech in *Fendoch Investment Trust Co.* v. *Inland Revenue Comrs.* (16). It is true that that was an income tax case, but the words, I think, are general. LORD SIMONDS said (17):

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"My Lords, I do not doubt that in construing the latest of a series of Acts dealing with a specific subject-matter, particularly where all such Acts are to be read as one, great weight should be attached to any scheme which can be seen in clear outline and amendments in later Acts should if possible be construed consistently with that scheme. But this is a principle which can easily be pressed too far in the consideration of a body of legislation such as that now under review . . ."

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Therefore I think that one must take the principle with a pinch of salt when a long series of Acts of this sort is being dealt with. In my judgment the word "conveyance" here used in s. 50 of the Act of 1938, ought to be given its ordinary meaning. It seems to me that this is necessary in order to give its proper effect to the object of the statute, which was only to allow the exemption to continue where no outsider had a finger in the pie. I would therefore dismiss the cross-appeal.

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DONOVAN, L.J.: I agree with both judgments, and have only two observations to add. Whether a document is a conveyance on sale or not raises a question of fact as well as of law, viz., is property being transferred to or vested in a purchaser on the occasion of a sale? The commissioners' legitimate request for full information as to the genesis of these transactions therefore involved no departure from the rule that documents are stamped, and not transactions. I think that the solicitors here concerned were unnecessarily coy when pressed to say how the whole thing began. If the parties started with the idea of a sale, and then dropped it in favour of some different scheme involving less stamp duty, there was no reason why they should not say so.

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As to the cross-appeal of the respondents, while it is true that, for the purposes of stamping, conveyances are distinguished from leases in the Stamp Act, it does not follow that this distinction, unless expressly excluded, must be read into all future legislation on stamp duty. HARMAN, L.J., has just referred to the cautionary observations of LORD SIMONDS on a cognate point in *Fendoch Investments Trust Co.* v. *Inland Revenue Comrs.* (17). Parliament, in s. 50 of the Finance Act, 1938, had the clear object of withholding exemption where, pursuant to some arrangement, the property came from a source outside the associated companies. As I view the matter, the court should endeavour to give effect to that intention unless the language of the section is too recalcitrant for the purpose. So far from that being the situation, the language is wholly apt to cover the present case, unless the segregation of leases from conveyances in the Act of 1891 is to be imported into the Act of 1938. For this I see no reason, and therefore no justification.

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Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords granted to both parties.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(15) In *R.* v. *Loxdale*, (1758), 1 Burr. at p. 447.
(16) [1945] 2 All E.R. 140; 27 Tax Cas. 53.
(17) [1945] 2 All E.R. at p. 144; 27 Tax Cas. at p. 68.

BUNCOMBE (VALUATION OFFICER) *v.* BALTIC SAWMILLS CO., LTD.

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), June 22, 23, 1961.]

Rates—De-rating—Industrial hereditament—Adapting for sale—Timber—Natural drying of timber—Factory and Workshop Act, 1901 (1 *Edw.* 7 *c.* 22), *s.* 149 (1)—*Rating and Valuation* (*Apportionment*) *Act,* 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 3 (1).

Timber brought to two timber stores was stacked with slats in between the boards as they lay on top of one another so as to allow a free flow of air. The stacking required skill and experience. After the timber had remained stacked for about three months its moisture content was reduced from that of "green wood", thirty per cent., to that of British Standards Specification, twenty-two per cent., at which retail sales normally took place.

Held: the timber stores were not industrial hereditaments within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, because they were used merely for storage (and thus were within the exception enacted in proviso (d)* to s. 3 (1)) and because, no one being employed in drying the timber, no manual labour was exercised in any adapting of the timber for sale, so that the premises were not a factory or workshop within the meaning of the Factory and Workshop Act, 1901, s. 149† and s. 3 (1) of the Act of 1928.

Poplar Revenue Officer v. *William Mallison & Son, Ltd.* ((1931), 2 D.R.A. 242) distinguished.

Appeal allowed.

[As to the meaning of "adapting for sale" in the definition of a factory or workshop constituting an industrial hereditament for rating purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 141, para. 189; and for cases on the subject, see 38 DIGEST (Repl.) 514-519, *242-271.*

For the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1), and the Factory and Workshop Act, 1901, s. 149 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 176, 180.]

Cases referred to:

Edwards v. *Bairstow,* [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; [1955] 3 W.L.R. 410; 28 Digest (Repl.) 397, *1753.*

Lanarkshire Assessor v. *Jeffray's Trustees,* 1935 S.C. 381; 38 Digest (Repl.) 519, *254.*

Poplar Revenue Officer v. *William Mallison & Son, Ltd.,* (1931), 2 D.R.A. 242.

Cases Stated.

The ratepayers were the owners and occupiers of two hereditaments comprising "Timber stores and premises, Goods Station Yard, Tunbridge Wells", and "Timber stores and appurtenances, Goods Station Road, Tunbridge Wells", assessed respectively at £100 net annual value, £25 rateable value and £90 net annual value, £22 rateable value, in Part II of the valuation list for Tunbridge Wells Borough under decisions of a local valuation court of Central Kent Local Valuation Panel on proposals made by the ratepayers on Oct. 3, 1956. On May 11, 1960, the Lands Tribunal (SIR WILLIAM FITZGERALD, Q.C., President)

* Rating and Valuation (Apportionment) Act, 1928, s. 3 (1) provides, so far as material—"In this Act the expression 'industrial hereditament' means a hereditament . . . occupied and used . . . as a factory or workshop: Provided that the expression . . . does not include a hereditament . . . primarily occupied and used for . . . (d) purposes of storage . . ."

† By s. 149 of the Factory and Workshop Act, 1901, whose definition of factory is made applicable by s. 3 (2) (b) of the Act of 1928, the expression "factory" for present purposes means—". . . (c) any premises wherein . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to . . . (iii) the adapting for sale of any article . . ."

A dismissed the valuation officer's appeals against those decisions ((1960), 7 R.R.C. 279). The valuation officer appealed by way of Case Stated to the Court of Appeal. He contended, inter alia, (i) that on the facts found by it the Lands Tribunal was wrong in law in deciding that the hereditaments were industrial hereditaments within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928; (ii) that neither hereditament was a factory or workshop within B s. 3 (1) of the Act, the timber in neither hereditament being altered or adapted for sale within s. 149 (1) of the Factory and Workshop Act, 1901; and (iii) that such manual labour as was exercised on the hereditaments was not exercised in or incidental to the altering or adapting for sale if there was an altering or adapting for sale of the timber or was in any event so trifling as not to come within s. 149 (1) of the Act of 1901.

C *W. L. Roots, Q.C.*, and *J. R. Phillips* for the valuation officer.
C. E. Scholefield, Q.C., and *D. G. H. Frank* for the ratepayers.

SELLERS, L.J.: This is the valuation officer's appeal against a decision of the Lands Tribunal in respect of two hereditaments in Tunbridge Wells described as " Timber stores and premises, Goods Station Yard " and " Timber D stores and appurtenances, Goods Station Road ". The Lands Tribunal, upholding the local valuation court, held that they were both industrial hereditaments and as such were entitled to be de-rated: i.e., that they are within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

Both the premises are similarly used for the reception of timber used by the respondent ratepayers for their business of timber importers and merchants. E About half of the timber imported goes to some saw-mills belonging to the ratepayers; the remainder is brought by lorries to these premises and is stacked in sheds. The only question is whether the learned President of the Lands Tribunal was entitled on the evidence before him to hold that what took place on these premises amounted to an adaptation of the timber for sale. If so, the decision was correct, because manual labour was exercised there by way of F trade or for purposes of gain, and if there were an adaptation for sale the labour would have been engaged in or incidental to the process and the requirements of s. 149 of the Factory and Workshop Act, 1901, retained for the purpose of the Act of 1928 by s. 159 (3) of the Factories Act, 1937, would have been fulfilled.

When the timber arrives from Scandinavia or elsewhere, so far as the timber G which comes to these two hereditaments is concerned, it is described as " green wood ", containing about thirty per cent. of moisture, which is described as " shipping dry ". In that state it is not properly fit to sell to the building trade for their purposes. The British Standards Specification of moisture content is twenty-two per cent., and retail sales, it seems, were normally made on that basis. Now all that takes place on the premises is that, when it has arrived, H the timber is stacked, and, as it has to dry out, it is stacked with slats in between the boards as they lie on top of one another so as to allow a free flow of air. The stacking requires some skill and some experience, so as to ensure good ventilation, and to assist the ventilation at least one side of the stacking area has a lattice work instead of a solid wall. After the incoming timber has been so stored for about three months, its moisture content is reduced to about I twenty-two per cent.

In my view, the two hereditaments are clearly places where timber is stored or kept, and, facilitated by the slats placed in the stacks, the timber at the same time dries out somewhat. The ratepayers do not dry it; they stack it in such a way that it dries itself. I cannot regard this as an industrial process of any kind, even a very limited one; and no man can properly be said to be employed in drying the timber. The men stow it; they do not dry it. Premises which are used wholly or mainly for storage are not subject to de-rating. That is provided for by s. 3 (1) proviso (d) of the Rating and Valuation (Apportionment)

Act, 1928. I would hold these premises to be so used. That seems to me to be the right conclusion of law on the facts found in the Case. A

It has been urged before this court that the decision in the tribunal is a question of fact—albeit, as the decision states, a "border-line" case—and, that being so, this court ought not to interfere with the finding. I think that there is no evidence that there is any "adapting" by the ratepayers of the timber for sale and therefore the decision would be erroneous in point of law. But, if that is too sweeping a conclusion, the decision in my view cannot stand, applying LORD RADCLIFFE's approach in *Edwards* v. *Bairstow* (1), which was a tax case. LORD RADCLIFFE said (2): B

> "When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law." C D

The learned President reached his decision, as he said, not without some hesitation, and sought to apply *Poplar Revenue Officer* v. *William Mallison & Son, Ltd.* (3). It may be (as was submitted on behalf of the valuation officer) that the learned President misdirected himself on this authority. I would regard the case rather in the opposite way as showing the distinction between the case which the court had to decide and the present case, because it emerged in the course of the hearing (during which the court apparently altered its preliminary view) that there was not mere storage (as was submitted on behalf of the revenue officer there), but that in the circumstances of that case and of those occupiers a particular hereditament was set aside for the special treatment of the timber. There were storage and distribution depots belonging to the occupiers, but the particular hereditament under consideration was a special area to which the timber was sent for drying and where there were kilns which provided steam and hot air for that purpose. It was held that, but for the existence of the drying chambers, the occupiers would not have used or occupied the hereditament. The court came to the conclusion that that particular hereditament, used for that special purpose, was de-rateable. LORD HEWART, C.J., said (4): E F G

> "There was some alteration or adaptation in the intimate nature of the wood itself; and I think it matters not, even if it be true, as is not established, that given a longer period of time a similar alteration would be brought about by the processes of nature, assisted perhaps by a slight artifice." H

I apprehend that there he had in mind just what was taking place here and, as I understand it, he said that mattered not. In the particular case which the court was considering there was this special treatment of the timber, even if the other form of stacking, with such "slight artifice" in the way of ventilation, were not in the same category, not entitling the premises to be de-rated, as these premises were. I think that view of the matter is to be derived from the argument of counsel for the occupiers, who was well versed in this branch of the law, and his argument (5) seems to accept that the mere drying of timber I

(1) [1955] 3 All E.R. 48; [1956] A.C. 14.
(2) [1955] 3 All E.R. at p. 57; [1956] A.C. at p. 36. (3) (1931), 2 D.R.A. 242.
(4) (1931), 2 D.R.A. at p. 245. (5) See (1931), 2 D.R.A. at p. 244.

A in the ordinary sense would not have been sufficient to de-rate those particular premises.

Several Scottish cases were also cited, and I think they all support the valuation officer's argument, although junior counsel for the ratepayers sought to show that there were some different features in some of them. In particular, although I do not quote the words, the observations of LORD PITMAN in B *Lanarkshire Assessor* v. *Jeffray's Trustees* (6) are very much in point and apt for the present case. For these reasons I think this appeal must be allowed.

DEVLIN, L.J.: I agree. Although we are differing from the decision of the learned President of the Lands Tribunal, I do not think this is a case in which an additional judgment from myself would be of any value. The point C is a short one and the learned President regarded it as a "border-line" case; the judgment of SELLERS, L.J., expresses entirely my conclusions on it.

DANCKWERTS, L.J.: I agree. With all respect to the President of the Lands Tribunal, it seems to me that it was not really a "border-line" case, as he described it, but a very clear case. He seems to have misled himself by a misreading of *Poplar Revenue Officer* v. *William Mallison & Son, Ltd.* (7), D which also involved a timber yard but in which some artificial process for the purpose of drying the timber was used by means of steam and heat. In the present case it seems to me that on the evidence the timber was stacked for storage and it was during the process of storage that the wind did the work of drying the timber. In other words, it was the wind and not the workmen that effected any change in the nature of the timber. I agree that the appeal E should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Order that the appeal of the valuation officer be allowed with costs in this court and with costs in the Lands Tribunal on scale 3 of the county court scale of costs, with discretion as to counsel's fees; that the question asked in the Case Stated be answered F *in the negative; declare that the hereditaments the subject of these appeals should be entered in Part I of the valuation list with respectively the figures set out in the Case Stated; and order that the case be remitted to the Lands Tribunal accordingly, with liberty to apply.*

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Stone, Simpson & Hanson,* Tunbridge Wells (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(6) 1935 S.C. at p. 386.

(7) (1931), 2 D.R.A. 242.

A

Re BAKER (Infants).

[COURT OF APPEAL (Ormerod, Upjohn and Pearson, L.JJ.), May 30, 31, June 1, July 14, 1961.]

Education—School attendance—Enforcement—Remedies—Wardship proceedings—Mother's refusal to send children to school—Local education authority's proceedings—Two convictions unavailing—Application to have children made wards of court—Directions sought as to their education—Chancery court's jurisdiction—Education Act, 1944 (7 & 8 *Geo.* 6 *c.* 31), *s.* 36, *s.* 37, *s.* 40 (2)—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1949 (12, 13 & 14 *Geo.* 6 *c.* 100), *s.* 9.

B

Notwithstanding school attendance orders followed by prosecutions and two fines, the mother of seven children, who was separated from the father, refused to send three of the children of compulsory school age to school; and in consequence they were not receiving efficient full-time education as required by s. 36 of the Education Act, 1944. The local education authority applied to the Chancery Division of the High Court under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, for the three children to be made wards of court and for directions as to their education.

C

D

Held: although the court had jurisdiction to continue the wardship of the children, the court would not do so in the present case for the following reasons—

(i) (per ORMEROD, L.J.; PEARSON, L.J., concurring), the prerogative of the Crown in relation to infants had been restricted in that it might no longer be exercised in relation to the particular matters placed by the Education Act, 1944, within the ambit of the local education authority's discretion and powers (see p. 281, letter C, and p. 284, letter H, post).

E

(ii) (per UPJOHN and PEARSON, L.JJ.), the Education Act, 1944, had established a comprehensive code which it was the duty of local education authorities to carry out, and it would not be proper for the court to exercise wardship jurisdiction solely to assist a local education authority in the enforcement of their statutory functions, or, in the absence of special circumstances, to exercise the court's discretionary control over a ward in a sphere of activity which had been entrusted by statute to a local education authority (see p. 283, letter I, p. 284, letter D, and p. 286, letter F, post).

F

(iii) (per ORMEROD and PEARSON, L.JJ.), moreover the remedy provided by the statute had not been fully used (see p. 282, letter A, and p. 287, letter G, post).

G

Re M. (*an infant*) ([1961] 1 All E.R. 788) applied.

Decision of PENNYCUICK, J. ([1961] 2 All E.R. 250) affirmed.

[As to statutory duty to receive education, see 13 HALSBURY'S LAWS (3rd Edn.) 555 et seq., paras. 1181 et seq.; and for cases on the subject, see 19 DIGEST 564 et seq. *61* et seq.

H

For the Education Act, 1944, s. 36, s. 37, s. 40, see 8 HALSBURY'S STATUTES (2nd Edn.) 181, 182, 184; and for the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, see 28 HALSBURY'S STATUTES (2nd Edn.) 777.]

Cases referred to:

A. B. (*an infant*), *Re,* [1954] 2 All E.R. 287; [1954] 2 Q.B. 385; 118 J.P. 318; [1954] 3 W.L.R. 1; 28 Digest (Repl.) 726, *2326.*

I

A.-G. v. *De Keyser's Royal Hotel, Ltd.,* [1920] All E.R. Rep. 80; [1920] A.C. 508; 89 L.J. Ch. 417; 122 L.T. 691; 17 Digest (Repl.) 437, *91.*

Carltona, Ltd. v. *Works Comrs.,* [1943] 2 All E.R. 560; 17 Digest (Repl.) 441, *119.*

M. (*an infant*), *Re,* [1961] 1 All E.R. 788; [1961] Ch. 328; [1961] 2 W.L.R. 350.

Point of Ayr Collieries, Ltd. v. *Lloyd-George,* [1943] 2 All E.R. 546; 17 Digest (Repl.) 480, *278.*

A *R.* v. *Gyngall*, [1893] 2 Q.B. 232; sub nom. *Re Gyngall*, 62 L.J.Q.B. 559; 57 J.P. 773; sub nom. *R.* v. *Gyngall, Re Hausherr* (*otherwise Austen*), 69 L.T. 481; 28 Digest (Repl.) 485, *25*.

Appeal.

The appellant local education authority, Norfolk County Council, applied by originating summons dated May 9, 1960, under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, for an order that three infants, Robin, Felicity and Wendy Baker, of compulsory school age, be made wards of court and that directions be given as to their education. The respondents were Mrs. Joy Elizabeth Baker, the mother of the infants, and Mr. Peter Shaw Baker, the father who was separated from the mother. On Mar. 15, 1961, PENNYCUICK, J., dismissed the local education authority's application (reported [1961] 2 All E.R. 250), holding that the Chancery court should not make an order seeking only directions as to education, jurisdiction in which was vested by statute in the authority. The local education authority appealed to the Court of Appeal.

Charles Sparrow for the local education authority (Norfolk County Council).
Arthur Bagnall, Q.C., for the mother.
T. A. C. Burgess for the father.

Cur. adv. vult.

July 14. The following judgments were read.

ORMEROD, L.J.: This appeal is against a decision of PENNYCUICK, J., dated Mar. 15, 1961, refusing to continue an order that the children of Mrs. Baker, one of the respondents, should be wards of court. As the case stems from the persistent failure of Mrs. Baker to provide for her children, or such of her children as are of compulsory school age, efficient full-time education suitable to the age, ability and aptitude of those children either by regular attendance at school or otherwise, it is essential that I should refer to the relevant sections of the Education Act, 1944. Section 36 of the Act, which states the duty of the parent, is as follows:

> "It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

Section 37 then sets out the duty of the local authority in cases where it appears to them that a child is not receiving the efficient full-time education prescribed by s. 36, and is as follows:

> "(1) If it appears to a local education authority that the parent of any child of compulsory school age in their area is failing to perform the duty imposed on him by the last foregoing section, it shall be the duty of the authority to serve upon the parent a notice requiring him, within such time as may be specified in the notice not being less than fourteen days from the service thereof, to satisfy the authority that the child is receiving efficient full-time education suitable to his age, ability, and aptitude either by regular attendance at school or otherwise.
>
> "(2) If, after such a notice has been served upon a parent by a local education authority, the parent fails to satisfy the authority in accordance with the requirements of the notice that the child to whom the notice relates is receiving efficient full-time education suitable to his age, ability, and aptitude, then, if in the opinion of the authority it is expedient that he should attend school, the authority shall serve upon the parent an order in the prescribed form (hereinafter referred to as a 'school attendance order') requiring him to cause the child to become a registered pupil at a school named in the order. Provided that before serving such an order upon a parent the authority shall, where practicable, afford him an opportunity of selecting the school to be named in the order and, if a school is selected

by him, that school shall, unless the minister otherwise directs, be the school named in the order."

Section 40 provides for the method of enforcing an order for school attendance, and prescribes an ascending scale of fines, and, on the third or any subsequent offence, the amount of the fine is not to exceed £10 or imprisonment for a term not exceeding one month or both such fine and such imprisonment. The section is as follows:

"(1) Subject to the provisions of this section, any person guilty of an offence against s. 37 or s. 39 of this Act shall be liable on summary conviction, in the case of a first offence against that section to a fine not exceeding £1, in the case of a second offence against that section to a fine not exceeding £5, and in the case of a third or subsequent offence against that section to a fine not exceeding £10 or to imprisonment for a term not exceeding one month or to both such fine and such imprisonment.

"(2) It shall be the duty of the local education authority to institute proceedings for such offences as aforesaid wherever, in their opinion, the institution of such proceedings is necessary for the purpose of enforcing the duty imposed upon a parent by this Act to cause his child to receive efficient full-time education suitable to his age, ability, and aptitude, and no such proceedings shall be instituted except by or on behalf of a local education authority (1)."

It should be noted, for it is important, that it may be the duty of the local education authority to institute proceedings for offences such as the breaches by the parent of the provisions of s. 37. It remains only, I think, to refer to the definition of "parent" contained in the definition section of the Act, which is s. 114 (1) and which provides as follows:

"'Parent', in relation to any child or young person, includes a guardian and every person who has the actual custody of the child or young person."

The facts in this case, so far as they are relevant, are as follows. Mr. and Mrs. Baker, the parents of the children in question, lived at all material times on a farm in Norfolk until November, 1953, when they separated. Mr. Baker went away and Mrs. Baker remained at the farm with the children. There are seven in all, but in this appeal we are concerned with three only, as they are the only ones of compulsory school age, and they are Robin, Felicity and Wendy, who are aged fourteen, thirteen and twelve years respectively. There appears to be no doubt that Mrs. Baker has persistently refused to allow any of her children to attend school. She has contended that by her own methods she is educating the children, and they are receiving at home an efficient full-time education. She has referred in her evidence in one or other of the numerous cases which have been before the courts to the fact that she was giving to the children the "light and warmth of a natural education", and she spoke of schools sometimes as a form of imprisonment and at other times as a zoo. Be that as it may, the local authority, as was their right, and indeed as was their duty, came to the conclusion, after investigating the matter, that Mrs. Baker was not affording to the three children named an efficient education as required by the Education Act, 1944, and, in those circumstances, conceived it their duty to take such steps as they could to ensure that the children received the prescribed education. It is no part of the duty of this court to comment on the behaviour of Mrs. Baker, or to remark as to the correctness or otherwise of the decision taken by the local education authority, but it should be noted that the judicial bodies concerned with the attendance orders, that is to say, the magistrates, and, in due course, quarter sessions, have each in their turn confirmed the view of the local education

(1) Subsection (2) is now amended by the Education (Miscellaneous Provisions) Act, 1948, s. 11 and Sch. 1, Part 1.

A authority that these children were not receiving a proper, or indeed any, education, and, although Mrs. Baker has insisted that she is bringing the children up in such a way that they will get the benefit of a natural education, the fact remains that they are learning very little as education is understood at the present time, and they are associating little if at all with other children of their own age, and indeed that they are doing a great deal of the housework and work about the B farm and land where they live.

In May, 1955, a summons was issued against Mrs. Baker in the local magistrates' court, and she was convicted of the breach of an attendance order served on her by the local education authority, but in July, 1955, that conviction was quashed by quarter sessions on the ground that the preliminaries to the order had not been carried out in accordance with the provisions of the statute. Nothing was C done after that until May 16, 1957, when attendance notices were served on Mrs. Baker in accordance with s. 37 (1) of the Act of 1944, and, as they were not complied with, on July 19 attendance orders were served. Mrs. Baker in turn failed to comply with these orders, and, on Nov. 15, 1957, she was convicted again by the magistrates. She appealed on May 16, 1958, to quarter sessions, but that appeal was dismissed. On Nov. 28, 1958, Mrs. Baker was again convicted D for a similar breach of the orders in question, and, on Feb. 10, 1959, appealed to quarter sessions, when her appeal was dismissed, but she then appealed to the Divisional Court. The appeal was heard on Feb. 5, 1960, and was dismissed. It is worth noting that LORD PARKER, C.J., in giving judgment in the Divisional Court, read from the Case Stated by quarter sessions this finding of fact:

E "Having considered the evidence, observed the children and heard the appellant's argument, we found as a fact that the appellant had failed at all material times to cause any of the said children to receive efficient full-time education suitable to their age, abilities and aptitude otherwise than at school."

On May 9, 1960, the local education authority took out an originating summons F under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, and the effect of that summons was that the children automatically became wards of court until such time as the matter was heard by the learned judge. It is conceded that the only purpose of the local education authority in taking out this originating summons was to enforce the orders which in their discretion they deemed it proper, and indeed their duty, to make, and no allegation of any kind G has at any time been made that these children are not being properly cared for other than that the parents have neglected their duties under the Education Act, 1944.

The matter came before PENNYCUICK, J., who made the order appealed from on Mar. 15, 1961. In his judgment he says (2):

H "I should like to make it clear that I do not intend to express the slightest agreement with the mother's views on the education of children in general, or of her own children in particular. Equally, I do not intend to express the slightest disagreement with the views expressed by the Norfolk justices or the Queen's Bench Divisional Court. On the contrary, I too have come to the clear conclusion that the mother is not causing her children to receive efficient full-time education as required by the Act."

I It would appear, therefore, that, not only the magistrates and the court of quarter sessions and the Divisional Court, but also PENNYCUICK, J., on hearing the originating summons formed the view that such education as was being provided by Mrs. Baker was not in accordance with the statutory provisions. Having set out the various statutory provisions and their arguments, PENNYCUICK, J., said (3):

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(2) [1961] 2 All E.R. at p. 256; [1961] Ch. at p. 311.
(3) [1961] 2 All E.R. at p. 254; [1961] Ch. at p. 307.

"It seems to me necessarily to follow that the court cannot properly give a direction where the decision whether the act is to be done rests with some other authority, so that the court is not itself able to decide whether or not the act is for the benefit of the infant,"

PENNYCUICK, J., as I have said, refused to continue the wardship in the circumstances. As I understand his judgment, the ground of his refusal was that the only matter on which the Chancery court was being asked to exercise its jurisdiction was the question of the education of the children, with regard to which statutory provision had already been made by the Education Act, 1944, and by previous statutes. He felt, therefore, that no useful purpose would be served in continuing the wardship, as clearly, in his view, the court could not make orders which might conflict with orders made by the local education authority in the exercise of a discretion vested in them by the Act of Parliament.

The learned judge derived assistance on this question from *Re M.* (*an infant*) (4). That was a case in which the circumstances were very far removed from the circumstances in this case, and indeed the order which had been made by the local authority was under an entirely different Act of Parliament. None the less, the principle, as enunciated by LORD EVERSHED, M.R., when the case came before this court, does appear to apply in any case where it is sought to make children wards of court in order to assist in the enforcement of some statutory duty placed on a local authority or indeed any other body or person. The Master of the Rolls, towards the end of his judgment in this court, said (5):

"It may perhaps be useful for me to add by way of summary the following:

"(i) The prerogative right of the Queen as parens patriae in relation to infants within the realm is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948: in particular the power to make an infant a ward of court by invocation of s. 9 of the [Law Reform (Miscellaneous Provisions) Act, 1949] is unaffected.

"(ii) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and in a case such as the present normally will, order that the child cease to be a ward of court. This result will occasion no surprise to those familiar with wardship proceedings, for in many cases where infants are made wards of court, the directions of the court are sought only on particular matters, such, e.g., as the place of education or to control the activities of the infant in relation to marriage or undesirable associations where a united parental control had failed; in such cases the court makes no order as to the custody, care or maintenance, for that remains in the hands of unimpeachable parents and the court does not interfere in relation to such matters.

"(iii) There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties."

I should say here that No. (iii) of the above summary is not relevant in this case as it has not been suggested by anyone that the local authority have been acting in some way in breach or in disregard of their statutory duties, but it has been included in the judgment of the learned judge, and for completeness should, I think, be cited here.

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(4) [1961] 1 All E.R. 788; [1961] Ch. 328.
(5) [1961] 1 All E.R. at p. 795; [1961] Ch. at p. 345.

A In the result the position would appear to be that the Education Act, 1944, provides for the education of children of compulsory school age, and it is enacted that it is the duty of the local education authority to satisfy themselves that such children are being properly educated, and, if in the view of the authority they are not being so educated, it is then the duty of the authority to see that they are and to take such steps as are prescribed by the Act of Parliament B to attain that end. It would appear, therefore, that there is a discretion in the local education authority which they must exercise in accordance with the terms of the statute; and there is also a duty laid on them by s. 40 (2) of the Act of 1944 to take steps prescribed in that section in the circumstances therein laid down, if in their view there is a breach of any order made by them. It follows that in such circumstances an anomalous situation might very easily be created C if the court, for instance, were asked to give directions relating to the education of one or other of those children which were inconsistent with the orders made by the local education authority. It seems, therefore, that the second of the principles laid down by the Master of the Rolls in *Re M.* (*an infant*) (6) applies in this case, and that the prerogative of the Crown has been limited by the statute in that it may no longer be exercised in relation to the particular matters dealt D with by the Education Act, 1944. This power has now been vested in the local education authority and to be within the ambit of the powers of the local authority and also of the Crown in proceedings of this kind might, as I have already said, result in many anomalies. The position is, therefore, that the jurisdiction of the Crown in relation to the matters vested in the local education authority should not be exercised in these circumstances. The judge recognised that this was the E position and consequently refused to continue the order of wardship.

The local authority, or indeed any other body or individual, may make an application by way of originating summons under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, seeking to have one or more of these children made wards of court. But the order will be an empty one, if, as in this case, the only matter on which directions are sought is the matter of education. In this F case there seems to be no ground left on which the Crown could properly make orders either similar to or contrary to orders already made. If this be right, it means that no court in the proper exercise of its discretion would make or continue a wardship order for the reason that there is nothing left for the court to do. It is a well-established principle to which attention has been drawn by the Master of the Rolls in *Re M.* (*an infant*) (7) that, where parental control is such as not to G call for complaint, there is no reason why the court should interfere. If the judge has not exercised his discretion to continue the wardship, then it is open to this court to do so and say whether in the circumstances the order of wardship should be continued. For the reasons which I have given, I think that it most certainly should not be, and, although I have every sympathy with the local education authority in the difficulty in which they have been placed, it does not appear H as a matter of law that the proceedings which they have started in the Chancery court are likely to be of assistance to them.

There is one matter to which I think that I should draw attention. Section 40 (1) of the Act of 1944, as I have already pointed out, provides for certain punishments to be administered by the magistrates in the event of a breach of an order made by the education authority. In this case the parent has been sum- I moned before the magistrates twice, and in each case penalties little more than nominal have been inflicted, which may of course have been perfectly proper in the circumstances. The Act does provide, however, that, on a third summons for neglect to obey an order, the magistrates may inflict a penalty of a maximum fine of £10 or imprisonment for not more than one month or both, according to the circumstances of the case. No third summons has been issued in this

(6) [1961] 1 All E.R. at p. 795; [1961] Ch. at p. 345.
(7) [1961] 1 All E.R. 788; [1961] Ch. 328.

case in a magistrates' court. It is impossible, therefore, to say how the mother would behave if she were threatened with a sentence of imprisonment. That may not be a matter of any great importance, but it is some indication of the way in which a court should exercise its discretion in deciding whether a wardship order should be continued. If there is another remedy available with a sanction which would appear on the face of it to be similar to the sanction within the power of the Court of Chancery, it is difficult to see why the discretion of the court should be exercised in any other way than by putting an end to the wardship. In these circumstances I would dismiss this appeal.

UPJOHN, L.J.: I agree that this appeal fails. I do so with the greatest regret because it is clear, on the evidence adduced before the learned judge, which has been read to us, that the unfortunate infants, the subjects of this appeal, are not receiving any education in a true sense of the word to enable them to take their proper place in the community when they are older. Though the appeal fails, I have no criticism to make of the local education authority for endeavouring to invoke, for the first time so far as I know, wardship proceedings to assist them in the execution of their statutory duties as education authority. It is obvious that the mother is not merely in complete breach of her duties under s. 36 of the Education Act, 1944 (which I shall call " the Act "), which has already been read by ORMEROD, L.J., but that she is also in utter disregard of her natural moral duty as the mother of these children.

Counsel on behalf of the local education authority has argued this case with great persuasiveness. He makes two main submissions. In the first place, he argues on a broad basis that we ought to approach the case apart altogether from the powers and duties conferred and imposed on the authority by the Act, and give directions as to the future education of the children, because the mother is in serious breach of her duties and it is in the paramount interest of the children that directions should be given by the court exercising powers and duties in relation to wardship proceedings, i.e., the Chancery Division of the High Court (to which I shall for brevity refer to as " the court "). He invites us to do this on the application of the local education authority. At first sight, that is an attractive argument, but on the whole I am unable to accede to it, for it involves the proposition that the authority are entitled to seek the directions of the court as to the education of the children rather than discharge their duties under the Act. This the local education authority plainly cannot do, for, where it appears to the authority that a parent is not giving a child efficient full-time education, they are under a duty to serve a notice under s. 37 (1) on the parent to satisfy the authority that the child is receiving efficient full-time education. If the parent fails to satisfy the authority, they are under a positive duty (if they are of opinion that it is expedient that the child should attend school) to serve on the parent a school attendance order; see s. 37 (2). If the parent fails to comply with the order and does not show that the child is receiving efficient full-time education, he commits an offence under s. 37 (5), and, under s. 40 (2), the authority are in certain circumstances under a duty to prosecute. The specific and positive duties cast on the local education authority cannot be delegated, and the court has no power to interfere in relation thereto. It seems to me that the authority cannot approach the court on this wide basis, but are bound to carry out their duties under the Act.

The second submission which counsel for the local education authority makes goes to the real kernel of the point. He invokes the aid of the court to assist the authority to enforce the statutory duties which are cast on them by the Act. I find this a more attractive argument.

The real question may, I think, be posed in one of two ways: first, whether the Education Act, 1944, in imposing duties on the local education authority, intended those powers and duties to be compendious and exclusive, forming in effect a complete and exhaustive statutory code, so that they have no right to invoke the assistance of the court in carrying out those duties; secondly, whether,

A if the Act does not go so far as that, it would be right to lend the assistance of the court having regard to the conflicting jurisdictions thereby created. Possibly the difference is mainly of academic interest, but during argument the point was made that, if the local education authority have some power to resort to the court for the purpose of assisting them to carry out their statutory powers and duties, yet in this case the point has not been reached when it would be proper B to invoke those powers, for, it is argued, the authority have not yet fully pursued their powers under s. 40 of the Act by prosecuting the mother. Although the authority have twice prosecuted the mother for her failure to carry out school attendance orders, the point has not yet been reached where it is open to the local magistrates to impose on the mother the punishment of imprisonment.

C Speaking for myself, I do not agree with this point. The mother has shown herself in persistent and flagrant disregard of the orders made on her; she has paid the trifling fines imposed on her, and has made no effort whatsoever to remedy her course of conduct or to comply in any way with the duties cast on her by the Act and orders made thereunder. She is plainly contumacious, and I see no reason why the authority, in the particular circumstances of this case, should not invoke the powers of the court (if they are entitled to do so) until there have been D three or more prosecutions under the Act. In the circumstances of this case, the sooner the court makes an order in aid of the powers and duties of the authority so much the better. The authority take the view, in which I concur, that, if the infants are made wards of court, the court, exercising those powers, is in a position to exercise a more effective control over the mother than is available to the education authority in continued prosecutions under s. 40 of the Act. Therefore, E it seems to me that the sole question is that which I have already posed: Is it proper for the court to make an order to assist the local education authority in the discharge of their duties under the Act?

The recent case of *Re M.* (*an infant*) (8) was much discussed before us and before the learned judge in the court below. PEARSON, L.J., and I were parties F to that decision. As a matter of decision, that case is not in point here, for the circumstances were very different. In that case the applicant was a lady to whom the care and control of the infant had been entrusted by the respondent local authority, who had, in exercise of their statutory power under the Children Act, 1948, assumed the position of parent. The lady was endeavouring to interfere with the exercise by the parental local authority of their powers under the Act. G But, as it was not shown, or even suggested, that the local authority were in any way exercising the powers and duties cast on them as parent by the Children Act, 1948, improperly, it was held in this court that the court would not interfere with the exercise of those powers and duties. In this case the local education authority are the applicants seeking to obtain the assistance of the court in the discharge of their duties against a mother plainly in breach of her statutory and moral duties H as such. That case is, however, relevant to this case, for it makes two matters clear: first, that the exercise of statutory duties by a local authority does not prevent the exercise by the court of its power to make infants wards of court in any case in which it is desirable to do so. Secondly, it makes equally clear that, where duties are cast on a statutory body such as a local authority, it would normally be wrong in the absence of some impropriety for the court to attempt I to exercise any powers which the legislature has thought fit to delegate to the local authority.

I have reached the same conclusion as the judge, though I prefer to put it in my own language. I think that the Education Act, 1944, has imposed on local education authorities a complete code which they are bound to carry out, and it would not be proper for the court to lend its assistance to them in carrying out those powers and duties. Many difficulties might arise if the court assumed

(8) [1961] 1 All E.R. 788; [1961] Ch. 328.

a concurrent jurisdiction. For example, it is plain that (apart from the local education authority themselves) the only body that can direct that a school attendance order shall cease is the local bench of magistrates when a case is prosecuted before them; and then only on an acquittal under s. 40: see s. 37 (6) and s. 40. It is perfectly clear that the Court of Chancery has no power to revoke or vary such an order; see s. 37 (7). What is to happen if the court, having given directions to implement the school attendance order, takes the view that the acquittal was against the weight of evidence? The acquittal and the existing order of the court would be in direct conflict. Let me give another example. Suppose under a direction given by the Chancery court the infants do become registered pupils as defined by s. 114 (1) of the Act. It then follows that under s. 40 (4) of the Act, as replaced by s. 11 of the Education (Miscellaneous Provisions) Act, 1953, the local education authority would have a power, and therefore a duty, in proper cases (which they could not delegate to the court) to make orders under the Children and Young Persons Act, 1933, which the court could not control and which might well be in conflict with the order of the court.

These considerations lead me to the conclusion that Parliament never intended that the local education authority should have power to apply to the Chancery court solely to assist them in the enforcement of their purely statutory duties in relation to elementary education. Alternatively, if there is some residual power in the authority to do so, it should not be exercised in the absence of special circumstances, and there are none present here.

Nothing that I have said in this judgment must be taken as suggesting in any way that, on application by a person having a proper interest in the welfare of infants, the court lacks jurisdiction to make infants wards of court even where the education authority are proposing to make, or have made, a school attendance order; though it is, it seems to me, quite clear that in such proceedings the court would have no power whatever to make orders in conflict with the exercise of duties cast on the local education authority by the Act, unless it be shown that there was some impropriety on the part of the authority in the exercise of their statutory duties and powers under the Act, as distinct from their wisdom (to use the words of LORD EVERSHED, M.R., in *Re M. (an infant)* (9)). For these reasons I come to the conclusion, again with much regret, that the court has no power to assist the local education authority in the exercise of their statutory duties, and therefore that the appeal must be dismissed.

I only desire to add one sentence by way of explanation of the judgment in *Re M. (an infant)* (10), though it is not directly in point in this case. The argument of counsel for the local education authority assumed that, in the summary of the law stated in three propositions by LORD EVERSHED, M.R. (11), the reference to "acting on familiar principles" in proposition (ii) referred to principles in infancy cases such as those laid down in *R.* v. *Gyngall* (12). This, with all respect to his argument, was an entire misconception. The reference to "familiar principles" was a reference to the well-known law that, where a statute has vested a discretion in a body, the court will not normally interfere with the exercise of that discretion.

PEARSON, L.J.: I agree. The facts which are now material can be summarised shortly. Mrs. Baker has seven children, of whom three, being of school age, are involved in these proceedings. She has persistently omitted and refused to send any of these children to school and they are not receiving efficient full-time education otherwise; indeed they are hardly receiving any education at all. Her husband, who is living apart from her, supports her attitude in regard to the children. Norfolk County Council, as the local education authority, have endeavoured persistently, and so far unsuccessfully, to persuade or compel

(9) [1961] 1 All E.R. at pp. 793, 795; [1961] Ch. at pp. 342, 345.
(10) [1961] 1 All E.R. 788; [1961] Ch. 328.
(11) [1961] 1 All E.R. at p. 795; [1961] Ch. at p. 345. (12) [1893] 2 Q.B. 232.

A Mrs. Baker to send her children to school. In 1955 they served on Mrs. Baker a school attendance order, and, when it was not complied with, they prosecuted and the magistrate convicted, but on appeal it appeared that the school attendance order had not been preceded, as it should have been, by a school attendance notice, and the conviction was set aside. On May 16, 1957, they served on her a school attendance notice, and on July 19, 1957, a school attendance order, and B when that was not complied with they prosecuted. There was a conviction and she was fined 10s. in respect of each child. She appealed to quarter sessions, contending that the children were receiving efficient full-time education at home. Her appeal was dismissed, and LORD EVERSHED, as chairman of quarter sessions, gave a short judgment explaining why he and his colleagues were wholly unable to accept her contention. The children were not being educated and not having C the companionship of other children. Mrs. Baker still did not comply with the school attendance order. She was again prosecuted, and, on Nov. 28, 1958, she was convicted and fined £1 in respect of each child. She appealed to quarter sessions, but on Feb. 10, 1959, her appeal was dismissed. She appealed to the Divisional Court, but on Feb. 5, 1960, her appeal was dismissed. In giving judgment, LORD PARKER, C.J., read from the Case Stated by quarter sessions this D finding of fact:

> "Having considered the evidence, observed the children and heard the appellant's argument, we found as a fact that the appellant had failed at all material times to cause any of the said children to receive efficient full-time education suitable to their age, abilities and aptitude otherwise than at school."

E The local education authority might then have instituted a third prosecution, and, if there had been a third conviction, the magistrates' court would have had power to inflict a sentence of imprisonment (not more than one month for each offence) or a fine or both. The local education authority did not take that course. Therefore, it cannot be said that they have exhausted their remedies under the Act.

F The next step of the local education authority was to take out an originating summons, dated May 9, 1960, addressed to Mr. and Mrs. Baker and applying (i) for the three children to be made wards of court, (ii) for directions as to their education, and (iii) for such further or other order as to the welfare of the children as might be just. Under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, the effect of that application was to make the three children become G forthwith wards of court, subject to certain provisions for termination of the wardship. The sole object of the local education authority in instituting the wardship proceedings was to compel Mrs. Baker to send her children to school. The Chancery court would have no power to enforce the school attendance order as such. The relevant powers of the Chancery court, stated in general terms, are to give directions in respect of wards of court, and, if any person disobeys such H directions, to commit for contempt of court.

The originating summons was heard by PENNYCUICK, J., in March, 1961. The judge, having read the affidavits of Mr. Earl on behalf of the local education authority, and those of Mrs. Baker and Mr. Baker, and heard the oral evidence of these witnesses, said (13):

I

> "I come without hesitation to the conclusion, so far as I am concerned to do so, that the mother is not causing the children to receive efficient full-time education as required by the statutory provisions of the Education Act, 1944."

However, the judge, having referred to the relevant provisions of the Education Act, 1944, and to passages in the judgment of LORD EVERSHED, M.R., in the recent case of *Re M. (an infant)* (14) in the Court of Appeal, decided that it

(13) [1961] 2 All E.R. at p. 251; [1961] Ch. at p. 306.
(14) [1961] 1 All E.R. 788; [1961] Ch. 328.

would be outside the proper scope of the jurisdiction of the Chancery court to give the directions desired by the local education authority, and, therefore, as there was not action to be taken in the wardship, he ordered that it should cease. The local education authority now contend that the decision of the learned judge was wrong and that he should have given the desired directions. That is the issue in this appeal.

Towards the end of his judgment in *Re M.* (*an infant*) (15), LORD EVERSHED, M.R., by way of summary, stated three propositions:

> " (i) The prerogative right of the Queen as parens patriae in relation to infants within the realm is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948: in particular the power to make an infant a ward of court by invocation of s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, is unaffected.
>
> " (ii) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and in a case such as the present normally will, order that the child cease to be a ward of court . . .
>
> " (iii) There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties."

I have read the third proposition for the sake of completeness, but it has no application to the present case, as there is no suggestion that the local education authority are acting in breach or in disregard of their statutory duties as contemplated by that proposition.

The first and second propositions are applicable. Under the first proposition, wardship jurisdiction of the Chancery court still exists notwithstanding Acts of Parliament conferring on local authorities powers and duties in respect of children, but, under the second proposition, the effect of such an Act may be, not, I think, if one speaks accurately, to restrict the jurisdiction, but to restrict the scope of the proper exercise of the jurisdiction. In the absence of special circumstances, the court ought not to exercise its power of control in a sphere of activity which has been entrusted by statute to a local authority.

To explain the reference in the second proposition to " familiar principles ", I will read an earlier passage in the same judgment of the Master of the Rolls (16):

> " What then is the effect of this statute to which I have made such references as occur to me to be necessary? I think that the effect may be stated in two propositions. First, the enactment is such that in a case like the present there is in the Act a clear and comprehensive scheme laid down (what LORD SUMNER called a modus operandi (17)) involving positive duties imposed by Parliament on the local authority and a precise formulation of the way in which the consequent powers are to be exercised, and, secondly, that as regards these duties and powers the discretion is conferred on the authority by the words—' appears to them '—which have occurred in the citations that I have made. The meaning of that phrase was expounded by LORD GODDARD, C.J., in *Re A.B.* (*an infant*) (18), to which I shall return, as meaning ' appears to the satisfaction of the local authority ', and that is a formula which, as LORD GODDARD, C.J., pointed out, must be taken to confer an absolute discretion on the person or authority concerned provided

(15) [1961] 1 All E.R. at p. 795; [1961] Ch. at p. 345.
(16) [1961] 1 All E.R. at p. 792; [1961] Ch. at p. 341.
(17) *A.-G.* v. *De Keyser's Royal Hotel, Ltd.*, [1920] All E.R. Rep. at p. 103; [1920] A.C. at p. 561.
(18) [1954] 2 All E.R. 287; [1954] 2 Q.B. 385.

A it is exercised bona fide. LORD GODDARD, C.J., in that respect followed the decisions of this court in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (19) and the later case of *Carltona, Ltd.* v. *Works Comrs.* (20)."

It is necessary to see whether there is in the Education Act, 1944, a clear and comprehensive scheme laid down involving positive duties imposed by Parliament on the local education authority and a precise formulation of the way in which the consequent powers are to be exercised, and whether statutory discretions are conferred on the local education authority. One does find all those features—the scheme and the positive duties and the precise formulation and the discretions—in s. 36 to s. 40 of the Act. The local education authority have to decide: (i) whether it appears to them that the parent of any child is failing to perform the duty imposed on the parent by s. 36; (ii) whether they are satisfied that the child is receiving efficient full-time education; (iii) whether in their opinion it is expedient that the child should attend school, so that a school attendance order should be made; (iv) if the parent selects a school to be named in the order, whether that school is unsuitable or whether attendance of the child at that school would involve unreasonable expenses, so that an application should be made to the Minister of Education; (v) if, while the school attendance order is in force, the parent requests that another school be substituted, or that the order be revoked on the ground that arrangements have been made for the child to receive efficient full-time education otherwise, whether the request should be granted; and (vi) if the school attendance order is not complied with, whether in their opinion the institution of proceedings is necessary for the purpose of enforcing the duty imposed on a parent by the Act so that there should be a prosecution.

If the Chancery court were to give a direction duplicating the obligation already imposed by the school attendance order, for the parent to send the child to school, subsequent questions would arise as to amendment, revocation or enforcement of the obligation. Then who would decide? Would the local education authority surrender their discretion to the Chancery court, or would the Chancery court surrender its discretion to the local education authority, or would they each exercise their own discretion so that a conflict could arise? It is clear that, at any rate in the absence of some very peculiar situation calling for and justifying intervention of the Chancery court in the statutory sphere of activity of the local education authority, there should be no such intervention.

In the present case the remedy under the Act is specifically provided and has not been fully tried out. It is for the local magistrates' court to decide (i) whether the parent has failed to comply with the school attendance order, (ii) whether it is proved under s. 37 (5) that the parent is causing the child to receive efficient full-time education suitable to his age, ability and aptitude otherwise than at school, and (iii) if there is a conviction, what penalty should be imposed. The provisions of s. 40 (1), providing progressive but limited penalties, have evidently been devised with a view to bringing pressure to bear on a parent to induce compliance with the order, without imposing severe penalties which might be disastrous for the children as well as the parent. The offending parent is entitled to have, and also bound to accept (subject to the right of appeal), the decisions of the local magistrates' court on all these matters.

In my opinion, although the local education authority have all the merits in this case and it may be regretted that no help can be given to them, the learned judge was right in declining to give the directions desired by the local education

(19) [1943] 2 All E.R. 546. (20) [1943] 2 All E.R. 560.

authority and consequently terminating the wardship. I agree that the appeal should be dismissed. A

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Clerk of Norfolk County Council* (for the local education authority); *Piesse & Sons*, agents for *Russell Steward, Stevens & Hipwell*, Norwich (for Mrs. Baker); *Field, Roscoe & Co.*, agents for *Sadler, Lemmon & Gethin*, King's Lynn (for Mr. Baker). B

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

C

CRITCHLEY *v.* CLIFFORD.

[Court of Appeal (Ormerod Willmer and Danckwerts, L.JJ.), May 8, 9, July 7, 1961.]

Rent Restriction—Sub-tenancy—Letting—Letting to intermediate landlord outside Acts as agricultural holding let to farmer—Sub-tenancy of cottage on farm——Cottage occupied as private dwelling, not in connexion with farm work—Whether sub-tenant protected by Rent Restriction Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 12 (2) *proviso* (iii). D

A farm of some two hundred acres, including a cottage, was let in 1932 to the plaintiff. The farm was subject to the Agricultural Holdings Act, 1948, and, by virtue of para. 1 of Sch. 7, not to the Rent Restrictions Acts. In 1944 the plaintiff sub-let the cottage, which was within the limits of rateable value of dwelling-houses to which the Rent Restrictions Acts applied. The sub-tenant was not, however, connected with work on the farm and accordingly the exemption under para. 1 of Sch. 7 to the Act of 1948 would not apply in relation to the sub-letting of the cottage if viewed separately as a letting on its own. The plaintiff, the intermediate landlord, sought to recover from the defendant, the sub-tenant, possession of the cottage, as having a status outside the protection of the Rent Restrictions Acts by virtue of s. 12 (2) proviso (iii) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which admittedly excluded from those Acts the letting of the farm with the cottage to the plaintiff, as " a house let together with land other than the site of the house " within proviso (iii). E F G

Held: in deciding whether the sub-tenant was entitled to the protection of the Rent Restrictions Acts the determining factor was the letting of the cottage, that sub-tenancy being the letting to which the word " let " in proviso (iii) to s. 12 (2) of the Act of 1920 referred; that sub-tenancy was within the Rent Restrictions Acts, and, therefore, the sub-tenant was entitled to their protection (see p. 292, letter C, p. 295, letter H, and p. 298, letter F, post). H

Prout v. *Hunter* ([1924] All E.R. Rep. 53) applied.

Rudler v. *Franks* ([1947] K.B. 530) and *Percy G. Moore, Ltd.* v. *Stretch* ([1951] 1 All E.R. 228) distinguished.

Appeal allowed. I

[**Editorial Note.** It was conceded that the occupying sub-tenant would not be protected by the Rent Restrictions Acts as against the superior landlord, if the tenancy of the farm were determined (see p. 293, letter F, and p. 298, letter C, post).

As to the application of the Rent Acts to houses let with land or other premises, see 23 Halsbury's Laws (3rd Edn.) 751-753, paras. 1507, 1508; and for cases on the subject, see 31 Digest (Repl.) 655-657, *7578-7587.*

A For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2) (iii), see 13 HALSBURY'S STATUTES (3rd Edn.) 1004.]

Cases referred to:

Clark v. *Downes*, *Clark* v. *Mawby*, [1931] All E.R. Rep. 157; 145 L.T. 20; 31 Digest (Repl.) 635, *7438*.

B *Cow* v. *Casey*, [1949] 1 All E.R. 197; [1949] 1 K.B. 474; [1949] L.J.R. 565; 31 Digest (Repl.) 713, *7984*.

Dudley and District Benefit Building Society v. *Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 31 Digest (Repl.) 639, *7472*.

Glossop v. *Ashley*, [1922] 1 K.B. 1; 90 L.J.K.B. 1237; 125 L.T. 842; 85 J.P. 234; 31 Digest (Repl.) 673, *7687*.

C *Knight* v. *Olive*, [1954] 1 All E.R. 701; [1954] 1 Q.B. 514; [1954] 2 W.L.R. 646; 3rd Digest Supp.

Lloyd v. *Cook*, *Goudge* v. *Broughton*, *Simson* v. *Miatt*, *Bartram* v. *Brown*, *Barker* v. *Hutson*, [1928] All E.R. Rep. 201; [1929] 1 K.B. 103; 97 L.J.K.B. 657; 139 L.T. 452; 92 J.P. 199; 31 Digest (Repl.) 724, *8079*.

Moore (*Percy G.*), *Ltd.* v. *Stretch*, [1951] 1 All E.R. 228; 3rd Digest Supp.

D *Prout* v. *Hunter*, [1924] All E.R. Rep. 53; [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest (Repl.) 639, *7467*.

Rudler v. *Franks*, [1947] K.B. 530; [1947] L.J.R. 658; 176 L.T. 326; 111 J.P. 190; 31 Digest (Repl.) 635, *7439*.

Sherwood (*Baron*) v. *Moody*, [1952] 1 All E.R. 389; 2 Digest (Repl.) 15, *63*.

Webster v. *McDonnell*, unreported.

E *Wirral Estates, Ltd.* v. *Shaw*, [1932] All E.R. Rep. 43; [1932] 2 K.B. 247; 101 L.J.K.B. 370; 147 L.T. 87; 96 J.P. 143; 31 Digest (Repl.) 635, *7442*.

Appeal.

The tenant appealed against an order of His Honour JUDGE FRASER HARRISON made on Oct. 26, 1960, in Liverpool County Court in favour of the plaintiff F landlord, requiring the tenant to give up possession of a dwelling-house at 35, Mill Brow, Speke, Liverpool, on Jan. 26, 1961. The grounds of appeal were that the judge was wrong in law in holding that the tenancy of the dwelling-house was not protected under the Rent Acts.

J. E. Jones for the tenant.

K. W. Dewhurst for the landlord.

G *Cur. adv. vult.*

July 7. The following judgments were read.

ORMEROD, L.J.: This is an appeal against a decision of His Honour JUDGE FRASER HARRISON given at Liverpool on Oct. 26, 1960, when he decided that the landlord of a cottage in Liverpool was entitled to possession against H the then occupying tenant and made an order to that effect. This appeal is on behalf of the tenant and the respondent is, of course, the landlord. The facts are as follows. The tenant has been the tenant since 1944 or thereabouts of a cottage known as 35, Mill Brow, Speke, Liverpool. At the time of the original tenancy the weekly rent was 7s. 6d. per week but there have been subsequent increases and today it is £1 per week. The landlord is not the owner of the I freehold of the cottage in question. Were he the landlord, there would be no question but that the tenant would be entitled to the protection of the Rent Acts. The landlord is himself a tenant of Tewitt Hall Farm, Speke, which is a farm of about two hundred acres and therefore the Agricultural Holdings Act, 1948, applies to these premises. The cottage in question is a cottage on the farm which was let to the landlord by Liverpool Corporation as part of the farm. The tenant, however, takes no part in the running or management of the farm but uses the cottage entirely for the purposes of occupation by himself and his family. It was contended successfully before the learned county court judge

that, as the Rent Acts operated in rem and not in personam, the Acts did not apply to the premises in question and in the circumstances the tenant was not entitled to protection.

This, of course, is a very difficult problem and it is one on which there is a surprising dearth of authority. It may be that this question has arisen on other occasions before judges of county courts, but by reason of the small amount involved or for other good reason no case similar to this appears to have come before this court. There was a case [cf. p. 297, text and note (25) post] on very similar lines before His Honour JUDGE HAROLD BROWN in Liverpool County Court prior to this case and it would appear that His Honour JUDGE FRASER HARRISON with very good reason chose to adopt the reasoning of JUDGE HAROLD BROWN in that case and in giving his judgment referred at length to the previous judgment. The previous case was to a very large extent on all fours with the present one and in those circumstances it is hardly surprising that the county court judge, having given the matter careful consideration, decided to adopt the reasoning and the language employed by his brother judge.

The relevant section of the Act of Parliament which we have to consider is s. 12 (2) (iii) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which is as follows:

> "For the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one-quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

There can be no doubt that in the circumstances of this case this subsection applies, and it is clear that the farm and buildings let with the farm are not within the purpose of the Rent Acts. It is contended, therefore, on behalf of the landlord that, as the Rent Acts operate in rem and not in personam, the exception was created when the tenancy was granted by Liverpool Corporation to the landlord, and in those circumstances any intermediate letting was likewise deprived of the protection of the Acts. The issue in this case is whether in the circumstances the Rent Acts apply to this particular letting or whether their effect is to exclude this letting from the protection of the Acts, thereby justifying an order for possession of the cottage.

The landlord in this case relied on *Rudler* v. *Franks* (1). That was a decision of the Divisional Court and the judgment was given by LORD GODDARD, C.J. That was a case of a tenant of a farm held on lease from the Crown and therefore Crown property. A cottage on the farm was let to a tenant and the tenant of the farm subsequently sought to recover possession of the cottage by a warrant under the Small Tenements Recovery Act, 1838. The justices refused to grant the warrant, holding that as between the landlord and tenant of the cottage the Rent Acts applied. It was held that the Rent Acts did not apply as the cottage was Crown property and the Crown was not affected by the Rent Acts, as they applied in rem and not in personam. LORD GODDARD, C.J., said (2):

> "So far as this court is concerned it seems that the case is concluded by the decision of the Divisional Court, consisting of LORD HANWORTH, M.R., and ROMER, L.J., sitting as additional judges of the King's Bench Division, in *Clark* v. *Downes* (3). That case has also been considered and must be taken as approved by the Court of Appeal of which the same two judges were members, in *Wirral Estates, Ltd.* v. *Shaw* (4). As I understand the decision it is this. The Rent Restriction Acts apply in rem and not in personam. The meaning of that is that the Rent Restriction Acts attach or apply to the property itself, and, therefore, as the Crown is not bound by the

(1) [1947] K.B. 530. (2) [1947] K.B. at p. 531.
(3) [1931] All E.R. Rep. 157. (4) [1932] All E.R. Rep. 43; [1932] 2 K.B. 247.

A Rent Restriction Acts the cottage or house as long as it remains Crown property, never becomes affected by them. If the tenancy of the cottage had been granted by the Crown, I think no one could have disputed the fact that the Rent Restriction Acts would not apply, because the Crown not being named in the Acts, obviously upon all the well known rules of construction is not affected by the Acts. The reason why the Acts do not apply B when the tenant of the Crown creates a sub-tenancy is first because, as I have just said, the Acts operate in rem and not in personam and so are never attached to the house at all. It was also pointed out by ROMER, L.J., that the Crown's rights would or might be affected because if the Crown sold the reversion the Crown would probably receive a less sum for the property if the Acts applied than if they did not apply, because the purchaser would C not be able to obtain vacant possession."

It is to be observed that the court was there dealing with property which was owned by the Crown and remained Crown property and it was well established that the Rent Acts did not apply to Crown property. There was some modification of this rule in 1952, but there is no doubt that in 1947 the rule was in force, D and in the circumstances, if property was originally Crown property, it remained so for as long as the reversion was the property of the Crown, however many lettings and sub-lettings there were. In the circumstances any sub-letting of the property would be subject to the same properties and characteristics as the original letting and the principal characteristic as far as this case is concerned is that, it being Crown property, the Rent Acts would not apply.

E The question which this court has to consider is whether in the circumstances of this case the Rent Acts would not apply because the original letting by Liverpool Corporation to the landlord was the letting of something which was outside the scope of the Acts. It was argued by counsel for the landlord that this was certainly a case where the Acts did not apply and therefore the court was acting properly in making an order for possession: that the operation of the Rent Acts being in rem, a characteristic must, therefore, have attached itself F to this property at the time of the original letting by Liverpool Corporation just as though the property were Crown lands, and that in those circumstances that particular characteristic could not be detached from any portion of the letting if there were a sub-letting by the tenant from Liverpool Corporation to a sub-tenant.

G This appears on the face of it to be a formidable argument, but of course it depends to a very large extent on the proper construction of the words of s. 12 (2) (iii) of the Act of 1920, which I have read. It is to be noted, however, that the section refers to land or premises let together with a house, and later to a house let together with land other than the site of the house, and it appears to me that the material part of the subsection which we have to construe is the meaning of the word "let". If the word "let" relates back to the original H tenancy between Liverpool Corporation and the present landlord, then of course the landlord's contention here is the right one. On the other hand, if it relates only to the contract of tenancy, if contract there was, between the present landlord and the present tenant, then I fail to see how it can apply in the circumstances of the present case.

The clue to the decision in this case may well be in a decision of this court in I *Prout* v. *Hunter* (5). Paragraph 1 of the proviso to s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:

> "this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture,"

and in *Prout* v. *Hunter* (5) it was held that the word "let" there meant "let to

(5) [1924] All E.R. Rep. 53; [1924] 2 K.B. 736.

the occupying tenant", and therefore where a landlord let a house unfurnished to a tenant who let it to a sub-tenant furnished, the former could not on an application by the landlord for possession claim the protection of the statute. It is unnecessary for me to refer to the judgments of the court which were delivered by BANKES, L.J., SCRUTTON, L.J., and SARGANT, J., but the position is clear that, at the time when that case was decided, a furnished dwelling was not within the protection of the Rent Acts, whereas an unfurnished dwelling was, and it was held that, where an unfurnished dwelling had been let to a tenant who afterwards furnished it and sub-let it, the person who had furnished and sub-let it could not claim the protection of the statute. In the circumstances of that case the word "let" was held to mean "let to the occupying tenant". Equally in this case, in construing proviso (iii) to s. 12 (2), it appears that the word "let" must mean "let to the occupying tenant", and, if that be so, the only tenancy that we have to consider in this case is the tenancy of the cottage of which the plaintiff in this case is the landlord and the defendant is the tenant. It may be that, at the time when the present landlord obtained a tenancy of the farm, the whole farm was then outside the protection of the Rent Acts, but the point that matters is that, at the time the landlord, i.e., the tenant of the farm, let the cottage to the tenant, he was letting a cottage to an occupying tenant for the purposes of his occupation of the cottage as a dwelling and not because the tenant was employed on the farm or engaged in any way in the management or running of the farm. If that is the proper way to construe s. 12 (2) (iii) of the Act of 1920, and I think that it is, then it appears to me that the argument which has been submitted on behalf of the landlord falls to the ground.

It may be that it is much too late to question the proposition that the operation of the Rent Acts is in rem and not in personam but the point which has to be considered is that the quality of being exempt from the provisions of the Acts does not apply until there is a tenancy involving an occupying tenant. In the circumstances, it appears that in this case there was no tenancy to which the Rent Acts could apply until 1944, when this cottage was let to the present tenant. At that time the cottage may well have been a part of a holding which for various reasons, and particularly by reason of s. 12 (2) (iii), was excluded from the operation of the Rent Acts, but nevertheless there was no tenancy of any kind with which this court is concerned until the premises were let to the present tenant. When they were let to him, they were let to him for his occupation, and in those circumstances I can see no reason why the Rent Acts should not apply.

It may well be that, had this cottage been sub-let to some other tenant or to this one as part of a larger holding, e.g., as part of the whole farm let to the landlord by Liverpool Corporation, then the protection of the Acts would not have applied to these premises and it would have been proper to make an order for the possession of this cottage as well as other premises let at the same time. But that is not this case. The landlord retained possession of the whole of the farm and did nothing more than let this particular cottage to the tenant. In those circumstances I see no reason why the Rent Acts should not apply. I would allow this appeal.

WILLMER, L.J.: I have reached the same conclusion. The difficulty in this case is to determine which of two conflicting principles, each of them well established by authority binding on us, is applicable in relation to the particular facts. Both sides agree, and indeed it is now well settled, that the Rent Acts operate in rem, i.e., they operate on property. But to say this, to my mind, does not advance the matter very far; for it remains to consider how the res is to be looked at.

The tenant's case is that, since the fundamental purpose of the Acts is to protect an occupying tenant, the property which constitutes the res must be

A looked at from his point of view. The principle contended for is nowhere more concisely and lucidly stated than in the judgment of SARGANT, J., in *Prout* v. *Hunter* (6). He said (7):

> "For the purpose of determining the status of a particular house and ascertaining whether it is within the Act or not, it is necessary, where there are several tenancies and sub-tenancies affecting it, to consider which of B those tenancies is the material one for the purpose. In *Glossop* v. *Ashley* (8) it was held that, for the purpose at any rate of determining the standard rent of the house, the material bargain is that which has been made with the occupying tenant, and upon the ground, as SCRUTTON, L.J., insisted (9), and I desire to concur with him—that the object of the Act was prima facie to protect the occupying tenant. If the status of the house as regards the C standard rent is to be ascertained by looking at the position of the occupying tenant, there is as much or more reason for regarding the position of the occupying tenant for the purpose of determining whether the landlord can obtain an order for possession."

In the present case the dwelling-house in question is well within the monetary D limits. Although it formed part of the landlord's agricultural holding, so far as the defendant's tenancy is concerned it is not "a house let together with land other than the site of the house", so as to be excluded by proviso (iii) to s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Nor is it excluded by para. 1 of Sch. 7 to the Agricultural Holdings Act, 1948, since the tenant who occupies it is not

> E ". . . the person responsible for the control (whether as tenant or as servant or agent of the tenant) of the farming of the holding."

Prima facie, therefore, and viewing the matter from the point of view of the defendant as occupying tenant, there would seem to be no reason why he should not be entitled, as against the plaintiff, his immediate landlord, to the full F protection of the Rent Acts.

It is conceded that, in the event of the superior landlord determining the plaintiff landlord's tenancy, the defendant tenant would not be protected against a claim for possession at the suit of the superior landlord. This was decided in *Cow* v. *Casey* (10), a decision of this court. But that decision left untouched the question whether a tenant in the position of this defendant is entitled to protection against his own immediate landlord so long as the latter's G tenancy subsists. It appears to be the view of the learned editors of MEGARRY ON THE RENT ACTS that such a tenant would be entitled to protection (see 8th Edn., at p. 20), and this seems to be in accordance with what was said by JENKINS, L.J., in *Knight* v. *Olive* (11). An analogous position arose in *Dudley and District Benefit Building Society* v. *Emerson* (12) where a mortgagor of a dwelling-house, whose statutory power of leasing was excluded by the terms of H his mortgage, had nevertheless purported to let the premises. In that case the tenant was held to be not entitled to the protection of the Rent Acts as against the mortgagee; but the view was expressed that, if the mortgagor had sought to get possession, the tenant would have been entitled to protection as against him—see, e.g., per SOMERVELL, L.J. (13).

It will be seen, therefore, that a formidable argument is put forward on behalf I of the defendant, the occupying tenant, as against his own immediate landlord who created the tenancy now in question. If the principle contended for by

(6) [1924] All E.R. Rep. 53; [1924] 2 K.B. 736.
(7) [1924] 2 K.B. at p. 744; [1924] All E.R. Rep. at p. 58.
(8) [1922] 1 K.B. 1.
(9) [1922] 1 K.B. at p. 8.
(10) [1949] 1 All E.R. 197; [1949] 1 K.B. 474.
(11) [1954] 1 All E.R. at p. 703; [1954] 1 Q.B. at p. 519.
(12) [1949] 2 All E.R. 252; [1949] Ch. 707.
(13) [1949] 2 All E.R. at p. 260; [1949] Ch. at p. 723.

the occupying tenant stood alone, I think that there could be no doubt but that he must be entitled to succeed on this appeal. A

The landlord, on the other hand, calls in aid the principle whereby, since the Rent Acts operate in rem, a dwelling-house which is once declared to be outside the ambit of the Acts remains outside them for all purposes, irrespective of who the occupying tenant may be, and regardless of the circumstances in which his tenancy may have been created. The most arresting example of the application of this principle is to be found in the decision of the Divisional Court in *Rudler* v. *Franks* (14), where the dwelling-house in question was Crown property, being part of a farm held on lease from the Crown. The tenant of the farm having let the dwelling-house to a sub-tenant, the latter was held not to be entitled to the protection of the Rent Acts. In the course of giving the leading judgment in which the other members of the court concurred, LORD GODDARD, C.J., said (15): B C

> ". . . if the property sought to be recovered is Crown property, notwithstanding that the tenancy is a sub-tenancy created by the tenant of the Crown, the Rent Restriction Acts do not apply to the cottage or house so long as the property remains Crown property. I need not consider what would happen if the Crown sold the reversion. So far as this court is concerned it seems that the case is concluded by the decision of the Divisional Court, consisting of LORD HANWORTH, M.R., and ROMER, L.J., sitting as additional judges of the King's Bench Division, in *Clark* v. *Downes* (16). That case has also been considered and must be taken as approved by the Court of Appeal of which the same two judges were members, in *Wirral Estates, Ltd.* v. *Shaw* (17). As I understand the decision it is this. The Rent Restriction Acts apply in rem and not in personam. The meaning of that is that the Rent Restriction Acts attach or apply to the property itself, and, therefore, as the Crown is not bound by the Rent Restriction Acts the cottage or house as long as it remains Crown property, never becomes affected by them." D E

Another instance of the application of the same principle is to be found in the decision of this court in *Percy G. Moore, Ltd.* v. *Stretch* (18), where the dwelling-house in question belonged to a local authority, so as to fall within s. 3 (2) (c) of the Rent and Mortgage Interest Restrictions Act, 1939. That subsection provided: F

> "The principal Acts shall not, by virtue of this section, apply . . . (c) to any dwelling-house being, or forming part of, a house or dwelling in respect of which a local authority for the purposes of Part 5 of the Housing Act, 1936, are required by s. 128 of that Act to keep a housing revenue account, other than a house or dwelling to which s. 129 (3) of that Act applies." G

In proceedings for possession brought by the tenant of the local authority against the sub-tenant to whom the house had been let, it was held that the house was not within the Rent Acts and that the sub-tenant was not entitled to protection. SOMERVELL, L.J., referred (19) to *Rudler* v. *Franks* (14) and the cases there cited, and held that the same principle applied as in the case of Crown property. JENKINS, L.J., in a brief judgment, which it is useful to cite in full, said (19): H I

> "I agree. Whether or not the full result of s. 3 (2) (c), in view of the terms in which it appears in the Act of 1939, was foreseen when it was drafted, I find the words of the subsection as it stands an insurmountable

(14) [1947] K.B. 530. (15) [1947] K.B. at p. 531.
(16) [1931] All E.R. Rep. 157. (17) [1932] All E.R. Rep. 43; [1932] 2 K.B. 247.
(18) [1951] 1 All E.R. 228. (19) [1951] 1 All E.R. at p. 230.

A obstacle to the contention of counsel for the tenant. Section 3 (2) (c) contains nothing to confine its application to claims for possession by local authorities. The exclusion operates if the dwelling-house in respect of which protection of the Rent Acts is claimed is, or forms part of, a house or dwelling in respect of which a local authority is required by s. 128 of the Act of 1936 to keep a housing revenue account. Once that fact is estab-
B lished, it follows that the dwelling-house is outside the Acts, and it does not matter whether the tenancy in relation to which protection is claimed is held directly from the local authority or from a lessee of the local authority. I agree both that the language of the subsection makes this plain, and also that the conclusion to which its language points is borne out by the cases to which my Lord has referred."

C The principle sought to be extracted from these authorities is that there are some houses which, whether by a rule of law or by express statutory provision, are altogether and for all purposes excluded from the operation of the Rent Acts. Such houses have a particular quality which affects their status, so as to prevent the occupying tenant, whoever he is, from obtaining protection. The dwelling-house in question in this case, it is said, falls precisely within this class,
D for it forms part of a farm of some two hundred acres let to the landlord by Liverpool Corporation. It is therefore expressly excluded by the concluding words of proviso (iii) to s. 12 (2) of the Act of 1920, which provides: ". . . this Act shall not apply to a house let together with land other than the site of the house ". The result, it is contended, is that this house has acquired a status which, so long as the landlord's tenancy of the farm subsists, excludes it for all
E purposes from the operation of the Rent Acts. It has been pressed on us that this conclusion inexorably follows unless *Rudler* v. *Franks* (20) and *Percy G. Moore, Ltd.* v. *Stretch* (21) are held to have been wrongly decided, which it is not open to this court to hold.

It seems to me that the solution to this difficult problem must depend on the true construction of proviso (iii) to s. 12 (2) of the Act of 1920. Is the letting
F there referred to the letting under which the occupying tenant holds? Or are the words to be construed as referring to a house which, prior to the letting under which the occupying tenant holds, *has been* let by the superior landlord together with land other than the site of the house? Counsel for the landlord argued that the status of the house must be looked at as it was immediately before the letting under which the tenant holds. At that moment it was a house
G which had been let (to the landlord) together with land, and accordingly he contended that it was a house to which the proviso applied.

I have come to the conclusion that the reasoning on which this submission is founded is fallacious. The contention that the status of the house in question must be looked at as it was before the letting under which the tenant holds seems to me to be in conflict with the ratio of the decision in *Prout* v. *Hunter* (22),
H to which I have already referred. The material letting must be that under which the occupying tenant holds. It follows that the status of the house must be looked at, not as it was before, but as it was after the material letting. Were this not so, it would be impossible, in the great majority of cases, to apply the Rent Acts at all—for, until premises have been let, no question as to the application of the Acts can arise. In these circumstances I think it must follow that,
I as between the tenant and the landlord, it is fallacious to have regard to the fact that, prior to the material letting, the house in question had previously been let together with other land by the superior landlord to the plaintiff landlord. I do not think it right to say that the fact of this prior letting had, as between the landlord and the tenant, had the effect of conferring on the house in question a status of immunity from the Rent Acts, such as was at one time enjoyed by

(20) [1947] K.B. 530. (21) [1951] 1 All E.R. 228.
(22) [1924] All E.R. Rep. 53; [1924] 2 K.B. 736.

houses which were Crown property or the property of a local authority. Accordingly, in my judgment, the principle on which *Rudler* v. *Franks* (23) and *Percy G. Moore* v. *Stretch* (24) were decided can have no application to the present dispute between this landlord and this tenant. While it is no doubt true that, in the event of Liverpool Corporation terminating the landlord's tenancy of the farm as a whole, the tenant would be left without any protection, I am in the end satisfied that, so long as the landlord's tenancy continues, the tenant is entitled, as against him, to the protection of the Rent Acts.

It follows that in my judgment the learned judge came to a wrong conclusion in holding that the landlord was entitled to possession, and I would therefore concur in allowing the appeal.

DANCKWERTS, L.J.: This action concerns a cottage, 35, Mill Brow, Speke, Liverpool. The plaintiff landlord farms Tewitt Hall Farm, which is the property of Liverpool Corporation, and comprises some two hundred acres. The landlord has been the tenant of the farm since 1932, and the cottage which is on the farm was let by the landlord to the defendant tenant on a weekly tenancy in 1944 or thereabouts. The tenant has never had anything to do with the farm. The landlord now wishes to use the cottage for a farm labourer and to house one of his servants, and accordingly has given the tenant notice to quit. The question is whether the tenant is protected by the Rent Acts. On Oct. 26, 1960, His Honour JUDGE FRASER HARRISON gave judgment ordering possession to be given to the landlord on Jan. 26, 1961, and from that judgment the tenant appeals.

There is no doubt that the farm, of which the landlord is tenant, is an agricultural holding which is outside the provisions of the Rent Acts by virtue of Sch. 7 to the Agricultural Holdings Act, 1948, which, by para. 1, provides as follows:

> "The Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, shall not apply to any dwelling-house which is comprised in an agricultural holding and is occupied by the person responsible for the control (whether as tenant or as servant or agent of the tenant) of the farming of the holding."

The cottage, on the other hand, unless the situation is such that it is outside the provisions of the Rent Acts, would be within the class of dwelling-houses to which the Rent Acts apply. Section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:

> "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed [certain amounts mentioned in the subsection] . . . and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies: Provided that . . . (iii) for the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one-quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

Section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, provides:

> "Subject to the provisions of para. (a) of the last preceding subsection [which deals with licensed premises] the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land

(23) [1947] K.B. 530. (24) [1951] 1 All E.R. 228.

A exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house."

When the cottage was sub-let to the tenant by the landlord, it was not let B with any land other than the site of the cottage or a garden so small as to make no difference to the position. But it is suggested that, as the cottage when it was let formed part of the farm, an agricultural holding, it is not within, and never acquired the protection conferred on a tenant by the provisions of, the Rent Acts which might otherwise be applicable.

Many judges have remarked on the baffling nature of the Rent Restriction C Acts. It has been said that the Acts apply to houses, not persons; that they operate in rem and not in personam; and that they operate on property. I must confess that I find these expressions more confusing than helpful; nor do they seem to me to be really accurate descriptions of the operation of the Acts. Of course, the Acts deal with houses below a certain value, and, for a tenant to gain the benefit of the Acts, the house in question must come within D the class of dwellings to which the Acts apply. But it is a letting which brings the operation of the Acts into effect. For instance, the provisions of the Acts of 1920 and 1939, to which I have referred, are based on the circumstances of the lettings of the dwellings mentioned in these provisions. It is not accurate to say that the Acts are not concerned with persons: for instance, assignees are denied the protection of the Acts, except in certain limited cases.

E The learned county court judge held that the tenant was not protected by the Rent Acts and gave judgment against him for possession, following a decision of His Honour JUDGE HAROLD BROWN in Southport County Court in *Webster* v. *McDonnell* (25). That case had some similar circumstances in that, amongst others, the plaintiff was a tenant of an agricultural holding from a superior landlord, and a cottage had been sub-let to the defendant, who was never F employed on the farm, in 1933. But the plaintiff had been granted a new tenancy of the whole farm on Feb. 2, 1959, so that the original tenancy, out of which the defendant's sub-tenancy was created, must have come to an end, and consequently that case was not really similar to the present. Indeed, JUDGE HAROLD BROWN observed in the course of his judgment that it was

G "perfectly clear and common ground that on the termination of the head tenancy by surrender or otherwise the defendant would have no protection as against the head landlord."

The result is that a situation must have occurred in that case in which the plaintiff was no longer the defendant's landlord, and the superior landlord was entitled to recover possession against the defendant, and the sub-tenant, i.e., H the defendant, had ceased to have the protection of the Rent Acts. In the present case the landlord's agricultural tenancy of the whole farm is still in operation. There is no question of his being evicted, and the only question is whether he can evict the defendant, the sub-tenant, under a tenancy of a cottage without material land created by the landlord.

In the High Court there appears to be no reported decision covering the I precise question to be decided, though there are numerous cases which are said to have some bearing on the matter. As pointed out by WILLMER, L.J., in his judgment, the dwelling-house or cottage let to the tenant in the present case is within the monetary limits specified in the Rent Acts, and the letting to the tenant was not a letting of "a house let together with land other than the site of the house" as required for the exclusion in proviso (iii) to s. 12 (2) of the Act of 1920; and the tenant is not

(25) Unreported.

"the person responsible for the control (whether as tenant or as servant or agent of the tenant) of the farming of the holding" A

as required for the exclusion in para. 1 of Sch. 7 to the Agricultural Holdings Act, 1948. The natural assumption, therefore, would be that the tenant is the kind of tenant which the Rent Acts are designed to protect.

The argument for the landlord depends on the assumption that, because the cottage forms part of a holding of two hundred acres which has been originally let for agricultural purposes, the holding and each and every part of it are irretrievably stamped with the agricultural exemption from the Rent Acts which occurred on that letting. Reliance is placed on decisions of this court and the Divisional Court which have conferred exemption from the Rent Acts in the case of land owned by the Crown; *Clark* v. *Downes* (26); *Wirral Estates, Ltd.* v. *Shaw* (27); *Rudler* v. *Franks* (28); or, in the case of property belonging to a local authority, *Percy G. Moore, Ltd.* v. *Stretch* (29). WILLMER, L.J., has quoted passages from these decisions and so I need not repeat these. B C

Admittedly, if the landlord's tenancy of the farm came to an end, the tenant would find that he was not protected against the superior landlord: *Cow* v. *Casey* (30); *Baron Sherwood* v. *Moody* (31); *Knight* v. *Olive* (32). But support can be found for the view that a tenant might be protected against his lessor, though not protected against title paramount, in *Dudley and District Benefit Building Society* v. *Emerson* (33). It seems to me that it is necessary, in applying the Rent Acts, to ascertain in any given case who is the landlord and who is the tenant and which is the letting to which the provisions of the material Act are referring: see the observations of GREER, L.J., in *Lloyd* v. *Cook* (34); and those of SARGANT, J., in *Prout* v. *Hunter* (35). It appears quite clearly from the last-mentioned case, and also from *Glossop* v. *Ashley* (36) that a sub-letting of a dwelling-house may affect the position of that house and the sub-tenant in respect of the Rent Acts. D E

As I suggested earlier in this judgment, in my view it is the letting of the house which is the determining factor in the construction of those difficult Acts, which, as SCRUTTON, L.J. (37) and SARGANT, J. (38), have pointed out, were designed to protect the occupying tenant. In my opinion the material letting in the present case is the letting of this cottage by the landlord to the tenant, and this court is not concerned for the present purpose with the manner in which the landlord acquired a tenancy of the whole of his holding. I respectfully concur in the observations of WILLMER, L.J., with which I agree entirely. The learned county court judge in my opinion came to a wrong conclusion and the appeal should be allowed. F G

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the tenant); *Hatchett Jones & Co.*, agents for *Hodgson & Sons*, Preston (for the landlord).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(26) [1931] All E.R. Rep. 157. (27) [1932] All E.R. Rep. 43; [1932] 2 K.B. 247.
(28) [1947] K.B. 530. (29) [1951] 1 All E.R. 228.
(30) [1949] 1 All E.R. 197; [1949] 1 K.B. 474. (31) [1952] 1 All E.R. 389.
(32) [1954] 1 All E.R. 701; [1954] 1 Q.B. 514.
(33) [1949] 2 All E.R. 252; [1949] Ch. 707.
(34) [1928] All E.R. Rep. at p. 212; [1929] 1 K.B. at p. 135.
(35) [1924] All E.R. Rep. at p. 58; [1924] 2 K.B. at p. 744.
(36) [1922] 1 K.B. 1. (37) In *Glossop* v. *Ashley*, [1922] 1 K.B. at p. 8.
(38) *In Prout* v. *Hunter*, [1924] All E.R. Rep. at p. 58; [1924] 2 K.B. at p. 745.

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ATTORNEY-GENERAL FOR NORTHERN IRELAND v. GALLAGHER.

[HOUSE OF LORDS (Lord Reid, Lord Goddard, Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest), June 19, 20, 21, July 20, 1961.]

B *Criminal Law—Insanity—Time to which test by M'Naghten rules should be related—Disease of the mind not impairing knowledge when quiescent—Psychopathic condition—Explosive outburst induced by drink.*

Criminal Law—Appeal—House of Lords—Jurisdiction—Whether appeal limited to point of law certified by court below—Administration of Justice Act, 1960 (8 *&* 9 *Eliz.* 2 *c.* 65), *s.* 1 (2).

C On appeal to the House of Lords in a criminal cause or matter, pursuant to s. 1 (2) of the Administration of Justice Act, 1960, the House of Lords is not limited to the point of law of general public importance that has been certified under s. 1 (2) to be involved in the decision of the court below, or to matters consequential on the decision of that point, but has jurisdiction to dispose of the appeal and, if necessary for the purpose, to consider other matters than the question certified (see p. 304, letter D, p. 305, letter D, D p. 305, letter F, and p. 314, letter I, post.)

The accused was, or probably was, according to the medical evidence, a psychopath, suffering from a disease of the mind. Under certain circumstances, one of which was the taking of drink, he was liable to have emotional outbursts of a violent character. During such an outburst it was, E according to medical evidence for the defence, doubtful whether the accused knew the nature of his acts or, if they were criminal, that they were wrong. According to medical evidence for the prosecution, the disease produced lack of self-control, but did not impair appreciation of the nature of facts or knowledge that they were wrong. In September, 1960, when his mental disease was quiescent, the accused formed an intention to kill his wife, F knowing that to be wrong. He bought drink on the morning of the alleged crime, but it was not established by evidence whether he drank it before or after the homicide. The accused killed his wife. He was indicted for murder. He pleaded not guilty, the defence being insanity and, alternatively, incapacity from drink to form the intent necessary to constitute murder. In summing-up to the jury in Northern Ireland, where the G defence of diminished responsibility was not available in law*, the Lord Chief Justice emphasised to the jury the importance of the time at which the test of insanity according to the M'Naghten rules should be applied, directing the jury's attention to the accused's mental state at the time before he bought drink on that morning. The jury found the accused guilty of murder, but the Court of Criminal Appeal in Northern Ireland allowed H an appeal on the ground of misdirection in that the jury should have been directed to apply the test of insanity solely to the time of the homicide. On appeal by the Crown,

Held: the verdict at the trial should be restored because—

(i) the effect of the summing-up as a whole was that the jury were told that they should consider whether the mental disease from which the I accused was suffering was one in which violent outbursts produced absence of knowledge of the nature and quality of the act or of its wrongfulness or one in which they merely produced lack or loss of self-control (see p. 311, letter I, and p. 304, letter F, and letter E, post); accordingly, there had not been any misdirection, and the defence of insanity was not established.

(ii) (per LORD DENNING) the accused was guilty of murder whether he knew at the time when he killed his wife that to do so was wrong or did not

* Section 2 of the Homicide Act, 1957, which provides the defence of diminished responsibility, does not apply to Northern Ireland (see s. 17 (3)).

know it, for, if he did not know it, he had induced in himself by intoxication the lack of knowledge of wrongfulness, which knowledge he had previously possessed notwithstanding his mental disease (see p. 314, letter D, post).

Appeal allowed.

[**Editorial Note.** LORD TUCKER also relied on the proviso, and held that there had been no miscarriage of justice (see p. 312, letter B, post). The question of the jurisdiction of the House of Lords on appeal in a criminal matter pursuant to a certificate was raised in *Sykes* v. *Director of Public Prosecutions* (ante, p. 33), but the particular submission there advanced by the Crown, viz., that the appellant was limited to the point certified but the respondent was not (see p. 43, ante), put forward a construction of the enactment that is not discussed in the opinions in the present case.

As to the defences of insanity and the effect in law of drunkenness, see 10 HALSBURY'S LAWS (3rd Edn.) 287, 290, paras. 530, 536; and for cases on the subject, see 14 DIGEST (Repl.) 60-65, *234-283*, 69-72, *315-339*.

For the Administration of Justice Act, 1960, s. 1, see 40 HALSBURY'S STATUTES (2nd Edn.) 208.]

Cases referred to:

Bedder v. *Director of Public Prosecutions*, [1954] 2 All E.R. 801; 38 Cr. App. Rep. 133; [1954] 1 W.L.R. 1119; 15 Digest (Repl.) 940, *9013*.

Director of Public Prosecutions v. *Beard*, [1920] All E.R. Rep. 21; [1920] A.C. 479; sub nom. *R.* v. *Beard*, 89 L.J.K.B. 437; 122 L.T. 625; 84 J.P. 129; 26 Cox, C.C. 573; 14 Cr. App. Rep. 159; 14 Digest (Repl.) 71, *332*.

Milne v. *City of London Police Comr.*, *Leonard* v. *Same*, *Boundford* v. *Same*, [1939] 3 All E.R. 399; [1940] A.C. 1; 108 L.J.K.B. 625; 161 L.T. 65; 103 J.P. 299; 31 Cox, C.C. 305; 27 Cr. App. Rep. 90; 8 Digest (Repl.) 675, *162*.

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Town St. Tr. 314; 1 Car. & Kir. 130, n.; 14 Digest (Repl.) 60, *246*.

R. v. *Davis*, (1881), 14 Cox, C.C. 563; 14 Digest (Repl.) 70, *319*.

R. v. *McCarthy*, [1954] 2 All E.R. 262; [1954] 2 Q.B. 105; 38 Cr. App. Rep. 74; [1954] 2 W.L.R. 1044; 14 Digest (Repl.) 71, *330*.

R. v. *Meade*, [1909] 1 K.B. 895; 78 L.J.K.B. 476; 73 J.P. 239; 2 Cr. App. Rep. 54; 14 Digest (Repl.) 71, *328*.

R. v. *Moore*, (1852), 3 Car. & Kir. 319; 175 E.R. 571; 14 Digest (Repl.) 72, *333*.

Appeal.

Appeal by leave of the House of Lords by the Crown from an order of the Court of Criminal Appeal of Northern Ireland (BLACK and CURRAN, L.JJ., and SHEIL, J.) dated Apr. 5, 1961, quashing a conviction of the respondent, Patrick Gallagher, on Feb. 2, 1961, at Belfast Assizes before LORD MACDERMOTT, C.J., sitting with a jury, for murder. The facts are set out in the opinion of LORD TUCKER, p. 306, letter B, to p. 307, letter D, post.

The Attorney-General for Northern Ireland (*W. Brian Maginess, Q.C.*), *C. A. Nicholson, Q.C.*, and *H. Bowman* (all of the Bar of Northern Ireland) for the Crown.

B. Kelly, Q.C., and *R. Ferguson* (both of the Bar of Northern Ireland) for the respondent.

Their Lordships took time for consideration.

July 20. The following opinions were read.

LORD REID: My Lords, the respondent, Patrick Gallagher, was convicted at Belfast of the murder of his wife on Sept. 7, 1960. There is no doubt that

A he killed her. The defence was insanity or, alternatively, that he was so drunk when he killed her as to be incapable of having any intent to kill her or do her grievous bodily harm. So there was no room for a verdict of not guilty; if the defence had been successful, the verdict would have been guilty but insane or manslaughter. The respondent appealed to the Court of Criminal Appeal of Northern Ireland on the ground of misdirection of the jury by the trial judge, B LORD MACDERMOTT, C.J. That court held that there had been misdirection and that the verdict of murder could not stand; they further held that, in the circumstances, they could not substitute either a verdict of guilty but insane or a verdict of manslaughter. They, therefore, directed a verdict of acquittal to be entered. The Attorney-General for Northern Ireland thereupon applied under the provisions of the Administration of Justice Act, 1960, for a certificate C that a point of law of general public importance was involved and for leave to appeal to this House. The court granted a certificate, but refused leave to appeal. Leave to appeal was later given by this House.

Before coming to the certificate, I must set out the facts so far as they are necessary for its consideration. The respondent had frequently used violence towards his wife, generally after taking drink. The medical evidence about his D mental condition was conflicting, but there was evidence that he is an aggressive psychopath, that this is a disease of the mind which is quiescent for considerable periods but manifests itself from time to time in explosive outbursts, and that taking drink is likely to cause an outburst. For some time before Sept. 7, 1960, the respondent had been in a mental hospital. On that date he was allowed to go to Omagh. There he bought a knife and a bottle of whisky. He was seen E cycling towards his home, and two hours later he entered a neighbour's house under the influence of alcohol and said that he had killed his wife. She was found dead, having sustained extensive and brutal injuries from the knife and a hammer. The respondent had drunk the greater part of the bottle of whisky either before or after the killing or both.

I can now come to the certificate. The court certified that

F "the following point of law of general public importance was involved in the said decision:—Whether a person in a psychopathic condition which is quiescent may become insane (within the meaning of the rules in *M'Naghten's Case* (1)) as the result of the voluntary consumption by him of intoxicating liquor, if the effect of that intoxicating liquor is to bring about an explosive outburst in the course of a mental disease although the disease G was not itself caused by intoxicating liquor."

One of the Crown's arguments submitted to the Court of Criminal Appeal and to this House was that, even if at the moment of killing his wife the respondent was incapable of knowing the nature and quality of his act or knowing that he was doing wrong, and even if that was a consequence or manifestation of his mental disease—of his being a psychopath liable to explosive outbursts— H yet the defence of insanity was not open to him because before taking the drink, when there was no defect in his reason, he had clearly evinced an intention to kill his wife and any temporary derangement of his reason at the time of the killing was the result of his own voluntary act in taking the drink. In my opinion, this is the point and the only point of law raised by the certificate. It is, I think, assumed in the certificate that, during an "explosive outburst", I the person's reason is dethroned to the extent required by the M'Naghten rules (2). Whether that assumption was justifiable on the evidence may be questionable, but the argument before the Court of Criminal Appeal appears to have proceeded on the footing that there was just sufficient evidence to entitle a jury to come to that conclusion if so minded.

The first argument submitted by counsel for the respondent was that, under the provisions of the Act of 1960, this House had no power or jurisdiction to

(1) (1843), 10 Cl. & Fin. 200. (2) (1843), 10 Cl. & Fin. 200.

decide any question beyond that set out in the certificate. If a decision of that question is sufficient to dispose of the whole case, then this House can do that but not otherwise. Counsel then submitted that no matter how the question of law in the certificate is dealt with, that cannot lead to substituting another verdict for the verdict of acquittal entered by the Court of Criminal Appeal. This must, I think, have been the view of that court, because the ground on which they refused to grant leave to appeal to this House was

> "that in the opinion of this court a ruling on this point of law in favour of the Crown's contention would not lead to a reversal of the decision of this court."

That argument depends on the proper construction of s. 1 of the Administration of Justice Act, 1960, which is in the following terms (3):—

> "(1) Subject to the provisions of this section, an appeal shall lie to the House of Lords, at the instance of the defendant or the prosecutor,—(a) from any decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter; (b) from any decision of the Court of Criminal Appeal on an appeal to that court.
>
> "(2) No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House.
>
> "(3) Section 5 of the Appellate Jurisdiction Act, 1876 (which regulates the composition of the House of Lords for the hearing and determination of appeals) shall apply to the hearing and determination of an appeal or application for leave to appeal under this section as it applies to the hearing and determination of an appeal under that Act; and any order of that House which provides for the hearing of such applications by a committee constituted in accordance with the said s. 5 may direct that the decision of that committee shall be taken on behalf of the House.
>
> "(4) For the purpose of disposing of an appeal under this section the House of Lords may exercise any powers of the court below or may remit the case to that court.
>
> "(5) In this Act, unless the context otherwise requires, 'leave to appeal' means leave to appeal to the House of Lords under this section."

Subsection (1) allows an "appeal" from a "decision" of the court below, and sub-s. (4) authorises this House in "disposing of" the appeal to "exercise any powers of the court below". So far there is nothing to suggest that the powers and duties of this House in this matter are different from or more limited than its powers and duties in ordinary appeals. The difficulty arises from sub-s. (2), which limits the grounds on which leave to appeal can be granted. First, there must be a certificate by the court below that a point of law of general public importance is involved in the decision, i.e., in the decision of the court below. And then comes the provision which causes the difficulty; before the court below or this House can grant leave, it must appear that "the point is one which ought to be considered" by this House. Taken by themselves, these last words might seem to indicate that all that this House is to do is to consider (which must include deciding) the point of law. But that cannot be right because there would then be no reason for authorising this House to exercise "any powers of the court below". Moreover, a limited consultative jurisdiction of this kind would

(3) In the application of the Administration of Justice Act, 1960, to Northern Ireland, references to the Court of Criminal Appeal and the Divisional Court of the Queen's Bench Division are modified by ibid., s. 18 (4), Sch. 2, Pt. 1, paras. 1, 2, and a specific modification of ibid., s. 1, is made by Sch. 2, Pt. 2; see 40 HALSBURY'S STATUTES (2nd Edn.) 226, 228, 229.

A be a novelty in United Kingdom procedure and, if that were all that this House can do, the procedure could hardly be called an "appeal" from the "decision" of the court below. The point of law is not the decision—it is only "involved in the decision". The decision in the present case was the substitution of a verdict of acquittal for the verdict of murder, and that is the decision from which the present appeal lies. The point certified by the Court of Criminal Appeal is B certified by them as having been "involved in the decision".

To make the issue clearer, let me suppose a case where the respondent in this House argued two points in the court below either of which, if right, entitled him to succeed. The court below, having decided one in his favour, might well say it was unnecessary to consider the second. Then, the first point having been certified, this House holds that the court below was wrong. What is then C to happen? It cannot reasonably be supposed that Parliament intended that the respondent is to have no opportunity of having his second point considered so that his conviction must stand. So it must either be considered by this House or by the court below. It is true that sub-s. (4) authorises a remit to that court, but that is only for the purpose of disposing of the appeal to this House. I can find nothing to authorise a remit to the court below directing it to re-open and D re-hear the case and come to a fresh decision. So in that case at least this House must go beyond the point certified and hear and decide the second point which may have no connexion at all with the first. If in such a case this House must exercise the whole of its ordinary functions on appeal, what is there to show that, in some other class of case, it is not to do so? The respondent points to the contrast between the language of s. 1 (2) of the Act of 1960 and the language of E s. 6 (1) of the Criminal Appeal (Northern Ireland) Act, 1930 (which is the same as in the corresponding English Act). Under the latter (4), the Attorney-General had to certify that "it is desirable in the public interest that a further appeal should be brought"; under the Act of 1960 it must appear "that the point is one which ought to be considered by that House"; under the old procedure, it was decided in *Milne* v. *City of London Police Comr.* (5) that it was open to the F appellant to take any point before this House, and the argument is that the change of language in the Act of 1960 clearly shows an intention to alter this.

In my judgment, the change of language can properly be regarded as indicating an intention to make some alteration, but the question remains—What was the alteration which was intended? In deciding that well-settled principles require us to go to the words of the new Act, we can have in mind the circumstances G when the Act was passed and the mischief which then existed so far as these are common knowledge, but we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act.

If I had to consider the provisions of sub-s. (2) without reference to the earlier H law, I would have no doubt that the purpose of sub-s. (2) is merely to define the conditions which must be satisfied before leave can be given and that, once leave has been given, its purpose is spent. The court below must certify that a point of law of general public importance is involved; then leave is not to be granted unless further it "appears", or is thought by that court or this House in deciding whether to give leave, that the point is one which ought to be con- I sidered by this House. I would not infer a prohibition against this House considering anything else but that point, and I would find no basis for an inference that this House is permitted to consider some further points but not others which it could normally consider in an ordinary appeal. It is familiar and well known that one thing which this House considers in deciding whether to give leave in a civil case is whether the case involves a point of law which ought to be considered by this House. But, once leave is given, this House can

(4) Cf., the Criminal Appeal Act, 1907, s. 1 (6); 5 HALSBURY'S STATUTES (2nd Edn.) 927.

(5) [1939] 3 All E.R. 399; [1940] A.C. 1.

and does consider other points as well. Subsection (2) could well mean that, whereas in civil cases the existence of such a point is only one element, though an important element, in deciding whether to give leave, in criminal cases, it is an indispensable element. There was no such indispensable element under the former law; so far as its language went, the Attorney-General could have acted on any ground that seemed sufficient to him to warrant a certificate that it was desirable in the public interest that a further appeal should be brought. Of course I do not say that this was the reason for the change of language. I only say that it is not an inevitable inference from the change of language that it must have been intended to limit the scope of the appeal once leave had been given.

As the proper construction of this section raises a new and important issue, I do not wish to go further than is necessary to decide this case. Others regarding it in the light of different facts may be more successful than I have been in finding in the terms of the section some basis for an implication that, in hearing an appeal under it, the powers of this House are in some way limited. This is a case in which the question of law certified and the question whether there was misdirection are not entirely unrelated. They are different questions because, even if I agree with the view of the Court of Criminal Appeal on the question of law certified—and I do agree with what I understand to be their view—I can still hold that there was no misdirection. So a decision that there was no misdirection is in no way merely consequential on a decision on the point of law certified. It is, therefore, necessary for me to hold, as I do, that the section does not limit this House to the question certified and matters consequential on its decision of that question. But I do not have to decide whether it is open to an appellant to raise matters wholly unrelated to the question certified.

On the question of misdirection, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend, LORD TUCKER. I agree with it, and, in particular, I wish to add that I entirely agree with his view that absurd and disastrous consequences can result from the present limitation of the powers of the Courts of Criminal Appeal. Accordingly, I move your Lordships that this appeal should be allowed and the verdict of murder restored.

LORD GODDARD: My Lords, in my opinion, this appeal should be allowed and the verdict and sentence passed at the trial restored. I have had an opportunity of reading the opinion about to be delivered by my noble and learned friend, LORD TUCKER, who has fully and carefully analysed the medical evidence, and I agree with his conclusions. I would, however, say that, despite the somewhat guarded admission of the Attorney-General before the Court of Criminal Appeal of Northern Ireland, there was not, in my opinion, any evidence of insanity; at the most, evidence only of self-imposed drunkenness. I will assume the respondent was an aggressive psycopath, but no one suggested that such a condition of itself amounted to insanity. I will assume that, on one who suffers from that mental condition, alcohol can have an explosive effect. This means no more than that drink would, or at most might, result in a loss of self-control. But to admit that as a defence would be to allow self-imposed intoxication to be set up as a defence of insanity, a proposition which was emphatically negatived by this House in *Director of Public Prosecutions* v. *Beard* (6). Moreover, there was no evidence whether the respondent consumed the whisky before or after he attacked his wife. No one suggested that, at the time of his trial, he was insane; he gave a reasonably coherent account of what he had done and why he did it directly or very soon after the killing, but he gave no evidence at his trial and has never suggested that he did not know what he was doing when he killed his wife. In my opinion, there was no misdirection by the Lord Chief Justice (LORD MACDERMOTT); it was most important to consider what the mental state of this man was when he set out in the morning to visit his wife, and equally important to consider his condition after he had killed her. When

(6) [1920] All E.R. Rep. 21; [1920] A.C. 479.

A a defence of insanity is raised, there is seldom evidence of witnesses who saw the killing; it has to be inferred in so many cases from the history of the accused before and after the actual deed. The defence could only rely on the evidence of Dr. Dawson, who to his credit was careful to emphasise that he could not be positive. In my opinion, his evidence does not support the onus which was on the respondent to establish insanity.

B The other matter which was argued on the appeal, whether this House is confined merely to answering the question submitted as one of general public importance has, I admit, caused me some difficulty. Reading sub-s. (2) of s. 1 alone of the Administration of Justice Act, 1960, would seem to support the view that the House is confined to a consideration of the point certified by the court below. But sub-s. (2) requires the House to dispose of the appeal and C enables it to exercise any powers of the court below. It may well be in many cases that the answer to the specific question will dispose of the appeal, as in the case of the appeal recently before the House (7) where the question submitted was whether there is still such an offence as misprision of felony. An answer in the affirmative upheld the decision of the trial court and no further question arose or could arise. But, for the reasons given by my noble and learned D friend, LORD REID, it is clear that this may not be always the case, yet the House must dispose not merely of the question certified but of the appeal, and, if to enable this to be done it becomes necessary to consider other matters, in my opinion they must have power to do so.

I would add that this case affords a striking illustration of what may result from the Court of Criminal Appeal in Northern Ireland, as in England, having E no power to order a new trial in an appropriate case. Had it not been possible for the court to certify that a point of law of general importance arose in the case and for this House to hold that it was fit for their consideration, a man who had brutally murdered his wife and whom a jury had declined to find was insane would have had to be set at liberty free of any consequence of his crime.

F LORD TUCKER: My Lords, I agree that, once the court from which the appeal is brought has certified that a point of law of general public importance is involved in the decision, and leave to appeal has been given, either by that court, or this House, the jurisdiction of this House to hear the appeal is established, and there is nothing in the Administration of Justice Act, 1960, in any way limiting its jurisdiction. It will always be a matter for the exercise of G its discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed from the decision in this case that an appellant can, as a matter of right, raise any such point. In the present case, I consider the point certified of necessity requires an examination of the decision of the Court of Criminal Appeal, and, when this decision is looked at, it becomes clear that, in order to dispose of the appeal, the H direction of the Lord Chief Justice (LORD MACDERMOTT) to the jury on the law with regard to the defence of insanity, as applied to the evidence given at the trial, must be considered.

The appeal is brought by the Attorney-General for Northern Ireland under the provisions of s. 1 and s. 2 of the Administration of Justice Act, 1960, against the order of the Court of Criminal Appeal of Northern Ireland dated Apr. 5, 1961, whereby it was ordered that the respondent's appeal from his conviction for I murder be allowed and judgment and verdict of acquittal be entered on the indictment whereon he was convicted. That the respondent killed his wife is beyond all question, and in the Court of Criminal Appeal and in this House it was common ground that the only possible verdicts were (i) guilty of murder; (ii) guilty of manslaughter; (iii) guilty but insane. A verdict of acquittal, i.e., not guilty, is the one verdict which no reasonable jury could have returned, yet this is the verdict which the Court of Criminal Appeal has directed to be

(7) *Sykes* v. *Director of Public Prosecutions*, ante, p. 33.

entered on the indictment. This involves no criticism of the Court of Criminal Appeal, but serves to expose the absurd and disastrous consequences which may result from the restrictions which Parliament has imposed on the powers of the Courts of Criminal Appeal in Northern Ireland and in England. The language of the relevant statutes is identical, and does not in any case permit an order for a new trial nor, in a case such as the present, give the court any discretionary powers with regard to verdict or sentence.

At the trial before the Lord Chief Justice of Northern Ireland and a jury at the winter assizes in Belfast from Jan. 30 to Feb. 2, 1961, the respondent was indicted for the murder of his wife Rose Gallagher on Sept. 7, 1960. He pleaded not guilty, and, though, of course, no admission was or could be made, there was no attempt to challenge the evidence of the prosecution to the effect that the respondent killed his wife. The defence relied on was that he was insane at the time within the meaning of the M'Naghten rules (8) or, in the alternative, was, by reason of drink, incapable of forming the intent necessary to constitute murder and, therefore, guilty only of manslaughter. The defence of diminished responsibility is not available in Northern Ireland (9). The following is an outline of the facts proved by the uncontradicted evidence of witnesses or from admissions made by the respondent in statements to police or other persons. The respondent and his wife had been married for about sixteen years, during which time there were frequent quarrels, generally when he had taken drink, and on occasions he used violence towards her. In 1957, she obtained a separation order against him and he went to England. He was injured at work there, and in 1959 returned to Ireland and lived again with his wife and family near Omagh. His drinking habits increased and there were further quarrels. On May 26, 1960, there was a serious quarrel. A doctor was sent for who persuaded him to go for treatment to a mental hospital in Omagh, where he was admitted as a temporary patient. On June 8 he was allowed to go home on a ninety-day trial. He again started drinking and assaulted his wife. On July 19 she refused to let him in and he went to his father's house. The doctor (Lagan) visited him there and arranged for his readmission to the mental hospital. By mid-August his condition had improved and he was allowed to go into Omagh. On Aug. 15 his wife obtained an order for maintenance against him for £3 a week. On Sept. 6 he was seen by Dr. Gray at the hospital, when he appeared to be cheerful and perfectly normal. On Sept. 7 Mrs. Gallagher was alone in the house after the children left for school. At 9.45 the respondent left the hospital and went into Omagh where he bought a "Sky-line" knife. He then entered a public house where he bought a bottle of Guinness and a bottle of Power's whisky. Shortly after this, he was seen riding a cycle along a road which was one of the routes leading to his wife's house to reach which would take him about half an hour. At 1.30 p.m., Miss Aitken and Mrs. Speers, who lived next door to Mrs. Gallagher, heard a noise and saw the respondent collapsing on the kitchen floor. He had blood on his clothes and hands and was drunk. They threw water on him. When he had recovered, they asked him what had happened to him. He said that he had killed his wife. One of them said "Oh, no, you didn't", and he replied: "Come round and see". They went to the house and found Mrs. Gallagher's body in the bed covered with bedclothes up to her neck and blood on the floor. They took the respondent back to their house, locked the door of Mrs. Gallagher's house and sent for the police. When the police arrived, they found Mrs. Gallagher's body naked except for a pair of shoes. There were terrible injuries to her head and body. The head and face were covered in blood and the sheets saturated. A "Sky-line" knife with a seven-inch blade stained with blood to the hilt was found in the room. On the floor beneath the bed was an old hammer, the head of which was stained with blood. On the chest of drawers was a bottle of Power's whisky containing about two

(8) (1843), 10 Cl. & Fin. 200. (9) See the Homicide Act, 1957, s. 2, s. 17 (3).

A glasses. There were blood stains on the cellophane with which the bottle was wrapped. At about 4.15 p.m., the respondent at Omagh Police Station said to Sergeant Coyle: "I have no regrets: she gave me a hell of a life these past three years". Later, after caution, he said: "I made up my mind to kill her about a fortnight or three weeks ago". Shortly after 7 p.m., he said: "I am going to open up my mind to you". He was told: "You don't have to" and B again cautioned. He said:

> "I will tell you all. I left hospital this morning about half past nine on parole given to me by Dr. Johnson. I went into Wellworth's and bought a knife at five and three and a bottle of aspirins. After I had killed the wife I was going to do myself in by first taking the aspirins to deaden the pain and then use the knife on myself. I went into Yarrow's pub in C Bridge Street and drank a bottle of Guinness and bought a bottle of whisky for £2. I went out on the bicycle and hid it. You fellows will have bother getting it. I went into the house at almost half past eleven and the wife was on her own. I asked her to take me back but she wouldn't. I then drank half of the whisky."

D The medical evidence showed that sexual intercourse had taken place which could have occurred at any time from a day or two before death until after death.

My Lords, I have found it necessary to set out this evidence in some detail, as it will be observed that nowhere does the respondent suggest that at any time he did not know the nature and quality of the act which he did or that he did E not know it was wrong. Nor does he ever say that he was drunk when he did it or show any regret for that which he had done. He gave no evidence at his trial. None the less the defence was that he was

> "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong."

F

It was sought to establish this defence by expert medical evidence directed to prove that the respondent is what is called "a psychopath", the characteristics of which are "emotional immaturity and instability; they live in themselves and lack social sense; they tend to yield to their instincts readily and lack self-control". There are different types of psychopaths, and the respondent is said G to be of the aggressive type, i.e., one who with provocation or on taking alcohol is apt to have a severe aggressive reaction or emotional outburst which may result in loss of control. Some of the medical witnesses for the prosecution had found no signs of psychopathy in the respondent, but they were all prepared to agree either that he was probably a psychopath or that he might possibly be one. One witness thought he was probably an "inadequate psychopath" rather H than an "aggressive psychopath", but the vital difference between the expert medical witnesses for the prosecution and Dr. Dawson for the defence was whether a man suffering from this type of disease of the mind, when he has one of these emotional outbursts, does or does not know the nature and quality of his acts or, assuming such acts to be criminal, that they are wrong. The prosecution's evidence was that this type of disease of the mind merely produces lack I of self-control and does not impair a man's appreciation of the nature of his acts or knowledge that they are wrong. Dr. Dawson for the defence was not prepared to say positively that such a disease does produce this result, but expressed a doubt whether a man suffering from this disease would, in one of these outbursts, know the nature of his acts or that they were wrong. Assuming for the moment that such a doubt, if accepted by the jury in preference to the positive assertions to the contrary by the prosecution witnesses, would suffice to establish the defence, the fact remains that, if the jury rejected the defence evidence as to the nature of the mental disease and accepted the evidence for

the prosecution that the respondent was never suffering from a disease of the mind which would produce anything more than lack of control, the defence would fail in limine. The defence have not shown that the disease of the mind proved is of the kind which will produce the required results from their point of view. It was, I think, with this in mind that the Lord Chief Justice, having regard to the nature of the evidence, focussed the attention of the jury on the respondent's mental condition at 9.45 a.m. when he left the hospital. Assuming that he was then an aggressive psychopath likely to have an explosive outburst under certain circumstances, would such outburst produce nothing more than lack of self-control? If so, he would for present purposes be regarded as a normal being responsible in law for his actions who could not improve his case by the consumption of alcohol, unless such alcohol brought about some quite different type of disease such as delirium tremens, of which there was no evidence in the present case.

It may be convenient, before turning to the summing-up which the Court of Criminal Appeal have held to contain misdirections, to refer quite shortly to a few passages in the evidence of the medical witnesses which summarise the effect of their evidence. The evidence of these witnesses was dealt with by the Lord Chief Justice in his summing-up in detail, and it is not suggested that he did not place before the jury a clear and accurate assessment of its effect. The evidence of Dr. Lagan, who is not a mental expert, was summarised by the Lord Chief Justice as follows:

> "Now, his evidence would seem to me to amount, in general words, to this: That this man is a man who has been subject to violence for no apparent reason; he's liable to something that might be called a brain storm; and Dr. Lagan added that he thought that he would have little knowledge of what he was doing at the time. He added that he was always sorry afterwards; and it's quite obvious from the doctor's evidence as to the position on earlier occasions . . . that he regarded him as 'mental'—at least in some degree—not just a drunkard—but a man 'mental' in some degree."

Dr. Gray had had long experience in mental institutions. He first saw the respondent on May 26, 1960. He found him mildly depressed, quite rational and rather emotional. He subsequently saw him quite often and found no signs of mental abnormality. In cross-examination, he said: "He possibly is a case of an aggressive psychopathic personality". He added:

> "In my opinion, leaving out of account any question of alcohol, the [respondent] would have known what he was doing when he struck these blows. If he knew what he was doing, he would have known that it was wrong."

He added that he had never seen him in a violent state and couldn't say what his condition would be when committing violence. Dr. Johnston was the resident medical superintendent of the mental hospital in Omagh. He saw the respondent at irregular intervals in the course of his routine work. He had allowed him out on parole, and at that time saw no evidence of mental defect. In cross-examination, he agreed that he was "probably" or "possibly" a psychopath. His intellectual age would be about nine or ten, the maximum in this scale being fifteen. He said his experience of an aggressive psychopath was that they are clear as to what happened during the outburst. He added that, if a psychopath was under the influence of drink, it would be more probable that his appreciation of what he was doing would be more limited. He concluded:

> "Knowing this man and having heard the circumstances of this case and assuming he did these things to his wife, my opinion is that he knew what he was doing; in my opinion he knew what he was doing was wrong."

It may be convenient to refer at once to the passage in the summing-up which followed the Lord Chief Justice's reading of this last passage to the jury—which

A he had called the test questions. These questions and the doctor's answers were clearly directed to the state of the respondent's mind at the moment of killing. The learned judge said:

> "Now, if you accept that, it is the end of this defence of insanity, because if you accept that, the man doesn't qualify, according to the rules which have been laid down. He may be a psychopath; he may be abnormal; B he may be mentally defective—but if you accept that opinion of Dr. Johnston's, he is not entitled to succeed in the defence of insanity which we are now discussing."

The effect of the evidence of Dr. Dawson on which the defence of insanity rested is summarised in the following passages:

C "Q.—On that date [i.e., Sept. 7, 1960] what is your opinion about the state of the [respondent's] mind?

"A.—. . . From the description of him when he was found, from the description of the terrible injuries received by his wife, it could be explained by a severe explosive reaction in an aggressive psychopath, probably to some extent, at least, under the influence of drink.

D "Q.—What, in your opinion, was his mental state prior to and at the time of killing her?

"A.—Well—this is presumption purely on what I've heard, and the nature of the injuries, and what I know of the man and of his state when he was discovered—therefore I can't quite honestly go beyond probabilities —but I do feel it is probable that this alleged attack on his wife was carried E out while in one of these explosive reactions. It would seem to me to fit what I have heard. I couldn't go further than that."

In the course of his answer to a further question as to the state of the respondent's mind during the explosive outburst, he said:

> "Assuming I am right in considering that he might be subject to the short-circuit and bomb-like type of reaction; and assuming also, my Lord, F that he may have been under the influence of alcohol, I can only express a very real doubt, either to his having an appreciation of what he was doing, or that even it was wrong—on those assumptions, my Lord, I have given this question, which I knew would be asked, very anxious thought."

Asked to explain the difference between the presence and absence of alcohol he G said:

> "Well, the only distinction I can draw, my Lord, is alcohol would make it still more doubtful as to whether he knew the nature and quality of his act; but even if he hadn't alcohol and was acting under provocation, with an extreme emotional reaction to that provocation, I would still have to express a doubt as to his appreciation of the nature and quality of his act— H a doubt, my Lord."

This is the passage which the Lord Chief Justice in his charge to the jury described as the high-water mark of his evidence. He said:

> "That's as far as he can put it, he says so very fairly. He can't be positive; he can't tell you that this man, in his opinion, didn't know what he was doing or didn't know that it was wrong. He says that for him there's I doubt . . . Alcohol would make it still more doubtful."

These are the conflicting medical views. There is some difference of opinion whether the respondent is in fact an aggressive psychopath. Dr. Dawson says he was, some of the others are prepared to accept that he might be, but the real conflict was whether these explosive reactions or outbursts in the case of an aggressive psychopath merely diminish or destroy the power of self-control, or whether they prevent him having any knowledge of the nature and quality of his act or that it is wrong. It was a conflict with regard to the nature of the

disease of the mind from which the respondent was suffering, assuming he had the disease. If the witnesses for the prosecution were right, this disease does not even under provocation or the stimulus of alcohol produce anything more than lack of self-control. If this was the true nature of the disease from which the respondent was suffering at 9.45 a.m. on Sept. 7, 1960, and presumably still suffers today, the defence of insanity fails at the outset. It was, accordingly, in my view, not only permissible but right and proper for the Lord Chief Justice to direct the jury to consider the condition of the man at that time and to tell them, in effect, that the subsequent consumption of alcohol could not assist the defence of insanity. This does not mean that a man can never produce in himself a disease of the mind by the excessive consumption of alcohol, e.g., delirium tremens, and in such a case the question will arise whether the disease so produced results in insanity within the M'Naghten rules (10). This was not such a case. It was not suggested that the respondent became an aggressive psychopath as a consequence of the consumption of alcohol. He was, it was said, an aggressive psychopath liable to outbursts of violence on provocation or under the influence of alcohol or any other exciting cause.

With these observations I turn to the judgment of the Court of Criminal Appeal. They said:

> "The main criticism on behalf of the [respondent] of the Lord Chief Justice's directions to the jury was that he directed them to apply the M'Naghten test (10) not to the time when the [respondent] killed his wife but to the morning of that day before he opened the bottle of whisky. It is pointed out that he so directed the jury both in the early part of his summing-up and also again nearer the end. This is at variance with the specific terms of the M'Naghten rules (10) which definitely fix the crucial time as the time of committing the act. The insanity sought to be relied on in the present case is a very special form of mental aberration. A jury would be entitled, if they accepted Dr. Dawson's evidence, to find that the [respondent] suffered from a disease of the mind which was episodic and that it could only affect the [respondent's] reason during one of the explosive outbursts to which Dr. Dawson referred. If their consideration was directed away from the actual time of the killing to some earlier period in the day when the disease was quiescent they might easily come to the conclusion that the [respondent] was not then suffering from the type of affliction which was being relied on by the defence. As against this it is pointed out that time and time again throughout the summing-up the Lord Chief Justice recurs to the questions 'Did the [respondent] know what he was doing and did he know that what he was doing was wrong?', and that on every occasion he relates these questions to the time of the fatal acts. This would be a conclusive answer if we could be sure that the jury in deciding the issue of insanity addressed themselves to these questions. No one can say what happened in the jury room. If the jury followed in their deliberations the order in which the M'Naghten test (10) was placed before them in the summing-up it is conceivable that they may first have chosen to consider whether the [respondent] was suffering from a mental disease—relating this question to the morning of the crime—and having considered that the answer to this question was in the negative, may have concluded that the defence of insanity failed."

The passages referred to are as follows:

> "Now, the next question I want to take up with you is in some ways, perhaps, the most difficult aspect—at all events for me—of this unfortunate case: When do you apply that M'Naghten test (10) in this case? We have heard a lot here during the course of this trial about intoxication, about

(10) (1843), 10 Cl. & Fin. 200.

A brain storms, about explosions, about sudden reactions, and it's very important, as I understand the situation, that we should get a pretty clear notion not only what the test is, but when it's applied.

"There is a question of the man's intoxication—which I will come to presently—and it raises an issue in itself; it also complicates the question of insanity. But, gentlemen, the whole tenor, the whole weight, of the B evidence in this case, as I have found it, is to the effect that if this man was suffering from a disease of the mind, it wasn't of a kind that is produced by drink. Sometimes we got cases where a man has become so sodden with drink that his mind becomes diseased; but that's not this case. There is clear evidence here—and it hasn't been disputed—that such mental peculiarities as he had may have existed when he wasn't taking drink. C There's the evidence of Dr. Johnston, as well as Dr. Gray, that his mind hadn't deteriorated. There's every reason to come to the conclusion that if this man was insane, it wasn't because of drink. I didn't understand that was challenged; and it seems to me that in view of that, and in view of all the circumstances of the case, you have to regard his condition on the 7th of last September, before he touched a drop—on this question of insanity— D later we have to come to another state of affairs—but on this question of insanity, my direction to you is that, in point of law, you must come to your conclusion without reference to the drink that the [respondent] took on Sept. 7; and that you should direct your attention to the state of his mind on that morning before he opened the bottle of whisky.

"This defence of insanity in this case cannot be made good with the aid E of that bottle of whisky. If the [respondent] was responsible for his actions before drinking that morning, he did not, in the eyes of the law, bring himself within the category of insanity which makes a man not responsible for his actions simply by making himself drunk. In other words, if a man is answerable for his acts, he can't bring himself over the line and be deemed not answerable by taking drink."

F And towards the end of his charge:

"Now, apply this test which I have described to you, I am afraid, on several occasions now, in the light of all that evidence, of your own good sense, of what the medical men, out of their experience and skill, have told you, of all the circumstances of the case, and apply it to the situation as it existed that morning before the man started on the whisky bottle. If you come G to the conclusion that, on the balance of probabilities, this man . . . didn't know that what he was doing was wrong, then you should find him guilty, but insane. On the other hand, if you come to the conclusion, remembering that the burden is on him of proving this defence of insanity, that he did know what he was doing when he killed his wife . . . then you should find him guilty on this evidence. Remember the test, again. First of all, was he H suffering from some disease or infirmity of mind? Is it such that he didn't know that what he was doing was wrong; or, if he did know, that he didn't know it was wrong—I'm sorry—I'll put that again. Is he suffering from a disease of the mind? As a result of that, was he prevented from knowing what he was doing; or, if he did know what he was doing, that it was wrong?"

I

My Lords, these passages, or parts of them, taken in isolation and quoted in a text-book on crime might be open to some criticism, but they must be considered in the context of a careful and detailed summing-up dealing with the medical evidence in relation to the particular kind of mental disease relied on by the defence. What the jury were being told was that they should consider whether *the particular mental disease from which he was said to be then suffering* was of the nature described by Dr. Dawson, namely one in which violent outbursts will produce absence of knowledge of the nature and quality of the act

or its wrongness, or merely lack or loss of self control as stated by the prosecution doctors. Reading the summing-up as a whole, this was, in my view, made abundantly clear. If, however, I am wrong in the interpretation I have placed on the summing-up taken as a whole, and if it is to be read in the sense impliedly attributed to it in the grounds on which the Court of Criminal Appeal certified that their decision involved a point of law of general public importance, I would have no hesitation, in view of the overwhelming nature of the evidence, consisting largely of the respondent's own statements, in holding that there had been no miscarriage of justice, and that the proviso to s. 3 (1) of the Criminal Appeal (Northern Ireland) Act, 1930 (11), should be applied.

For these reasons, I would allow the appeal and restore the verdict and sentence passed at the trial.

LORD DENNING: My Lords, every direction which a judge gives to a jury in point of law must be considered against the background of facts which have been proved or admitted in the case. In this case the respondent did not give evidence himself. And the facts proved against him were:—He had a grievance against his wife. She had obtained a maintenance order against him and had been instrumental in getting him detained in a mental hospital. He had made up his mind to kill his wife. He bought a knife for the purpose and a bottle of whisky—either to give himself Dutch courage to do the deed or to drown his conscience after it. He did in fact carry out his intention. He killed his wife with the knife and drank much of the whisky before or after he killed her. There were only two defences raised on his behalf: (i) Insanity; (ii) Drunkenness.

The Lord Chief Justice (LORD MACDERMOTT) directed the jury that the *time* when they had to consider whether he was insane or not (within the M'Naghten rules (12)) was before he started on the bottle of whisky. "You should direct your attention", he said to them, "to the state of his mind before he opened the bottle of whisky." If he was sane at that time, he could not make good the defence of insanity "with the aid of that bottle of whisky". Immediately after the jury retired, counsel for the respondent took up this point of *time*. He suggested that it was inaccurate and inconsistent with the M'Naghten rules (12). But the Lord Chief Justice adhered to his view. He declined to modify his charge to the jury on the matter. "If I'm wrong", he said, "I can be put right". It was on this very point of *time* that the Court of Criminal Appeal reversed him. His direction was, they said, "inconsistent with the M'Naghten rules (12)", which fix the crucial time as "the time of the committing of the act", that is, the time of the killing and not at an earlier time. The question is whether the direction of the Lord Chief Justice as to the *time* was correct. At least that is how I read the question posed by the Court of Criminal Appeal. It is complicated by the fact that, according to the medical evidence, the respondent was a psychopath. That does not mean that he was insane. But it sharpens the point of the question. He had a disease of the mind. It was quiescent before he started on the whisky. So he was sane then. But the drink may have brought on an explosive outburst in the course of which he killed her. Can he rely on this self-induced defect of reason and put it forward as a defence of insanity?

My Lords, this case differs from all others in the books in that the respondent, whilst sane and sober, before he took to the drink, had already made up his mind to kill his wife. This seems to me to be far worse—and far more deserving of condemnation—than the case of a man who, before getting drunk, has no intention to kill, but afterwards in his cups, whilst drunk, kills another by an act which he would not dream of doing when sober. Yet, by the law of England, in this latter case his drunkenness is no defence even though it has distorted his reason and his will-power. So why should it be a defence in the present case? And is it made any better by saying that the man is a psychopath? The answer

(11) Cf. the Criminal Appeal Act, 1907, s. 4 (1), proviso.
(12) (1843), 10 Cl. & Fin. 200.

A to the question is, I think, that the case falls to be decided by the general principle of English law that, subject to very limited exceptions, drunkenness is no defence to a criminal charge nor is a defect of reason produced by drunkenness. This principle was stated by SIR MATTHEW HALE in his PLEAS OF THE CROWN, Vol. 1, p. 32, in words which I would repeat here:

B "This vice [drunkenness] doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy . . . by the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."

This general principle can be illustrated by looking at the various ways in which drunkenness may produce a defect of reason: (a) It may impair a man's powers of C perception so that he may not be able to foresee or measure the consequences of his actions as he would if he were sober. Nevertheless, he is not allowed to set up his self-induced want of perception as a defence. Even if he did not himself appreciate that what he was doing was dangerous, nevertheless, if a reasonable man in his place, who was not befuddled with drink, would have appreciated it, he is guilty; see *R.* v. *Meade* (13), as explained in *Director of Public Prosecutions* D v. *Beard* (14). (b) It may impair a man's power to judge between right or wrong, so that he may do a thing when drunk which he would not dream of doing while sober. He does not realise he is doing wrong. Nevertheless, he is not allowed to set up his self-induced want of moral sense as a defence. In *Beard's* case (15) LORD BIRKENHEAD, L.C., distinctly ruled that it was not a defence for a drunken man to say he did not know he was doing wrong. (c) It may impair a man's power E of self-control so that he may more readily give way to provocation than if he were sober. Nevertheless, he is not allowed to set up his self-induced want of control as a defence. The acts of provocation are to be assessed, not according to their effect on him personally, but according to the effect they would have on a reasonable man in his place. The law on this point was previously in doubt (see the cases considered in *Beard's* case (16)), but it has since been resolved by *R.* v. F *McCarthy* (17), *Bedder* v. *Director of Public Prosecutions* (18) and s. 3 of the Homicide Act, 1957.

The general principle which I have enunciated is subject to two exceptions: (i) If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intent, is an answer; see *Beard's* G case (19). This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing (see *R.* v. *Moore* (20)) as where, at a christening, a drunken nurse put the baby behind a large fire, taking it for a log of wood (18 GENTLEMAN'S MAGAZINE, 1748, p. 570); and where a drunken man thought his friend (lying in his bed) was a theatrical dummy placed there and stabbed him to death ("The Times" Jan. 13, 1951). In each of those H cases it would not be murder. But it would be manslaughter. (ii) If a man by drinking brings on a distinct disease of the mind such as delirium tremens, so that he is temporarily insane within the M'Naghten rules (21), that is to say, he does not at the time know what he is doing or that it is wrong, then he has a defence on the ground of insanity; see *R.* v. *Davis* (22), and *Beard's* case (23).

Does the present case come within the general principle or the exceptions I to it? It certainly does not come within the first exception. The respondent was

(13) [1909] 1 K.B. 895.
(14) [1920] All E.R. Rep. at pp. 29, 30; [1920] A.C. at pp. 502-504.
(15) [1920] All E.R. Rep. at p. 31; [1920] A.C. at p. 506.
(16) [1920] All E.R. Rep. at pp. 25, 26; [1920] A.C. at pp. 495-497.
(17) [1954] 2 All E.R. 262; [1954] 2 Q.B. 105.
(18) [1954] 2 All E.R. 801.
(19) [1920] All E.R. Rep. at pp. 28, 30; [1920] A.C. at pp. 501, 504.
(20) (1852), 3 Car. & Kir. 319.
(21) (1843), 10 Cl. & Fin. 200.
(22) (1881), 14 Cox, C.C. 563.
(23) [1920] All E.R. Rep. at pp. 28, 29; [1920] A.C. at pp. 500, 501.

not incapable of forming an intent to kill. Quite the contrary. He knew full well what he was doing. He formed an intent to kill, he carried out his intention and he remembered afterwards what he had done. And the jury, properly directed on the point, have found as much, for they found him guilty of murder. Then does the case come within the second exception? It does not to my mind; for the simple reason that he was not suffering from a disease of the mind brought on by drink. He was suffering from a different disease altogether. As the Lord Chief Justice observed in his summing-up: "If this man was suffering from a disease of the mind, it wasn't of a kind that is produced by drink". So we have here a case of the first impression. The man is a psychopath. That is, he has a disease of the mind which is not produced by drink. But it is quiescent. And, whilst it is quiescent, he forms an intention to kill his wife. He knows it is wrong, but still he means to kill her. Then he gets himself so drunk that he has an explosive outburst and kills his wife. At that moment he knows what he is doing but he does not know it is wrong. So in that respect—in not knowing it is wrong—he has a defect of reason at the moment of killing. If that defect of reason is due to the drink, it is no defence in law. But, if it is due to the disease of the mind, it gives rise to a defence of insanity. No one can say, however, whether it is due to the drink or to the disease. It may well be due to both in combination. What guidance does the law give in this difficulty? That is, as I see it, the question of general public importance which is involved in this case.

My Lords, I think the law on this point should take a clear stand. If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So, also, when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do. A psychopath who goes out intending to kill, knowing it is wrong, and does kill, cannot escape the consequences by making himself drunk before doing it. That is, I believe, the direction which the Lord Chief Justice gave to the jury and which the Court of Criminal Appeal found to be wrong. I think that it was right, and for this reason I would allow the appeal. I would agree, of course, that if, before the killing, he had discarded his intention to kill or reversed it—and then got drunk—it would be a different matter. But when he forms the intention to kill and without interruption proceeds to get drunk and carry out his intention, then his drunkenness is no defence, and none the less so because it is dressed up as a defence of insanity. There was no evidence in this case of any interruption, and there was no need for the Lord Chief Justice to mention it to the jury.

I need hardly say, of course, that I have here only considered the law of Northern Ireland. In England, a psychopath such as this man might now be in a position to raise a defence of diminished responsibility under s. 2 of the Homicide Act, 1957.

My Lords, I have thus dealt with the case by considering the point raised by the Court of Criminal Appeal; and by dealing with it, I think it is possible to dispose of the appeal. If it were necessary to consider any other point in order to dispose of the appeal, I would certainly be prepared to do so; for I take the view that, once leave to appeal is given to your Lordships' House, all points are open as well as the point stated; and that it is not correct for the Court of Criminal Appeal to limit the appeal to the point which they consider to be of general public importance. Your Lordships will be well able, of course, to prevent any abuse of this power.

I would allow this appeal and restore the conviction of murder.

A **LORD MORRIS OF BORTH-Y-GEST:** My Lords, the Court of Criminal Appeal of Northern Ireland have certified that a point of law of general public importance was involved in their decision. Their decision, shortly stated, was that the conviction of the respondent ought to be set aside because the jury were wrongly directed. The point of law as defined in the certificate of the Court of Criminal Appeal can only have relevance and significance if it is related to B their decision that the summing-up was open to criticism on the ground that there was misdirection. As the point of law stated by the Court of Criminal Appeal is not a theoretical one but a practical one, it must be taken to postulate that there was evidence from which the jury could have held that the respondent had been in a psychopathic condition, that such condition was quiescent, that he voluntarily consumed intoxicating liquor, and afterwards had an " explosive outburst ", C and to raise the question whether, on such basis, the jury was incorrectly directed as to the application of the rules in *M'Naghten's Case* (24). The submission of the Crown was that there was no misdirection.

On the part of the case dealing with insanity, the issue before the jury was whether the respondent at the time of the killing was suffering from a disease of the mind, which disease had the effect of producing a defect of reason so that D either he did not know the nature and quality of the act he was doing or that he did not know that it was wrong. If he had any disease of the mind, he had it prior to and on the morning of Sept. 7; it was immaterial how it was caused, though, if the respondent had any disease of the mind, it was not of a kind that was caused by drink. If he had a disease of the mind in the morning, I do not read the medical evidence as suggesting that some later consumption of alcohol E altered the nature of the disease. Nor do I read the medical evidence as suggesting that any disease of the mind originated during the day. It was said that the respondent had a disease of the mind which was " episodic ", in that it made him liable to have outbursts. If there was some explosive outburst resulting either in his not knowing what he was doing or not knowing that it was wrong, there would only be applicability of the M'Naghten rules (24) if such explosive outburst F was a manifestation of, or a result of some disease of the mind which existed in the morning. If there was some explosive outburst which resulted from drink and not from a disease of the mind, then the M'Naghten rules (24) would not be applicable. It was for the respondent at the trial to show that his actions at the time of the killing were manifestations of a disease of the mind and not manifestations of being under the influence of alcohol.

G Since, in the present case, it was not suggested that, if the respondent had some disease of the mind, it had not existed at the start of the day and throughout the day, a consideration whether such disease existed in the morning was equally a consideration whether it existed " at the time of the committing of the act ". When the learned Lord Chief Justice (LORD MACDERMOTT) told the jury in his summing-up that they should come to their conclusion without reference to the H drink that the respondent took on Sept. 7, and should direct their attention to the state of his mind in the morning before he opened the bottle of whisky, he was helpfully reminding them that, for the M'Naghten rules (24) to apply, the defect of reason producing a condition of either not knowing the nature and quality of the act being done or of not knowing that it was wrong must be the result of a disease of the mind and not the result of being under the influence of I drink. The learned Lord Chief Justice was pointing the difference between the possible case where a psychopath does something because he is drunk and the possible case where a psychopath does something because he is a psychopath. The many references in the summing-up to the tests in regard to the knowledge of the respondent (i.e., his knowledge as to the nature and quality of the act he was doing or whether it was wrong) must, in the nature of things, have had reference to the moment of time of the act (i.e., the killing) which was in question. The

(24) (1843). 10 Cl. & Fin. 200.

learned Lord Chief Justice summarised all the medical evidence very carefully. The most that Dr. Dawson could say in regard to the respondent's knowledge was that, assuming that the respondent " may have been under the influence of alcohol ", he (Dr. Dawson) expressed a " very real doubt " as to the respondent's knowledge in the material respects; if it were assumed that the respondent had not had alcohol Dr. Dawson expressed " a doubt " as to the respondent's knowledge. If the jury thought that the respondent did have a disease of the mind, then such disease of the mind existed on the morning of Sept. 7 and before the defence of insanity could succeed the jury would have had to have been of the opinion that that disease of the mind was of such a kind that it could produce and that it did produce a defect of reason which had the result that the respondent either did not know what he was doing or did not know that it was wrong.

Having these considerations in mind it seems to me that, read as a whole, the summing-up did not wrongly direct the jury in their consideration of the issue of insanity.

I would allow the appeal.

Appeal allowed.

Solicitors: *Linklaters & Paines*, agents for *Chief Crown Solicitor*, Ulster (for the Crown); *J. Tickle & Co.*, agents for *David Gordon*, Belfast (for the respondent).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

Re BLACK BOLT AND NUT ASSOCIATION OF GREAT BRITAIN'S AGREEMENT (No. 2).

[Restrictive Practices Court (Diplock, J., Sir Stanford Cooper, Mr. W. L. Heywood and Mr. W. G. Campbell), June 29, July 27, 1961.]

Restrictive Trade Practices—Agreement—New agreement—Test whether new agreement is " to the like effect " to another agreement in respect of restrictions declared to be contrary to the public interest—" Effect "—Test to be applied where court has given reasoned judgment on reference of original agreement—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 20 (3).

The test whether an agreement is " to the like effect " under s. 20 (3) of the Restrictive Trade Practices Act, 1956, to another agreement in respect of restrictions declared contrary to the public interest under s. 21 (1) of that Act is—" Do the parties by the new agreement agree that one or more of them shall do or refrain from doing acts like those which it was agreed should be done or not done by those provisions of that other agreement which contained restrictions declared to be contrary to the public interest? " (see p. 320, letter G, post).

The test to be applied whether a restriction in a new agreement is " like " a restriction in an agreement which has been declared contrary to the public interest where the Restrictive Practices Court has given a reasoned judgment on the reference of the original agreement is—" In the absence of any fresh evidence other than the terms of the new agreement, would the reasoning expressed in the judgment of the court on the original reference in which it was held that the respondents had failed to satisfy the court under s. 21 of the Restrictive Trade Practices Act, 1956, that acts which the parties to the original agreement had by the provisions thereof which contained restrictions agreed should be done or not done were not contrary to the public interest, necessarily lead the court to the conclusion that the acts which the person subject to the injunction has by entering into the new agreement agreed should be done or not done must also be deemed under that section to be contrary to the public interest ?" If the answer to this question is " Yes ", the new agreement is to " the like effect " to the original agreement

A in respect of the restrictions declared by the court to be contrary to the public interest (see p. 321, letter F, post).

In determining whether this test is satisfied, the court cannot look at any material other than (a) the terms of the new agreement or arrangement, (b) the terms of the restrictions declared to be contrary to the public interest in the original reference, and (c) the pleadings and the reasons for judgment B in the original reference and any documents specifically incorporated by reference therein (see p. 321, letter I, post).

[For the Restrictive Trade Practices Act, 1956, s. 20, see 36 HALSBURY'S STATUTES (2nd Edn.) 952.]

Case referred to:

Black Bolt and Nut Assocn. of Great Britain's Agreement, Re, [1960] 3 All E.R. C 122; L.R. 2 R.P. 50; [1960] 1 W.L.R. 884; 3rd Digest Supp.

Application.

Application by the Registrar of Restrictive Trading Agreements for a declaration and an injunction under s. 20 (3) of the Restrictive Trade Practices Act, 1956. The facts are set out in the judgment of the court.

D *B. J. M. MacKenna, Q.C.*, and *W. Gumbel* for the Black Bolt and Nut Association of Great Britain.

Arthur Bagnall, Q.C., for the Registrar.

Cur. adv. vult.

July 27. **DIPLOCK, J.**, read the following judgment of the court: This is an application on the part of the Registrar for a declaration that a proposed E agreement to come into effect on July 31, 1961, entered into by the persons who were respondents to the reference to this court (which we will call "the original reference") entitled *Re Black Bolt and Nut Assocn. of Great Britain's Agreement* (1) is an agreement or arrangement to the like effect to the agreement which was the subject-matter of the order made by the court in the original reference in respect of the restriction (that is to say, No. 4) which was declared by such order to be F contrary to the public interest. The Registrar also asks for an injunction restraining the Association from entering into the proposed agreement. The actual terms of the restrictions contained in the agreement (which we will call "the original agreement") referred to this court in the original reference are hereinafter referred to as "the original restrictions" (2). It is sufficient at this stage to observe that, by the original restrictions, a distinction was drawn between the G supplies of goods to government departments, railways and other large users (other than inquiries for day-to-day requirements) on the one hand, and other kinds of supplies on the other hand. The latter (which we will call "ordinary supplies") could only be sold by members of the Association at fixed prices contained in, or ascertainable from, the Association's price list; the former (which we will call "large-user supplies") were required by restriction No. 4 H to be sold at a price not less than a minimum price notified to members by the secretaries. In fact, as was stated somewhat elliptically (3) the arrangement between the members as to the minimum price notified by the secretaries under the original agreement was that each member proposing to tender for supplies to any large user should report his proposed quotation to the secretaries and the lowest price of the proposed quotations was then notified to all members as the minimum I price which could be quoted. The agreement or arrangement in respect of "large-user supplies" was thus quite different from that in respect of ordinary supplies. There were no fixed prices for large-user supplies, but merely an arrangement which prevented a Dutch auction among members making tenders for large-user supplies. On the reference, the court declared that the original restrictions in respect of ordinary supplies (other than a restriction relating to quantity

(1) [1960] 3 All E.R. 122; L.R. 2 R.P. 50.
(2) See [1960] 3 All E.R. at pp. 129, 130, 136; L.R. 2 R.P. at pp. 62-64, 91, 92.
(3) [1960] 3 All E.R. at p. 140; L.R. 2 R.P. at p. 98.

discounts) were not contrary to the public interest, but that all the original restrictions relating to large-user supplies (that is, restriction No. 4 and ancillary restrictions) were contrary to the public interest. The original agreement thereupon became void in respect of restrictions relating to large-user supplies, with the consequence that all members became free to deal with large-user supplies on whatever terms they thought fit.

What they have now mutually agreed to do by the new agreement to come into effect on July 31, 1961, is to subject large-user supplies to restrictions identical with those applicable to ordinary supplies. These new restrictions are in general the same as those which the court declared on the original reference to be not contrary to the public interest when applied to ordinary supplies; but with an alteration designed to permit members to supply goods at a price lower than the fixed price to an amount commensurate with any special saving in cost of production resulting from the special nature or circumstances of the order. It is desirable to emphasise that, on this application, we are in no way concerned with whether this proposed new or amended agreement is or is not contrary to the public interest either in respect of ordinary supplies or in respect of large-user supplies. It will be subject to registration under s. 9 and s. 10 of the Restrictive Trade Practices Act, 1956, and can be referred to the court by the Registrar if he thinks fit, under sub-s. (1) of s. 20 of the Act. On such a reference, and only on such a reference, would we have jurisdiction to determine whether any of the new or amended restrictions are contrary to the public interest.

The jurisdiction which we are called on to exercise on the present application is not a jurisdiction under sub-s. (1) of s. 20, but a jurisdiction under sub-s. (3) of that section, ancillary to the jurisdiction in respect of the original agreement which we have already exercised under sub-s. (1) in the original reference. Subsection (3) is in the following terms:

> " Where any such restrictions [that is restrictions in the original agreement] are found by the court to be contrary to the public interest, the agreement [scilicet, the original agreement] shall be void in respect of those restrictions; and without prejudice to the foregoing provision the court may, upon the application of the Registrar, make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement who carry on business in the United Kingdom—(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions; (b) from making any other agreement (whether with the same parties or with other parties) to the like effect."

This subsection deals with the consequences of a declaration made by the court in the exercise of its jurisdiction under sub-s. (1) that restrictions are contrary to the public interest. The consequences are twofold: the first is automatic, namely, that the agreement becomes void in respect of those restrictions; the second is that the court acquires an ancillary jurisdiction to grant in aid (or, in the language of s. 22 (1) " in pursuance ") of its declaration such injunctions as are specified in para. (a) and para. (b) of s. 21 (1).

The parties to the new or amended agreement are the same as the parties to the original agreement, and the crucial question on this application is whether the new or amended agreement falls within the words " any other agreement . . . to the like effect " in s. 20 (3) (b). If it does not, we have no jurisdiction to grant any injunction on the present application. One must approach the construction of these words in the light of the general scheme of the Act. The agreements to which the Act applies are agreements under which restrictions of certain kinds specified in s. 6, as qualified by s. 7 and s. 8, are accepted by two or more parties; that is to say, agreements under which the parties agree that one or more of them shall do or refrain from doing certain acts. All such agreements are prima facie contrary to the public interest, but the only immediate consequence of this

A is that they become registrable under s. 9 and liable to be referred to the court. The court's primary jurisdiction in respect of any such agreement which is referred to it is to declare whether any restrictions which the parties have so accepted are contrary to the public interest. This is the jurisdiction which is conferred by sub-s. (1) of s. 20. The only automatic legal consequences of a declaration that any restrictions are contrary to the public interest is that im-
B posed by the first part of sub-s. (3), namely, that the agreement is void in respect of those restrictions. This of itself merely prevents the agreement from having any legal effect so far as restrictions are concerned. It does not make the agreement illegal, nor does it of itself prevent parties to the agreement from continuing voluntarily to act in precisely the same way as before the restrictions were declared contrary to the public interest.

C Parliament, no doubt, assumed that respondents to references would in general behave like responsible citizens and refrain from acting in a manner which had been declared contrary to the public interest, and the Act, accordingly, provides no automatic sanction to ensure that they will so refrain. It leaves it to the court to determine in each individual case whether or not such a sanction should be imposed. The only sanction which the court can impose is an injunction of the
D kind specified in para. (a) and para. (b) of s. 20 (3). Once it has made such an injunction, the court's jurisdiction to discharge or to modify it is governed by the provisions of s. 22. The court may only discharge an injunction or replace it by an injunction in different terms on an application made in accordance with that section with the leave of the court, and the court may only grant such leave "upon prima facie evidence of a material change in the relevant circum-
E stances": scilicet—the circumstances specified in s. 21 of which the court must be satisfied if it is to declare that the restrictions are not contrary to the public interest. On an application made under s. 22, the whole matter is re-opened, and the court can hear further evidence directed to showing that the consequences of restrictions of the kind previously declared to be contrary to the public interest have become different as a result of the changed circumstances. This is the section
F which provides the machinery for dealing with changes in circumstances which alter the economic or other relevant consequences of restrictions, which have previously been the subject of declarations and ancillary injunctions by the court.

It is in the light of this general scheme of the Act that the words of sub-s. (3) of s. 20,

G "... order ... for restraining all or any of the persons party to the agreement who carry on business in the United Kingdom—(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions; (b) from making any other agreement (whether with the same parties or with other parties) to the like effect",

fall to be construed. "Giving effect to ... the agreement in respect of those
H restrictions" means doing or refraining from doing those acts which, by accepting the relevant restrictions, the parties to the agreement agreed should be done or not done. But an injunction in terms of para. (a) would not in itself be effective to prevent the persons against whom it was made from continuing to act in that manner which has been declared contrary to the public interest. They could cancel the existing agreement in respect of the restriction declared to be contrary
I to the public interest and enter into and give effect to a new agreement, not necessarily with the same parties as those who were parties to the original agreement, under which they accepted similar restrictions. It is against this kind of conduct that para. (b) is aimed. The agreement with which the "other agreement" referred to in para. (b) has to be compared to see whether it is "to the like effect" is the original agreement in respect of the restrictions declared to be contrary to the public interest. The meaning of the expression "effect" in relation to an agreement may vary with the context in which it appears. Prima facie, it means those acts which the parties to the agreement thereby agree that

one or more of them shall do or refrain from doing, but it is capable in the appropriate context of a wider meaning and of embracing the remoter consequences, including the economic consequences, of doing or refraining from doing those acts. In our view, both the immediate context of the subsection and the wider context of the Act require the word " effect " in para. (b) of the subsection to be given its prima facie and narrower meaning. The word appears also in para. (a) in the context " giving effect to . . . the agreement ", where it clearly has the narrower meaning. It is used in both paragraphs to define the terms of an injunction, breach of which exposes the persons subject to the injunction to penalties for contempt of court. The economic consequences of doing or refraining from doing acts, the doing or refraining from doing of which amounts to a restriction within the meaning of the Act, must vary with the general economic conditions in which the relevant agreement is from time to time operating and, if these consequences were what was meant by the " effect " of the new agreement, it would be impossible for the persons subject to the injunction to know at the time of entering into the new agreement whether they were in breach of the injunction or not. On the one hand, an agreement identical in terms with one declared to be contrary to the public interest might, as a result of changes in general economic conditions, have wholly different economic consequences from those of the original agreement at the time that it was declared to be contrary to the public interest, while on the other hand an agreement which required the parties to do or refrain from doing acts quite different from those which they were required to do or refrain from doing by the agreement declared contrary to the public interest might, as a result of changed general economic conditions, have economic consequences identical with those of the original agreement at the time that it was declared to be contrary to the public interest.

We should lean heavily against any construction of the Act which placed persons subject to an injunction in such a position. Our view that the word " effect " in para. (b) of the subsection does not bear this wide meaning is reinforced by the fact to which we have already drawn attention, that the Act, by s. 22 lays down a procedure which can be invoked by persons subject to an injunction who contend that there has been a change in general economic conditions which alter the remoter consequences of an agreement which entitle the court to declare that restrictions accepted by the parties to the agreement which were previously declared to be contrary to the public interest are no longer contrary to the public interest.

In our view, the test whether an agreement is " to the like effect " to another agreement in respect of restrictions declared to be contrary to the public interest is:

> " Do the parties by the new agreement agree that one or more of them shall do or refrain from doing acts like those which it was agreed should be done or not done by those provisions of that other agreement which contained restrictions declared to be contrary to the public interest? ".

This brings us to the final question: " How like is like? ". The word " like " is imprecise. At one extreme it can be said that the earth is like an orange; at the other that one pea is like the proverbial other pea in the same pod. To say that one thing is " like " another means no more than that the one thing bears to the other a resemblance relevant to the comparison sought to be made. When the court is granting an injunction in pursuance of a declaration that certain restrictions are contrary to the public interest, the purpose of the injunction is to prevent, until there has been a material change in relevant circumstances justifying re-consideration of the matter by the court under s. 22, any continuation by the persons subject to the injunction of conduct of a kind which has been declared contrary to the public interest. The resemblance relevant to the comparison sought to be made is in those characteristics of the restrictions which caused the court to declare them contrary to the public interest.

A It is true that the characteristics which cause the court to declare any restriction to be contrary to the public interest are in a sense negative, for the onus lies on respondents to satisfy the court that a restriction complies with one or more of the requirements specified in para. (a) to para. (g) of s. 21 (1) and with the requirement of the balancing clause at the end of that subsection; and in the broadest sense it might be said that the characteristic of any agreement by which B parties accept restrictions which causes the court to declare the restrictions to be contrary to the public interest is simply that the agreement is one to which Part 1 of the Act applies. But this is to ignore the reality that the court's real decision is not that the agreement is one to which Part 1 of the Act applies; for it has no jurisdiction with respect to agreements to which Part 1 of the Act does not apply. Its real decision is that, the agreement being one to which C Part 1 of the Act applies, the restrictions thereby accepted by the parties are not justified by the existence of any of the circumstances specified or, if any of those circumstances exist, the restrictions are, nevertheless, not justified under the balancing clause.

Where, after hearing argument and evidence in justification of particular restrictions, the court have, as in the present case, given a reasoned judgment D why the attempted justification has failed, they will usually have indicated those characteristics of the restrictions which have led them to the conclusion that the attempted justification fails and in the absence of which they might not necessarily have arrived at the same conclusion. In such a case, there should be little difficulty in determining whether a new agreement entered into by a respondent either with the same parties or with different parties has characteristics which, E if the new agreement had also been the subject-matter of the original hearing and not supported by evidence other than that called at the original hearing, would have led the court to the conclusion that the justification of the new agreement also failed. Accordingly, the test to be applied in a case where the court has given a reasoned judgment on the original reference is this:

F "In the absence of any fresh evidence other than the terms of the new agreement, would the reasoning expressed in the judgment of the court in the original reference in which it was held that the respondents had failed to satisfy the court under s. 21 of the Restrictive Trade Practices Act, 1956, that acts which the parties to the original agreement had by the provisions thereof which contained restrictions agreed should be done or not done were not contrary to the public interest, necessarily lead the court to the G conclusion that the acts which the person subject to the injunction has by entering into the new agreement agreed should be done or not done must also be deemed under that section to be contrary to the public interest?"

If the answer to this question is "Yes", the new agreement is to "the like effect" to the original agreement in respect of the restrictions declared by the H court to be contrary to the public interest, and to enter into the new agreement is a breach of an injunction made in the terms authorised by para. (b) of s. 20 (3) of the Act. This sort of test is one which is familiar to any lawyer brought up in a system of law in which the doctrine of stare decisis is applied. We are conscious that it calls for precision and clarity of reasoning in the judgments of the court, but, to the extent that any judgment is defective in these respects, the consequence I can only be to make it more difficult to establish that a new agreement is "to the like effect" to a previous agreement in respect of any restriction.

In determining whether the test is satisfied, the court cannot look at any material other than (a) the terms of the new agreement or arrangement, (b) the terms of the restrictions declared to be contrary to the public interest in the original reference, and (c) the pleadings and the reasons for judgment in the original reference and any documents specifically incorporated by reference therein. It would be wrong to refer to the evidence in the original reference, for, unless it otherwise appears from the reasons for judgment, the court may not have accepted

that evidence or may not have been influenced by it in reaching their decision. Parties who are subject to an injunction must in justice be in a position to know with reasonable certainty what sort of conduct on their part will subject them to penalties for contempt of court. It is also irrelevant, for reasons which we have already discussed, to consider whether, at the time at which the new agreement was entered into, there had been some change in circumstances affecting the economic consequences of giving effect to the agreement. These matters are only relevant on an application to discharge or vary the injunction under s. 22 of the Act.

No doubt the test which we have laid down cannot be applied where there has been a consent order on the original reference. In such cases no reasons are given. The grounds on which the court's declaration is made—and the only basis on which the court has the jurisdiction to make it—is that, the respondents having called no evidence, the court applies the statutory presumption in s. 21 (1) that the restrictions are contrary to public interest. It may well be that the draftsman of the Act did not foresee the wide use which would be made of consent orders. The problem of what is the appropriate test when there has been a consent order on the original reference may raise difficulties, but these may be left to be dealt with when such a case arises.

There are no such difficulties in the present case where the court gave a fully reasoned judgment. It is true that the restrictions in the original agreement relating to large-user supplies which were declared invalid, were dealt with briefly, for no serious attempt was made by the Association to justify them. On the other hand, the grounds on which the restrictions relating to ordinary supplies were held to be not contrary to the public interest were stated in considerable detail, and particular stress was laid, in the peculiar circumstances of this industry, on the advantage to the purchaser of a readily ascertainable fixed price for each of the enormous variety of products, as this obviated the trouble and expense of making multifarious inquiries from a number of different manufacturers. The original restrictions relating to large-user supplies did not provide for a fixed price for any product, and did not obviate the necessity of the purchasers making inquiries from a number of manufacturers. Those restrictions were, as pointed out at the outset of this judgment, quite different from those relating to ordinary supplies and different in those characteristics mentioned above, which caused the court to declare the latter to be not contrary to the public interest. It must, therefore, follow that the reasoning which led the court to conclude that the restrictions in the original agreement relating to large-user supplies were contrary to the public interest, would not necessarily lead it to the conclusion that new restrictions relating to large-user supplies similar to those which, in relation to ordinary supplies have already been held to be justified, were contrary to the public interest.

The new agreement is, accordingly, not in our view " to the like effect " to restriction No. 4 of the original agreement, and we have no power to restrain the Association from entering into it. This does not mean that we are in any way prejudging whether or not the new agreement will be contrary to the public interest, either in respect of the new restriction relating to large-user supplies, or the modified restriction relating to ordinary supplies. That question is not before us.

Solicitors: *Allen & Overy* (for the Black Bolt and Nut Association of Great Britain); *Treasury Solicitor.*

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

A

OLIVER AND OTHERS v. ASHMAN AND ANOTHER.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), June 28, 29, 30, July 3, 1961.]

B *Negligence — Damages — Personal injury — Measure of damages — Loss of amenities of life—Loss of future earning capacity—Child aged twenty months—Mental defective as result of injury—Expense of home help and child's entering private institution in the first instance—Probability that child would spend most of his life in state institution—Total award unlikely to be used by or on behalf of child.*

In assessing damages for personal injuries involving loss of a period of C expected life, loss of earnings during that period should not be valued as a separate head of damage, but, whether the injured person is living or has died, the damages for his loss of expectation of life should be assessed at the conventional sum (in the region £200) which should be regarded as covering all the elements of the lost expectation, including the opportunity of enjoying what would have been earned during the lost period (see p. 332, letter D, D p. 338, letter G, and p. 341, letter C, post).

Observations of LORD ROCHE in *Rose* v. *Ford* ([1937] 3 All E.R. at pp. 380, 381) and of VISCOUNT SIMON, L.C., in *Benham* v. *Gambling* ([1941] 1 All E.R. at p. 13) applied.

Harris v. *Bright's Asphalt Contractors, Ltd.* ([1953] 1 All E.R. 395) approved.

E *Pope* v. *D. Murphy & Son, Ltd.* ([1960] 2 All E.R. 873) overruled.

Per HOLROYD PEARCE, L.J.: although there is no distinction between damages for loss of expectation of life awarded to a living plaintiff and those awarded to the executors of a dead man, yet in the former case the plaintiff can obtain, in addition to damages for loss of expectation of life, substantial F damages for the constant pain and disappointment of knowing that his life has been shortened (see p. 332, letter E, post).

The infant plaintiff, a boy aged twenty months, sustained in February, 1958, severe injuries in a road accident for which the defendants admitted liability. These injuries damaged his brain and, as a result, he became mentally defective, unable to talk or to understand what was said to him. G He did not, apparently, have sustained feeling, and so did not have prolonged pain and suffering in consequence of the accident. The medical evidence was that a slight improvement in his condition might occur and that education of a very limited character might be possible, but that for the rest of his life he would require constant care and attention. For some three or four years his parents might have to employ a nanny to look after him. H Though the infant plaintiff might go to a private institution in the first instance, yet in a few years' time he would probably have to go into a state institution for mental defectives. He would never be able to earn his living. His expectation of life had been rendered by the accident a good deal less than normal; possibly thirty rather than sixty years. He had a younger brother who was normal and who would progress in advance of him. The father of I the infant plaintiff was an executive earning £1,250 a year. The damages of the infant plaintiff were assessed at £11,000. In assessing them the trial judge took into account loss of earnings during the period of loss of expectation of life, and treated as irrelevant the prospect that the infant might not be able to use the money awarded as damages, e.g., while he might be maintained by the state in a health service institution.

Held: in the special circumstances of the case the award of £11,000 was not one with which the Court of Appeal would interfere for the following reasons—

(i) although the trial judge had erred in taking into account the loss of earnings during the period for which expectation of life was lost, yet that factor must have been small having regard to the remoteness of the period.

(ii) (per HOLROYD PEARCE and WILLMER, L.JJ.); there was no certainty that the infant would not both need and spend the damages awarded (see p. 328, letter C, and p. 336, letter H, post).

Per PEARSON, L.J.: the extent of the infant's financial need arising from the accident was a relevant matter which could properly be taken into consideration in assessing damages (see p. 339, letter I, to p. 340, letter A, post).

Decision of LORD PARKER, C.J. ([1960] 3 All E.R. 677), affirmed for reasons partly different.

[As to the measure of damages for personal injury, see 11 HALSBURY'S LAWS (3rd Edn.) 255, para. 427; as to damages for loss of earnings, see ibid., 258, para. 430; and for cases on the measure of damages for personal injury, see 36 DIGEST (Repl.) 200, *1053-1057*.]

Cases referred to:

Admiralty Comrs. v. *Susquehanna (Owners), The Susquehanna*, [1926] All E.R. Rep. 124; [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 17 Asp. M.L.C. 81; 41 Digest 802, *6624*.

Benham v. *Gambling*, [1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. 49; 164 L.T. 290; 36 Digest (Repl.) 231, *1227*.

British Transport Commission v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; [1956] 2 W.L.R. 41; 3rd Digest Supp.

Davies v. *Smith*, (Jan. 30, 1958), "The Times", Jan. 31, 1958.

Flint v. *Lovell*, [1934] All E.R. Rep. 200; [1935] 1 K.B. 354; 104 L.J.K.B. 199; 152 L.T. 231; 36 Digest (Repl.) 200, *1055*.

Halliday (or Reid) v. *Lanarkshire Traction Co.*, 1934 S.C. 79.

Harris v. *Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395; [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; 24 Digest (Repl.) 1077, *334*.

Liffen v. *Watson*, [1940] 2 All E.R. 213; [1940] 1 K.B. 556; 109 L.J.K.B. 367; 162 L.T. 398; 36 Digest (Repl.) 201, *1067*.

Phillips v. *London & South Western Ry. Co.*, (1879), 5 Q.B.D. 78; 41 L.T. 121; 43 J.P. 749; *subsequent proceedings*, (1879), 5 C.P.D. 280; 49 L.J.Q.B. 223; 42 L.T. 6; 44 J.P. 217; 17 Digest (Repl.) 190, *860*; 36 Digest (Repl.) 198, *1045*.

Pope v. *D. Murphy & Son, Ltd.*, [1960] 2 All E.R. 873; [1960] 2 W.L.R. 861; 3rd Digest Supp.

Richards v. *Highway Ironfounders (West Bromwich), Ltd.*, [1955] 3 All E.R. 205; [1955] 1 W.L.R. 1049; 24 Digest (Repl.) 1072, *313*.

Roach v. *Yates*, [1937] 3 All E.R. 442; [1938] 1 K.B. 256; 107 L.J.K.B. 170; 36 Digest (Repl.) 200, *1056*.

Rose v. *Ford*, [1937] 3 All E.R. 359; [1937] A.C. 826; 106 L.J.K.B. 576; 157 L.T. 174; 36 Digest (Repl.) 229, *1210*.

Slater v. *Spreag*, [1935] All E.R. Rep. 900; [1936] 1 K.B. 83; 105 L.J.K.B. 17; 153 L.T. 297; 36 Digest (Repl.) 229, *1209*.

Appeal.

This was an appeal by the infant plaintiff from the judgment of LORD PARKER, C.J., given on Nov. 3, 1960, and reported [1960] 3 All E.R. 677. The appeal was on the ground that the sum awarded to the infant plaintiff as damages, viz., £11,000, was, on the facts proved, unreasonably low. The defendants served a cross-notice asking that the judgment should be varied by reducing the sum awarded on the grounds (i) that on the facts found the damages were unreasonably high, (ii) that the learned Lord Chief Justice misdirected himself in that he did not take sufficiently into account the fact that the infant plaintiff would be in a position where he could not use or require much money.

A *N. R. Fox-Andrews, Q.C.*, and *J. D. Stocker* for the infant plaintiff.
D. P. Croom-Johnson, Q.C., and *E. W. Eveleigh, Q.C.*, for the defendants.

Cur. adv. vult.

July 3. The following judgments were read.

HOLROYD PEARCE, L.J.: On Feb. 24, 1958, the infant plaintiff, who was B then twenty months old, was on his mother's knee in a car driven by the father. The defendants' negligence caused a collision in which the child's skull was fractured. At the time of the trial, the child was four years and four months old. The tragic results of the accident are summarised in the very clear and concise finding of LORD PARKER, C.J., who saw the child in his room for a quarter of an hour or so in the presence of the father and the mother. In his judgment he refers to C the fact that the child's mental condition deteriorated after the accident. He says:

> "Gradually he lost all power of speech and at present he is completely mute except that he does try to formulate the word 'daddy' and, I think, the name of his young brother, Angus."

D LORD PARKER, C.J., then refers to the epileptic fits which were frequent, but were reduced by drugs, so that they now occur only about once every week, but on the other hand are longer when they occur. He says:

> "Further, as time went by it became clear that his brain was very seriously affected. He cannot do anything for himself, dressing or undressing. He can feed himself after a fashion with his left hand and a spoon but is clearly E clumsy in doing it. He entails constant attention and it is right to say that his mother has managed to look after him in effect for twenty-four hours of the day. He is highly emotional, he emits most curious screams from time to time and on top of that, he is very easily upset and cries for long periods; when he does cry it is difficult to stop him. He is quite unmanageable in the ordinary way, although his mother does exercise some control over him. F He does not understand orders except that she can make him come to her by inducing him with a sweet, but to all intents and purposes he is not responsive to any commands or instructions. He has curious jerking movements. He bites anything and everything—books, pencils, his young brother—and is clearly subject to violent emotions although, of course, he is in no sense vicious."

G The Lord Chief Justice then refers to the medical evidence, as to which there was no real contest. That shows that there is (1):

> ". . . grave impairment of the intelligence, the child now being imbecile with severe traumatic epilepsy, and is not capable of talking. There will be a definite limit to the amount of improvement this child is capable of making in future. A little further improvement may occur but he will H remain always of gravely diminished intelligence. Epilepsy may become less marked with the passage of time, but it is impossible to be definite about this. The presence of such frequent attacks is regarded at present as shortening the expectation of life. All his life he will stand in need of constant care and attention and prove ineducable."

I The expectation of life was said by Sir Russell Brain, who was called on behalf of the defendants, to be about half that of normality. That is to say, his expectation of life would then be thirty years instead of sixty. The learned Lord Chief Justice then says this (2):

> "The prognosis as I find it is that it is unlikely that the infant plaintiff will be able to regain anything for practical purposes, at any rate in speech, and that as far as education is concerned it can only be of a very, very

(1) [1961] 1 Q.B. at p. 341. (2) [1960] 3 All E.R. at p. 678; [1961] 1 Q.B. at p. 342.

limited character. All the doctors agree that what this child needs is affectionate care and control all the time; secondly, constant medical supervision, in particular for the epileptic fits; thirdly, such attempts as can be made towards re-education. There is some conflict of evidence how that can best be achieved. All are agreed, at any rate, that as long as it is possible to retain him in the home under the constant care of his mother, the better, but the parents, who are very sensible people, have now resigned themselves to the fact that the child will have to leave home at some time in the future. He will be getting too big to be properly controlled by his mother and, in addition, there is the difficulty of bringing him up with the younger brother, a perfectly normal child."

He then discusses what is to be done with the child when he becomes too big to be managed at home. He refers to the parents' reasonable desire that he should be educated in some private institution, and in particular a Rudolph Steiner school. He then accepts Sir Russell Brain's evidence to the effect that today, provided that one goes to a first-class state institution, the chances are that the child will have better care and better medical attention and education than in a private establishment. The learned Lord Chief Justice continues (3):

"He agrees, naturally, that some regard must be had to the parents' wishes and quite clearly, if the Rudolph Steiner schools will take the child—and it is too early to tell that yet—or some other private institution, it would no doubt be right to try that first, but Sir Russell Brain is clearly of the view that sooner or later this child will have to go to a state institution and what is more, that there he will remain for the rest of his natural life, subject to visits home."

The learned Lord Chief Justice then turns to the question of damages and says (3):

"He [the child] must be compensated in money for such expenditure as will have to be incurred on his behalf by having some extra help in the home so long as he remains at home. It looks, on that basis, as if his parents on his behalf will have to employ a nanny for some moderate number of years, say three or four years. Also it looks as if they will have to expend, and rightly expend, money in sending him to some private institution in the first instance, if any private institution will take him. And when he goes to a state institution, they may well require extra help in the home in the periods when he comes out of the state institution and comes home. In respect of these matters, the child is clearly entitled to compensation.

"So far as damages for pain and suffering are concerned, any award must be small and possibly nil because the general view is that this child really does not feel pain and suffering. If he does, it is purely momentary . . . The more difficult question is what the child is entitled to receive as a result of what he has lost through his injuries. He has lost the opportunity, to use quite general terms, of living, marrying, having children and enjoying life. He has also lost the opportunity of earning a living and obtaining such amenities as his earnings could buy. As against this, he will be kept, on one view, for the rest of his natural life at the expense of the state. Now, as to the loss of opportunity to enjoy life, this is not the case of a person who has known the enjoyment of life and has been deprived of it . . . At the same time, I am quite unable to accept the contention put forward by counsel for the defendants that this is purely what I may call a *Benham* v. *Gambling* (4) case. The infant plaintiff is, I think, entitled to something for what he has lost, whether he knows he has lost it or not, albeit that the amount may well be less than in the case of a person who has enjoyed life and

(3) [1960] 3 All E.R. at p. 679; [1961] 1 Q.B. at p. 343.
(4) [1941] 1 All E.R. 7; [1941] A.C. 157.

A amenities and knows that he has lost them. The trouble, however, is to put that into money."

Counsel for the plaintiff cannot really criticise what one may call the summing-up of the Lord Chief Justice. It is the verdict, the sum awarded, of which counsel complains. Indeed, no judgment could set out more clearly and fairly the evidence and the conclusions on the relevant matters, but the sum awarded, B it is argued, is so inadequate as to make it a wholly erroneous estimate. That is a difficult argument to make good in a case that both counsel describe as unique—no comparable case has been cited to us. Counsel for the plaintiff urges that the plaintiff has been robbed of his human intelligence and all the normal pleasures of life. He will never know a home and a wife and family, or work, or holidays or hobbies. On any normal standards, counsel argues, C the figure awarded would be barely apt for his injuries and loss of the amenities of life, without considering the expense of some thousands of pounds which the next few years will entail before he gets into a state institution, and without considering his loss of future earnings. Though the child is spared the added pain of knowing what he has lost, it is, it is argued, still a vast loss which would by itself amply support the award of £11,000.

D Counsel for the defendants, on his cross-appeal, contends that the figure of £11,000 is too high in that the learned Lord Chief Justice erred in the plaintiff's favour on two points of law. First, it is said, he declined to reduce the damages by virtue of the fact that the plaintiff would in all probability have no opportunity of spending the sum awarded to him. He considered that that fact was irrelevant. Secondly, he held that he was entitled to take into account as a E head of damage the loss of earnings during the period by which the plaintiff's life had been shortened. If the defendants cannot reduce the damages by virtue of these two points, they seek to use them in support of the judgment if this court thinks that otherwise the figure is too low.

On the first point the learned Lord Chief Justice said this (5):

F "In awarding such a sum, I am conscious of the fact that it may well be —indeed, I think that the overwhelming probabilities are—that a large part of this money will never be expended by or on behalf of the infant plaintiff. It will, I think, to a large extent remain untouched and left to his next of kin, or it may well be that the parents, if a receiver were appointed, might obtain some use of the money, but I think these considerations are entirely G irrelevant. It seems to me entirely irrelevant to the damages whether the plaintiff will ever be able to use the money. Of course, on the view that it may be that he can and will live at any rate for a time in a private institution, then that sum will enable him to do so."

No authority was cited in support of the defendants' proposition. The observations of GODDARD, L.J., in *Liffen* v. *Watson* (6) tend against it. In that case H the court held that a plaintiff could maintain a loss in respect of board wages although in fact she was receiving board and lodging free from a relative. GODDARD, L.J., there said (7):

"The only consideration is, what has [the plaintiff] lost? She has lost the value of her board and lodging, just the same as she has lost her wages. Therefore, she is entitled to be compensated for that loss. What she does I with the compensation when she gets it is a matter for her, and not for anybody else."

It was argued that if a jury think that the right figure would be £10,000 but are satisfied that the plaintiff cannot spend more than £5,000, they should award only £5,000 as damages or alternatively take into account the inability to

(5) [1960] 3 All E.R. at p. 680; [1961] 1 Q.B. at p. 344.
(6) [1940] 2 All E.R. 213; [1940] 1 K.B. 556.
(7) [1940] 2 All E.R. at p. 219; [1940] 1 K.B. at p. 558.

spend and make some imprecise abatement. For the plaintiff is only entitled to damages, it is argued, as compensation and he can only have them if they can be used to compensate. But what warranty is there for such a proposition? The plaintiff having made out his cause of action in negligence and proved his damages is entitled to his judgment. There is no condition that he should spend or use the damages. They are his to save or to spend or to dissipate in any useful or useless manner that he may choose. His needs or his ability to use his damages are, as it seems to me, irrelevant to their assessment. It would be undesirable to introduce the suggested principle into the law of tort. If that were done, an attempt would no doubt be made to extend it to cases where the plaintiff was rich so that he could never need the damages to which he was entitled. However, we are told that there is a case pending before us in which this point is to be argued and in which a large sum depends on it. I prefer, therefore, not to conclude the point since in this case it can sufficiently be met by the fact that here there is no certainty that the child will not both need and spend the money and it has not been so found. He will need a substantial portion during the next few years and something for holidays thereafter. It is not impossible, though it is extremely unlikely, that the child will defeat the pessimistic prognosis, to a sufficient extent to enjoy outside an institution a harmless and not inexpensive life.

On the second point the learned Lord Chief Justice said this (8):

> "I would also like to say that in awarding this sum I have followed the decision of STREATFEILD, J., in *Pope* v. *D. Murphy & Son, Ltd.* (9) and in making this assessment have ignored the undoubted fact that in this case the expectation of life has been reduced. Accordingly, doing the best I can, I would give judgment in this case for Robin Oliver for £11,000."

In that case STREATFEILD, J., declined to follow *Harris* v. *Bright's Asphalt Contractors, Ltd.* (10), in which SLADE, J., held that no damages can be recovered in respect of lost earnings during the period in which the plaintiff would have lived had it not been for the defendants' negligence. STREATFEILD, J.. however, held that such damages could be recovered. Both judges answered differently a question to which there is no wholly satisfactory solution. Each view can produce in certain circumstances common-sense results and each can produce apparent injustices. That of STREATFEILD, J., would seem, perhaps, more apt for the case of a living plaintiff, that of SLADE, J., for an action by executors.

The earlier authorities are in accord with *Pope's* case (9) although the point was never argued. In *Phillips* v. *London & South Western Ry. Co.* (11), there is no specific mention of the plaintiff's life having been shortened. FIELD, J., told the jury to take into account what the plaintiff would have earned. He said (12):

> "The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a sum of money as you think he would have been likely to earn if this accident had not happened."

He referred to "the prospect of a speedy death" (13) and the tenor of the judgment indicates (14) that he is telling the jury to take into account the loss of earnings during years that will now be lost to the plaintiff. JAMES, L.J., on appeal (15) said:

> ". . . you are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable."

(8) [1961] 1 Q.B. at p. 345; [1960] 3 All E.R. at p. 680.
(9) [1960] 2 All E.R. 873.
(10) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.
(11) (1879), 5 Q.B.D. 78.
(12) (1879), 5 Q.B.D. at p. 82.
(13) (1879), 5 Q.B.D. at p. 80.
(14) (1879), 5 Q.B.D. at pp. 80, 81.
(15) (1879), 5 Q.B.D. at p. 87.

A There is no suggestion that the consideration should be limited to the shortened span of life which the plaintiff would have as a result of his injury. It must be remembered that the appeal was against an inadequate verdict and that the point was whether the trial judge had put the case too low for the plaintiff, not whether he had put it too high. By the date of the second trial, the possibility of a speedy death seems to have receded, and nothing bearing on this B point was said (16). It is fair, however, to deduce from the first trial, as STREATFEILD, J., deduced, that the judge and counsel and the Court of Appeal assumed without argument that it was correct to take into account in the assessment of damages the lost earnings during the lost years. That view might seem prima facie to be in accord with ordinary common law principles.

SLESSER, L.J., accepted this view in *Roach* v. *Yates* (17), and said:

C

> "First, then, the plaintiff's loss of wages may be noticed . . . Speaking for myself, I see no justification for approaching that problem by starting with the assumption that he would only have lived so long as the accident has now allowed him to live. I think the proper way of approaching the problem is that which was followed in *Phillips* v. *London & South Western Ry. Co.* (18), the leading case on this matter—namely, first to consider what sum he would have been likely to make during his normal life if he had not met with the accident."

D

However, the analysis of that case by SLADE, J., shows (19) that GREER, L.J., said nothing on this point; that MACKINNON, L.J., merely concurred; and that the observations of SLESSER, L.J., should be regarded as dicta.

E The Law Reform (Miscellaneous Provisions) Act, 1934, provided that on the death of any person all causes of action vested in him shall survive for the benefit of his estate. That brought the problem into sharper focus. For nearly a century the dependants of a deceased man had had a right to damages for his lost earnings during lost years but under a different guise. The Fatal Accidents Act, 1846, had given them a right of compensation for loss of benefits that they F would have derived from his earning power. Such benefits were not the earnings which he lost during the lost years but certain resulting benefits which the dependants would have enjoyed had he continued to live and earn and support himself, and had he continued out of the surplus to provide for them.

With the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, the deceased himself, through his executors, could for the first time claim what G he had lost. But, whereas in terms of money it was clear what the dependants had lost (so far as reasonable forecast could ascertain it), it was far from clear what in terms of money the deceased himself had lost. Life had been taken from him and death had been put on him. If part of the loss of the deceased was his lost wages during the lost years then there would be an overlap between claims by the estate and claims by the dependants. Where the estate was left H to the dependants the claims under the Fatal Accidents Act and the Law Reform Act could be set off; but if the beneficiary of the estate was some person other than his dependants, there might be a double claim in respect of part of the benefit of the lost earnings.

In *Rose* v. *Ford* (20), LORD WRIGHT (21) saw this difficulty and suggested a common-sense solution of it. In that case the House of Lords had to consider I what the executors could claim on behalf of the estate since the passing of the Act of 1934. LORD ATKIN there said (22):

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(16) (1879), 5 C.P.D. 280.
(17) [1938] 1 K.B. at p. 268; [1937] 3 All E.R. at p. 447.
(18) (1879), 5 Q.B.D. 78.
(19) In *Harris* v. *Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.
(20) [1937] 3 All E.R. 359; [1937] A.C. 826.
(21) [1937] 3 All E.R. at p. 375; [1937] A.C. at p. 853.
(22) [1937] 3 All E.R. at p. 363; [1937] A.C. at p. 835.

> "Can the damages include a calculation of loss of income which the deceased would have received during normal expectation of life, but would not have saved so as to increase his estate?"

Those words seem by implication to suggest that he could at least claim such sums as he would have saved during the lost years. LORD ROCHE (23), however, pointed out the undesirability of detailed analysis and concluded that the right method of assessing loss of expectation of life was to leave the point broadly to the jury. He said this (24):

> "A rich miser living in squalor, or a very poor man deeply sunk in misery, might require special treatment, but, ordinarily, a person may be assumed to have, or to be able to earn, enough to live his or her life, and to enjoy it. Earnings or income are otherwise, and to an extent beyond this, irrelevant."

In *Rose* v. *Ford* (25) the House decided that this court had been right in recognising in *Flint* v. *Lovell* (26), the validity of a claim made by a living person for damages in respect of the prospective shortening of his life by the defendant's negligence. It further held that such a claim for loss of expectation of life was not confined to living plaintiffs, but was equally admissible where the action was brought by the personal representatives. The opinions make it clear that the claim made by the personal representatives is in such cases the same claim that the plaintiff would have made had he been alive to make it, the claim that would have died with him had not life been kept in it by the Law Reform Act of 1934 (see particularly LORD RUSSELL OF KILLOWEN (27) and LORD WRIGHT (28)). Those opinions leave no room for distinguishing between a claim brought by a living plaintiff and a claim brought on behalf of a dead plaintiff in respect of the loss of earnings during the years of which he has been deprived. This is perhaps unfortunate, since otherwise there would be much to be said for applying the reasoning of *Pope* v. *Murphy, Ltd.* (29) to a living plaintiff and that of *Harris* v. *Bright's Asphalt Contractors, Ltd.* (30) to the executors who bring an action for the estate of a deceased man. However, since it is the cause of action of the living man which passes to his executors, it is only a claim in respect of his lost expectation of life. It is not a claim in respect of his actual death or its actual consequences.

After *Rose* v. *Ford* (25) the courts had a difficult task in assessing the value of the lost expectation of life. Some may remember how on such claims one investigated in detail the temperament and health of the deceased, his family life, his expectations of happiness, his expectations of material prosperity, and how impossible it was to forecast the result. Widely divergent assessments were produced by different tribunals. On one view of the matter there is no loss of earnings when a man dies prematurely. He is no longer there to earn them, since he has died before they could be earned. He has merely lost the prospect of some years of life which is a complex of pleasure and pain, of good and ill, of profits and losses. On the other view, he has in addition to losing a prospect of the years of life, lost the income that he would have earned, and the profits that would have been his had he lived.

In that difficult state of the law *Benham* v. *Gambling* (31) came to be decided. The House there held that a judgment of £1,200 given in respect of the death of an infant child should be reduced from £1,200 to £200. VISCOUNT SIMON, L.C., dealt with the difficulty of assessing all that makes up "life's fitful fever" and said (32):

(23) [1937] 3 All E.R. at p. 379; [1937] A.C. at p. 860.
(24) [1937] 3 All E.R. at p. 380; [1937] A.C. at p. 861.
(25) [1937] 3 All E.R. 359; [1937] A.C. 826.
(26) [1934] All E.R. Rep. 200; [1935] 1 K.B. 354.
(27) [1937] 3 All E.R. at p. 366; [1937] A.C. at p. 838.
(28) [1937] 3 All E.R. at p. 369; [1937] A.C. at p. 843.
(29) [1960] 2 All E.R. 873. (30) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.
(31) [1941] 1 All E.R. 7; [1941] A.C. 157.
(32) [1941] 1 All E.R. at p. 12; [1941] A.C. at p. 166.

A "The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness."

He said that it was necessary before damages could be given under that head for the court to be satisfied (33):

B ". . . that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence."

He then said this (34):

"I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appre-
C ciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future
D pecuniary prospects."

If the two latter sentences meant that in the particular case before the House no claim in respect of pecuniary loss was made, they leave the matter open. If they were meant to apply to every case of loss of expectation of life they are conclusive or at the least a very powerful obiter dictum in favour of the view expressed by SLADE, J.

E In my judgment, however, there are three matters which together make it clear that the House was saying that no regard should ever be had to financial gains or losses in such cases. First the speech of LORD ROCHE in *Rose* v. *Ford* (35) had been referred to in argument. So, too, had *Halliday* (*or Reid*) v. *Lanarkshire Traction Co.* (36), where the court had held that loss of future wages during the lost years was but an ingredient in the loss of expectation of life and did not
F fall to be valued as an item on its own. Secondly, the words used by LORD SIMON, and especially the words "of course", seem to show that the sentence was intended to be of general application. Otherwise one would expect some such words as "on the pleadings in this case". Thirdly, LORD SIMON ended by saying (37):

"I trust that the views of this House, expressed in dealing with the
G present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy."

It is clear that the House was intending to settle once and for all a difficult problem in clear and careful terms meant to be of general application. Probably that is why on an interesting and difficult subject the noble and learned Lords
H spoke with only one voice. I find it impossible to believe that they were intending to leave unanswered an obvious argument which *Reid* v. *Lanarkshire Traction Co.* (36) and LORD ROCHE'S speech in *Rose* v. *Ford* (35) must have brought to their notice (in the utterly improbable event of their not having perceived it), an argument which is, if good, implicit in almost every claim for damages for loss of expectation of life, namely, the argument that would include as a head of
I damage the lost earnings during the lost years. Had they left such an argument unanswered the declared purpose of LORD SIMON'S speech would have been defeated.

In my judgment, therefore, the matter is concluded in this court by *Benham* v. *Gambling* (38) and the decision of SLADE, J., in *Harris* v. *Bright's Asphalt*

(33) [1941] 1 All E.R. at p. 12; [1941] A.C. at p. 166.
(34) [1941] 1 All E.R. at p. 13; [1941] A.C. at p. 167.
(35) [1937] 3 All E.R. at p. 375; [1937] A.C. at p. 853. (36) 1934 S.C. 79.
(37) [1941] 1 All E.R. at p. 14; [1941] A.C. at p. 168.
(38) [1941] 1 All E.R. 7; [1941] A.C. 157.

Contractors, Ltd. (39) was correct. That was the view clearly expressed by SIR RAYMOND EVERSHED, M.R. (with which JENKINS, L.J., and PARKER, L.J., agreed) in *Richards* v. *Highway Ironfounders (West Bromwich), Ltd.* (40). That view was obiter since in that case, while holding that the head of damages had been wrongly included, this court ordered a re-trial on liability. Thus, the decision on damages is obiter. Nevertheless, it is directly in point and of great weight.

Counsel for the plaintiffs forcibly argued that we should distinguish between the assessment of damages (as opposed to the cause of action) in the case of a living plaintiff and a dead man's estate, by holding that *Benham* v. *Gambling* (41) only binds us in the latter case. They relied on the opinion of MACKINNON, J., in *Slater* v. *Spreag* (42), where he indicated that it was the wording of s. 1 (2) (c) of the Act of 1934 which made it impossible to recover loss of future earnings during the lost years of life. But *Benham* v. *Gambling* (41) contains no trace of such reasoning. In my judgment we are not entitled in this court to draw such a distinction.

Thus the courts have decided that lost wages during the lost years can only be taken into account as one of the threads in the variegated tapestry of life. When the tapestry is severed there is but one sum recoverable in respect of that severance. What is lost is an expectation, not the thing itself. The House of Lords have laid down that on an objective and artificial valuation, the sum at which the loss of expectation is to be assessed must be a moderate one on the scale indicated in *Benham* v. *Gambling* (41).

Although, however, there is no distinction between damages for loss of expectation of life awarded to a living plaintiff and those awarded to the executors of a dead man, yet in the former case the plaintiff can in addition to damages for loss of expectation of life obtain substantial damages for the constant pain and disappointment of knowing that his life has been shortened. I can find nothing in *Benham* v. *Gambling* (41) to prevent such damages and in many cases justice requires it. In the present case the point is irrelevant since this child will never be aware that his life has been shortened.

In the present case, therefore, the learned Lord Chief Justice erred in the plaintiff's favour in so far as he took into account apart from the diminished expectation of life the loss of earnings during the years by which the child's life had been shortened. The figure which he put on that aspect of damage cannot have been negligible since he expressly referred to it. Nevertheless, it cannot have been very substantial. It was an estimate of earnings unknown in character or amount which, subject to the vicissitudes of life, would have started to run some twenty-six years hence and would have continued to run for some thirty years thereafter. It was a small imponderable among several large imponderables. In my judgment, we should certainly not reduce the figure awarded and the cross-appeal fails.

The appeal is more difficult. The ingredients that go to make the final figure have been scrupulously weighed in the judgment. We can only alter it if we are satisfied that it is a wholly erroneous estimate of the damage, if we are satisfied that, broadly speaking, there is only one reasonable answer to the problem and that the learned judge has failed to give it. One cannot seek for precision or certainty in many cases which are tried by the courts in their anxious task of weighing imponderables. Often, there is a norm, whether established by common sense or reason or the convention of the courts. Then one can decide how great a departure from it justifies the description " wholly erroneous ". Here there is no such norm. Both counsel of great experience describe the case as unique. They can cite no comparable case among the many strange and unhappy injuries that have come before the courts.

(39) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617. (40) [1955] 3 All E.R. 205.
(41) [1941] 1 All E.R. 7; [1941] A.C. 157.
(42) [1935] All E.R. Rep. 900; [1936] 1 K.B. 83.

A The unusual features are these. There has been a complete and painless destruction of all the higher attributes of man. There is no consciousness of what is lost, no anguish of remembered happiness. The deprivation is so complete that in a few years the only possible solution will be for the child to become an inmate of a National Health institution. Thereafter, the state will shoulder the burden of care and expense. The loss of earnings is many years B distant and problematical. If counsel for the plaintiff's powerful argument is right, namely, that the sum awarded is barely sufficient to compensate for the injuries alone without taking into account the material things, the loss of earnings and the expenses of the next few years, the amount awarded must be inadequate. But is it right? Large sums have been awarded in cases where physical havoc is tragic and widespread. In such cases there have been pain C and the knowledge of what is lost, the expenses of the nursing of a physical wreck and a permanent loss of earnings. Here these features are absent, and their absence destroys comparison. Any compensation for the child's painless loss of humanity must be artificial. No sum can compensate or make an appreciable difference. But one must award such a sum as represents artificially the gravity of the loss. It is hard to give cogent reasons for this figure or for that. One D can merely assert.

I myself would feel inclined towards a larger figure, but the learned Lord Chief Justice and my brethren all think otherwise. I can give no adequate reason to support a higher figure or to show that one figure is more right than the other. There is no norm by which one can say that this figure is right and the other wrong. To say in SHELLEY'S words "I cannot argue I can only E feel" may be permitted in a juryman but it is rarely a sound foundation for a judgment. Here, the Lord Chief Justice has impeccably balanced all the relevant matters with sympathy and anxious consideration and arrived at a conclusion. One certainly cannot say that it was wholly erroneous. I would therefore somewhat regretfully agree with my brethren's view that the appeal must be dismissed.

F **WILLMER, L.J.:** I have found this an exceedingly difficult case, for the situation in which the court is called on to award damages is of a most exceptional kind. I should like to start by expressing my appreciation of the help I have derived from the arguments of counsel on both sides.

The difficulty is largely due to the fact that the court is called on to award G now a once-for-all sum which will compensate the plaintiff for consequences which may stretch far into the future. It might be better if, in exceptional cases such as this, the court were enabled to make a provisional award, with power to adjust it hereafter in the light of circumstances as they in fact develop. However, no such power exists, and we therefore have to do our best now to award such a sum as will be appropriate to take care of all likely contingencies.

H Counsel for the plaintiffs has accepted the correctness of the Lord Chief Justice's reasoning—except possibly for one sentence of the judgment. The appeal is founded on the contention that, even allowing for the correctness of the reasoning, the sum awarded is too small, and so much too small that this court ought to interfere. In particular, it is contended that the sum awarded is no more than sufficient to cover compensation for the actual physical injuries sustained by the plaintiff and the loss of all life's amenities. It contains no room I for any allowance for the considerable expenses likely to be expended for the benefit of the plaintiff during the next few years, e.g., in providing a nanny and sending him to a special school. Furthermore, it is said, it contains no room for any, or any sufficient, allowance for the total loss of the plaintiff's future earning capacity. To make proper allowance for these considerations it is contended that the award ought to be substantially increased.

On the other side the defendants contend that, if the Lord Chief Justice's reasoning is accepted as sound, the amount awarded is a proper and appropriate

sum which should not be disturbed. It is, however, complained that the learned Lord Chief Justice misdirected himself in two material respects, and that these misdirections resulted in his awarding too large a sum. It is said that he misdirected himself, first, in saying that the fact that in all probability a large part of the money will never be used is entirely irrelevant; and, secondly, in following the decision of STREATFEILD, J., in *Pope* v. *D. Murphy & Son, Ltd.* (43), so far as concerns loss of earnings during the period by which the plaintiffs' expectation of life has been shortened.

There are thus four main issues which arise for consideration: (i) Does the award make sufficient allowance for expenses likely to be incurred for the benefit of the plaintiff? (ii) Does the award make sufficient allowance for the plaintiff's probable loss of future earnings? (iii) Is the fact that a large part of the money will probably never be used relevant? (iv) Was it right to follow *Pope* v. *Murphy* (43)—and assuming it was wrong, and that the learned Lord Chief Justice misdirected himself in that respect, does the error afford any good ground for reducing the award?

I can deal with the first point quite shortly. The probability seems to be that for a matter of some three or four years in the near future a nanny will have to be employed. There is a further probability that, following that, the child will have to be sent to some special school or institution where his education will have to be paid for. I cannot regard the expenses likely to be incurred in these respects as forming any substantial part of the sum awarded by the learned Lord Chief Justice. Indeed, it seems to me extremely probable that any expenses which are likely to be incurred over the next few years can be defrayed, for the most part if not wholly, out of the interest on the capital amount which has been awarded. This means that, at the end of such period of education as this child is capable of receiving in a school for which payment has to be made, the capital sum awarded will remain substantially intact and will thereafter presumably go on increasing in value with the accretion of interest. In these circumstances, I do not find it possible to say that any very substantial allowance ought to be made in respect of the foreseeable expenses likely to occur in the next few years. After the lapse of these next few years the unhappy probability is that the child will spend the rest of his days in a National Health institution, and no question of spending money on him or for his benefit will arise.

With regard to the second question, namely, whether the award makes sufficient allowance for the plaintiff's probable loss of future earnings, I would venture once again to emphasise that this is a wholly exceptional case. In the ordinary case that comes before the court a plaintiff normally has to go on supporting himself, and in those circumstances the loss of earnings to which he is subjected is properly regarded as a total loss. The award of damages in such cases is properly based directly on the loss of earnings. This loss, of course, has to be substantially discounted, having regard to the various chances of life and other imponderables, and having regard also to the fact of getting the money now in one lump sum. But here the circumstances are totally different, because (apart from the short period of education to which I have already referred) the probability is that throughout the whole of what would have been this child's normal span of life there will be no spending. He will never have the expense of maintaining a home, whether for himself alone or for himself and dependants. He will never have to bear the cost of food and clothing, light, heat, and so forth. Throughout the greater part of his life there will be no cause for expenditure. In those circumstances it would seem prima facie quite wrong to have regard to any probable future loss of earnings without also having regard on the other side of the account, to the probable saving of what would ordinarily be the expenses of life.

Oddly enough this is not a matter on which there seems to be any great wealth of authority. Reference was made to *Liffen* v. *Watson* (44), but I do not think

(43) [1960] 2 All E.R. 873. (44) [1940] 2 All E.R. 213; [1940] 1 Q.B. 556.

A that that is at all a parallel case. There, the victim was fortunate enough to find a relative who was prepared to house her free of cost, and the court held, in my judgment properly, that that was not a matter to be taken into consideration for the purpose of reducing the award of damages. That seems to me to be a wholly different case from that of this plaintiff, who, so far as can be foreseen, will be detained for the rest of his life in a National Health institution. The B point was touched on by LORD ATKIN in *Rose* v. *Ford* (45) in the passage of his speech to which HOLROYD PEARCE, L.J., has already made reference. LORD ATKIN left the question unsolved; but at least what he said does give ground for thinking that he saw a distinction between earnings which would have been saved and earnings which would not.

Possibly more help is to be derived from what was said by LORD REID in C *British Transport Commission* v. *Gourley* (46). LORD REID there said (47):

> "... No one would suggest that it is improper to take into account expenditure genuinely and reasonably incurred, or that the plaintiff's damages should be assessed on the fees which he would have continued to receive without regard to the outgoings which he would have continued to incur."

D *Gourley's* case (46) is, of course, a very different case from this, but so far as it goes that expression of view is in accord with what I should myself have conceived to be the right principle.

In those circumstances, it seems to me that the Lord Chief Justice was quite right when, in taking into account the possible future loss of earnings of this child, he expressed the view that the saving of the normal expenses of life should E be set off against such loss, bearing in mind that for most of this unfortunate child's life there will in fact be nothing on which to spend the money.

What the future earnings of the child would have been had he not met with this accident must remain completely speculative; so also must the question how far such earnings would have exceeded what he would have been likely to spend on living and providing a home for himself and any dependants that he might F have. Moreover, there is a further difficulty in weighing any possible loss under this head, due to the fact that it lies so far in the future. Even now the child is but five, and presumably would not in any case have started earning for at least another ten years. It follows, I think, that any loss of earnings would in this case have to be more than usually discounted, having regard to the benefit of receiving the money now. What is left after discounting for these items, and G after allowing for the expenses which will be saved, seems to me to amount to no more than an element to be taken into consideration in assessing the loss of the ordinary pleasures and amenities of life.

Furthermore, as HOLROYD PEARCE, L.J., has pointed out, it is to be remembered that in this case we are dealing with a plaintiff who is quite incapable of appreciating what he has lost. It is not suggested that he has undergone, or will H undergo, any pain and suffering. He has never known what are the joys and sorrows of ordinary adult human life, and he cannot ever know what he has been deprived of. I think that it must be obvious that where a man has known these pleasures of ordinary life, the award of damages must be greater than in the case of one who has never known them and who never will. This plaintiff, in so far as that matter is concerned, is (most unhappily) in the same position I substantially as if he had actually been killed in the accident.

The upshot is that we are left with the sum of £11,000 awarded by the learned Lord Chief Justice which, for the reasons which I have given, seems to be likely to remain substantially intact, even allowing for the payment of education expenses during the forthcoming few years. It is to be borne in mind that the damages awarded in an action of this sort are compensatory and not punitive.

(45) [1937] 3 All E.R. at p. 363; [1937] A.C. at p. 835.
(46) [1955] 3 All E.R. 796; [1956] A.C. 185.
(47) [1955] 3 All E.R. at p. 808; [1956] A.C. at p. 213.

This being so, how can it be said (assuming that I have correctly summed up the position) that this plaintiff is insufficiently compensated? Would he be any better compensated if a larger sum of money had been awarded?

In the well-known case of *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna* (48) VISCOUNT DUNEDIN said:

> " (iii) If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question. (iv) For a jury question no rigid rules, or rules that apply to all cases, can be laid down . . ."

Approaching this, therefore, as a jury question, I have to ask myself whether the award of £11,000 is a proper award on the basis of the learned Lord Chief Justice's reasoning. This is a case in which, as it seems to me, the question of quantum was more than usually at large. I emphasise again what HOLROYD PEARCE, L.J., has said, that counsel on both sides have described it as a unique case. Clearly it is a case in which there is room for widely differing estimates. In those circumstances, I find it quite impossible to say that, assuming there was no misdirection of himself by the Lord Chief Justice, the quantum of damage at which he arrived amounted to a wholly erroneous estimate. That is sufficient to dispose of the appeal.

So far as the cross-appeal is concerned, the first question which arises is the relevance of the fact that a large part of the money will probably never be used. I think counsel for the defendants' argument on that point was very neatly summed up in the phrase that he used when he said: " What cannot ever be used cannot be compensation ". So stated it seems to me that the point has no little force. Certainly I think that it would be a point of considerable force in a case in which it could be said as a matter of practical certainty that the money never would be used. I do not find it necessary to reach any concluded opinion on that point, and it is better that I should say no more about it, having regard to the fact that we are told that another case is likely to reach this court quite soon in which the point will be of some importance. In the present case it seems to me that the submission fails on the facts so far as they are known. For this is not a case in which there can be anything approaching certainty as to the future. I have already discussed in the course of this judgment the expenditure which is likely to be incurred over the next few years, in minding the child at home, engaging a nanny, and sending the child possibly thereafter to some special school. Those expenses are more or less readily foreseeable. What lies beyond is really in the dark. The probability, I agree, on the evidence is that the child will live the rest of his life, no one knows how long, in some sort of public institution. But we can only assess probabilities; we cannot deal with certainties, or anything approaching certainties, in this case; and we must not forget that the sum awarded is one which must take care of all the contingencies of what may turn out to be quite a prolonged life. The one thing to which, as it seems to me, this plaintiff is entitled is adequate security—such an award as will ensure that all foreseeable, or even possible, expenses to be incurred on his behalf in the future are adequately covered by the sum awarded. In those circumstances I find it impossible to say that the fact that we now think, as a matter of probability, that a large part of the sum will never be used is a reason—on the facts of the present case—for diminishing the quantum of damages awarded.

The second respect in which it is alleged that the learned Lord Chief Justice misdirected himself is that he followed the decision of STREATFEILD, J., in *Pope* v. *Murphy* (49), and in considering the prospective loss of future earnings ignored the fact that the child's expectation of life has been shortened. This raises a further question, namely, whether, assuming the learned Lord Chief Justice was wrong, the error is such as ought to lead this court to vary the amount

(48) [1926] All E.R. Rep. at p. 127; [1926] A.C. at p. 661; 17 Asp. M.L.C. at p. 83.
(49) [1960] 2 All E.R. 873.

A awarded, bearing in mind that the assessment of general damages in a case such as the present is essentially a jury question, and not a matter or arithmetical calculation.

In my judgment the learned Lord Chief Justice did fall into error in following the decision in *Pope* v. *Murphy* (50), which must, in my view, be held to have been wrongly decided so far as this point is concerned. I reach that conclusion both as a B matter of principle and as a matter of authority. So far as authority is concerned, I think that we are concluded by what VISCOUNT SIMON, L.C., said in *Benham* v. *Gambling* (51), bearing in mind that all the other noble Lords concurred in what he said. LORD SIMON's words, are categorical (52):

> "Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in C respect of loss of life, not of loss of future pecuniary prospects."

It is said that *Benham* v. *Gambling* (51) is not a governing authority in the present case, for there the infant was already dead, whereas here we are concerned with the prospects of an infant who is still alive. In so far as we are invited to consider what his prospects would have been during a period when ex hypothesi he will D be dead we are, as I see it, in exactly the same position as a court considering the case of one who is already in fact dead. It is further objected that the precise point now under discussion was not before the House of Lords in *Benham* v. *Gambling* (51). I cannot accept this. In 1941, when *Benham* v. *Gambling* (51) was before the House of Lords, the point was one which already had a history behind it. It had been considered in Scotland in *Halliday* (*or Reid*) v. *Lanarkshire Traction Co.* (53), where the Lord Ordinary (LORD WARK) said: E

> "Nor would they [the jury] be entitled to give a sum based on the shortening of his expectation of life, with subsequent earlier cessation of earning capacity, less the anticipated diminution in the cost of maintenance during the period between the anticipated earlier date of death and the date of his expectation had the accident not taken place. What, in my view, F they would have been entitled to consider would have been the additional handicap on his enjoyment of life due to the anticipation of earlier death—in effect an additional award of solatium."

When that case was considered by the Inner House on appeal this precise point was not specifically dealt with. It is, however, to be inferred from the fact that the members of the Inner House expressed general approval of the Lord Ordinary's G judgment, and did not vary his award, that they found no reason to quarrel with what he had said on this particular point. In 1937 *Rose* v. *Ford* (54) was before the House of Lords. It may be remarked that, if the point now contended for were a good one, it is surprising that it was not the subject of strenuous argument in that case. For the deceased in that case, at the time when she received the injuries which proved fatal, was a healthy young woman, earning her living, and H with the expectation of a long earning life before her. In that case LORD ROCHE was the only member of the House who dealt with the point now under consideration. What he said was of no little significance, especially as *Halliday* (*or Reid*) v. *Lanarkshire Traction Co.* (55) had been called to the attention of the House. LORD ROCHE said (56) that the element of shortening of the normal expectation of life

> I ". . . was obviously and rightly arrived at without regard to the question of the amount of future earnings, and solely on the basis of what life was going to be worth to a healthy young woman, earning her own living . . ."

A few sentences later, he continued (57):

(50) [1960] 2 All E.R. 873. (51) [1941] 1 All E.R. 7; [1941] A.C. 157.
(52) [1941] 1 All E.R. at p. 13; [1941] A.C. at p. 167. (53) 1934 S.C. at p. 81.
(54) [1937] 3 All E.R. 359; [1937] A.C. 826. (55) 1934 S.C. 79.
(56) [1937] 3 All E.R. at p. 380; [1937] A.C. at p. 861.
(57) [1937] 3 All E.R. at p. 381; [1937] A.C. at p. 861.

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> " . . . ordinarily, a person may be assumed to have, or be able to earn, enough to live his or her life, and to enjoy it. Earnings or income are otherwise, and to an extent beyond this, irrelevant."

Thus LORD ROCHE was clearly expressing the view that the loss of the prospect of earning after the date of accelerated death could not be the subject of a separate head of claim, but was merely a matter to be taken into consideration in assessing the loss of expectation of life. I do not understand LORD SIMON in *Benham* v. *Gambling* (58) to be saying anything different from what had already been said by LORD ROCHE in *Rose* v. *Ford* (59).

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Since that date, the view expressed by LORD SIMON has been followed by SLADE, J., in *Harris* v. *Bright's Asphalt Contractors, Ltd.* (60), which was specifically approved by this court, albeit obiter, in *Richards* v. *Highway Ironfounders (West Bromwich), Ltd.* (61). It has also been followed by LORD GODDARD, C.J., and MORRIS, L.J., with whose judgments VAISEY, J., concurred, in *Davies* v. *Smith* (62) referred to in KEMP & KEMP, THE QUANTUM OF DAMAGES (2nd Edn., Vol. 1, at p. 353 et seq.).

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I do not think that anything said in the course of the various hearings in *Phillips* v. *London & South-Western Ry. Co.* (63) can be regarded as any authority for the contrary view. For it does not appear from the reports of that case that this point was ever really considered. Reliance has also been placed on what was said by SLESSER, L.J., in *Roach* v. *Yates* (64). Though it cannot be suggested that what SLESSER, L.J., said was obiter, it is to be remarked that the other two members of the court managed to arrive at the same figure of general damages to be awarded without finding it necessary to express any opinion on the point. I cannot, therefore, regard the observations of SLESSER, L.J., as having any great weight when set against the very clear and precise statement of principle enunciated by LORD SIMON in *Benham* v. *Gambling* (58).

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Even apart from authority, I should arrive at the same conclusion as a matter of principle. The prospective earnings which a person might have earned during a period when ex hypothesi he will already be dead strike me as far too speculative to be capable of assessment by any court of law. Nor do I think that that would be a relevant inquiry. For what has been lost by the person assumed to be dead is the opportunity to enjoy what he would have earned, whether by spending it or saving it. Earnings themselves strike me as being of no significance without reference to the way in which they are used. To inquire what would have been the value to a person in the position of this plaintiff of any earnings which he might have made after the date when ex hypothesi he will be dead strikes me as a hopeless task. All that one can say is that he has lost the opportunity of enjoying what he would have earned during the remainder of his normal expectation of life; and this, as it seems to me, is merely one of the factors to be considered in making what I may call a *Benham* v. *Gambling* (58) award of damages for loss of expectation of life.

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For that reason I am unable to accept that the learned Lord Chief Justice directed himself correctly in following the decision in *Pope* v. *Murphy* (65). But I am equally unable to take the view that this error can have the slightest effect on the amount of the award. Had I come to the conclusion that potential earnings after the probable date of the plaintiff's death ought to be taken into consideration, I should also have held that these would have to be balanced against what he would have spent in maintaining himself and providing himself with a home suitable to his station in life. The result of striking that balance is

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(58) [1941] 1 All E.R. 7; [1941] A.C. 157.
(59) [1937] 3 All E.R. 359; [1937] A.C. 826.
(60) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617.
(61) [1955] 3 All E.R. 205.
(62) (Jan. 30, 1958), "The Times", Jan. 31, 1958.
(63) (1879), 5 Q.B.D. 78, and 5 C.P.D. 280.
(64) [1937] 3 All E.R. at p. 447; [1938] 1 K.B. at p. 268.
(65) [1960] 2 All E.R. 873.

A so speculative, and the inquiry relates to a period so far in futuro, that any figure arrived at would have to be so heavily discounted as to be reduced almost to vanishing point. When compared with the amount of £11,000 already awarded as general damages I could only regard the result as minimal. The only consequence of correcting what I conceive to be the Lord Chief Justice's error is to supply an additional reason for not increasing the award. I certainly cannot regard B it as a reason for reducing the award.

I do not think, therefore, that either point argued in support of the cross-appeal is valid, and accordingly I agree that both appeal and cross-appeal should be dismissed.

PEARSON, L.J.: This is a terrible case, in which injuries caused by the C defendants' negligence have reduced the infant plaintiff, previously a normal child, to the state of a low-grade mental defective, incapable of speech and incapable of looking after himself and not expected to recover. The damages have been assessed at the sum of £11,000. The plaintiff contends that the sum is substantially too low. The defendants, who have served a cross-notice of appeal, contend that the sum is substantially too high.

D As a matter of first impression having regard to the general level of assessments of damages in cases where a high degree of incapacity has been caused, and taking into account the depreciation in the value of money since some of these assessments were made, I should be inclined to consider this assessment of £11,000 as on the low side. There are, however, certain special features emerging from the evidence and findings in this case and tending to distinguish it from E many of the others.

First there is, so far as can be determined, the absence of any substantial pain or suffering, physical or mental. In particular, the infant plaintiff seems to have little if any realisation of his own disability and deprivation of the opportunity of leading and enjoying a normal and full life. The fact of such disability and deprivation is a major element in the assessment and requires a large figure for F compensation, but it is not in this case accompanied and aggravated by the presence of pain and suffering to any substantial extent.

Secondly, there is the probable expectation that, after being kept at home for a few years and after having probably a rather short stay in a private institution, the infant plaintiff will go to a state institution and be kept there free of charge for the rest of his life. That greatly diminishes the probable maintenance liability G and provides an important offset to the loss of earning capacity, which in any case has to be discounted because the earnings would not have begun for many years.

Thirdly, there is a matter to which I have a different line of approach from that which has been adopted by the Lord Chief Justice and HOLROYD PEARCE, L.J. The Lord Chief Justice said (66):

H "Doing the best I can in all the circumstances, I would award to this child a sum of £11,000. In awarding such a sum, I am conscious of the fact that it may well be—indeed, I think that the overwhelming probabilities are—that a large part of this money will never be expended by or on behalf of the infant plaintiff. It will, I think, to a large extent remain untouched and left to his next of kin, or it may well be that the parents, if a receiver I were appointed, might obtain some use of the money, but I think these considerations are entirely irrelevant. It seems to me entirely irrelevant to the damages whether the plaintiff will ever be able to use the money. Of course, on the view that it may be that he can and will live at any rate for a time in a private institution, then that sum will enable him to do so."

It seems to me, however, that the extent of the infant plaintiff's financial need arising from the accident is a relevant matter which can properly be taken into

(66) [1960] 3 All E.R. at p. 680; [1961] 1 Q.B. at p. 344.

consideration on both sides of the account. Where a plaintiff has been rendered helpless by his injuries, which have been caused by the defendants' negligence, the sum awarded as compensation should be sufficient to ensure that he will be properly looked after by others in any situation which can reasonably be foreseen, so that even rather improbable contingencies will be covered. On this basis, I regard the sum of £11,000 as a sufficient, but not excessive sum. If the situation develops favourably, so that substantial sums can be spent for the infant plaintiff's benefit, the bulk of the money will be used up in that way. If the situation does not develop favourably, so that the infant plaintiff enters and remains permanently in a state institution and very little money can be spent for his benefit, there will be a large surplus to descend to his next of kin. If his next of kin at the time of his death should happen to be his parents, nobody would think it morally wrong, or in a broad sense unjust, that they should in the end receive some solatium for the sorrow, anxiety and trouble which the accident and their child's injuries have brought on them. But the next of kin at the time of his death may not be his parents, nor even brothers or sisters. They may be more distant relatives inheriting the surplus as a fortuitous windfall. In any case the only proper object of the assessment of damages for the infant plaintiff is to provide compensation for him, and the provision of money which in certain contingencies will descend to the next of kin is only an incidental result. Suppose there were a jury trial. Having in their deliberations arrived at a sum sufficient to cover the foreseeable financial needs of the plaintiff, the jury might reasonably be reluctant to add more money merely for the purpose or with the probable effect of increasing the surplus which would eventually descend to his next of kin whoever they might happen to be at the time of his death. In my view, that is a relevant factor which the jury may at any rate take into account to such extent as they think appropriate in the particular case. The jury have the task of fixing a sum which is in all the circumstances fair and reasonable compensation for the plaintiff. It is a difficult task, and it is not easy for the judge to give them any very definite guidance. They probably do not know much about other awards in broadly similar cases (although of course a judge acting as a jury can have that advantage). The jury's task would become more difficult than ever, if the scope of permissible considerations which they are allowed to take into account had to be severely restricted. It is not desirable to say more about this point in the present case, because, as counsel have informed us, there is under appeal another case in which this point is of central and crucial importance.

Fourthly, the Lord Chief Justice has included in his assessment of damages a sum in respect of the loss of prospective earnings during the period between the end of the infant plaintiff's expected life as shortened by the accident and the end of his expected life as it would have been if the accident had not occurred. For the sake of brevity I will refer to that period as " the lost period ". A claim of this kind had been rejected by SLADE, J., in *Harris* v. *Bright's Asphalt Contractors, Ltd.* (67). On the other hand, a claim of this kind had been upheld by STREATFEILD, J., in *Pope* v. *D. Murphy & Son, Ltd.* (68). STREATFEILD, J., gave a conventional sum of £250 (a sum in the region of £200) for loss of expectation of life, applying the principle of the decision of the House of Lords in *Benham* v. *Gambling* (69). He gave, in addition, £5,000 for the loss of earning capacity over the total period of time that the plaintiff otherwise (that is to say, if the accident had not occurred) might reasonably have expected to earn, and of that £5,000 one-half (i.e., £2,500) was attributable to the lost period. In the present case, the Lord Chief Justice said that in awarding the sum of £11,000 he had followed the decision of STREATFEILD, J., in *Pope* v. *D. Murphy & Son, Ltd.* (68) and in making the assessment he had ignored the undoubted fact that in the present

(67) [1953] 1 All E.R. 395; [1953] 1 Q.B. 617. (68) [1960] 2 All E.R. 873.
(69) [1941] 1 All E.R. 7; [1941] A.C. 157.

A case the expectation of life had been reduced. That means that he used the same method as STREATFEILD, J., had used, estimating the loss of earnings for the total period of time that the plaintiff might reasonably have expected to earn if the accident had not occurred. Some part has to be attributed to the lost period, although by reason of the long postponement there would be a heavy discounting.

On this question, whether it is right to award as a separate head of damage a B sum of money in respect of the loss of earnings for the lost period, I agree with the judgments which have been delivered. One has to take into account the judgment of the Lord Ordinary (LORD WARK) and the judgments of the Inner House of Session in *Halliday* (*or Reid*) v. *Lanarkshire Traction Co.* (70), the speech of LORD ROCHE in *Rose* v. *Ford* (71), the speech of VISCOUNT SIMON, L.C., with which the other noble and learned Lords concurred, in *Benham* v. *Gambling* (72), C the reasoning of SLADE, J., in *Harris* v. *Bright's Asphalt Contractors, Ltd.* (73), and the judgment of SIR RAYMOND EVERSHED, M.R., with which JENKINS, L.J., and PARKER, L.J., concurred, in *Richards* v. *Highway Ironfounders* (*West Bromwich*), *Ltd.* (74). There are also other authorities, which have been mentioned. In my view the conclusion, shortly stated, is that the conventional sum in the region of £200 which is to be awarded for loss of expectation of life should be regarded D as covering all the elements of it—e.g., joys and sorrows, work and leisure, earning and spending or saving money, marriage and parenthood and providing for dependants—and should be regarded as excluding any additional assessment for any of those elements.

Having regard to the special features that I have mentioned, I am satisfied that the assessment of the damages in this case at £11,000 is not too low. On E the other hand, having regard to the terrible nature of the injuries and their consequences and the possible need for money to be spent for the benefit of the infant plaintiff, I cannot consider the assessment too high. I agree therefore that the appeal and cross-appeal should be dismissed.

Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *G. Howard & Co.* (for the infant plaintiff); *L. Bingham & Co.* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(70) 1934 S.C. 79. (71) [1937] 3 All E.R. at p. 380; [1937] A.C. at p. 861.
(72) [1941] 1 All E.R. at p. 13; [1941] A.C. at p. 167.
(73) [1953] 1 All E.R. at pp. 399-402; [1953] 1 Q.B. at pp. 629-634.
(74) [1955] 3 All E.R. 205.

GARLAND & FLEXMAN (a firm) AND ANOTHER *v.* WISBECH CORPORATION.

A

[QUEEN'S BENCH DIVISION (Diplock, J.), July 10, 11, 1961.]

Harbour—Quay—Cranes—Undertakers providing cranes for public use—Stevedores using cranes—Undertakers subsequently themselves undertaking stevedoring services—Whether undertakers entitled to refuse use of cranes to public, including stevedores—Harbours, Docks, and Piers Clauses Act, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 22, *s.* 33.

B

The defendant corporation had for some years provided cranes and crane-drivers for the use of the public at a quay constructed by them under the Wisbech Corporation Act, 1889, which incorporated the Harbours, Docks, and Piers Clauses Act, 1847. The plaintiffs, whose business included that of stevedores, had used the cranes on payment of the appropriate charges. By s. 30 of the Act of 1889, the corporation were empowered not only to provide cranes for public use, but also to provide stevedoring services. In 1960 the corporation themselves began to undertake stevedoring business at the quay and, to promote this business, refused to allow the plaintiffs and other members of the public to use the cranes. The plaintiffs, relying on s. 22* and s. 33† of the Act of 1847, sought a declaration that on payment of the appropriate rates they were entitled at all reasonable times to be allowed the use of the cranes.

C

D

Held: (i) although the corporation were not obliged to provide cranes, yet s. 22 of the Act of 1847 required them, if they chose to provide cranes, to provide also servants and labourers to work the cranes and to make both available at all reasonable times for the use of the public (see p. 346, letter H, to p. 347, letter B, post).

E

(ii) section 33 of the Harbours, Docks, and Piers Clauses Act, 1847, on its true construction merely gave a right of access to the installations on the quay and did not deal with the right to use cranes on the quay (see p. 346, letter H, post).

F

Dictum of LORD MACMILLAN in *London & North Eastern Ry. Co.* v. *British Trawlers' Federation, Ltd.* ([1934] All E.R. Rep. at p. 589) followed.

[As to the provision of warehouses, works, cranes, etc., at harbours, see 33 HALSBURY'S LAWS (2nd Edn.) 582, para. 1007.

For the Harbours, Docks, and Piers Clauses Act, 1847, s. 22, s. 33, see 23 HALSBURY'S STATUTES (2nd Edn.) 1129, 1132.]

G

Case referred to:

London & North Eastern Ry. Co. v. *British Trawlers' Federation, Ltd.*, [1934] All E.R. Rep. 580; [1934] A.C. 279; 103 L.J.K.B. 311; sub nom. *British Trawlers' Federation* v. *London & North Eastern Ry. Co.*, 150 L.T. 461; Digest Supp.

H

Action.

In this action the plaintiffs who were ship-brokers carrying on business at the port of Wisbech in the county of Cambridge, sought a declaration against the defendants, Wisbech Corporation, that on payment of the appropriate rate the plaintiffs, at all reasonable times and in common with other members of the public, were entitled to be granted the use of the cranes provided by the corporation at the port of Wisbech to enable the plaintiffs to load and unload goods onto or from vessels in respect of which they had been engaged to provide stevedoring services. Whether the plaintiffs were entitled to the declaration depended inter alia on the true construction of the Harbours, Docks, and Piers Clauses Act, 1847. The facts and the relevant provisions of the Act are set out in the judgment.

I

* Section 22 of the Harbours, Docks, and Piers Clauses Act, 1847, is printed at p. 345, letter B, post.

† Section 33 of the Act of 1847 is printed at p. 345, letter C, post.

A *H. I. Willis, Q.C.*, and *M. Mann* for the plaintiffs.
Desmond Ackner, Q.C., and *R. I. Threlfall* for the defendant corporation.

DIPLOCK, J.: The question whether the plaintiffs are entitled to a declaration depends solely, I think, on the true construction of the Wisbech Corporation Act, 1889, which I shall refer to as the Special Act, and the Harbours, Docks, and B Piers Clauses Act, 1847, which I shall refer to as the Clauses Act. It is convenient that I should at the outset refer to certain of the sections of those Acts on which the plaintiffs' rights, if they have any, to the use of the cranes depend.

The quay at Wisbech on which the cranes are now used was constructed by the corporation under the powers conferred on them to construct a quay or river wall by the Special Act. Section 3 of that Act defines the quay or river wall C as meaning "the quay or river wall and the works connected therewith by this Act authorised". Section 5 incorporates among other Acts the Clauses Act, so far as it is applicable for the purposes of and not varied by or inconsistent with the Special Act. Section 6 describes the situation of the quay or river wall, and s. 9 deals with the power of the corporation to make subsidiary works. It provides, so far as is relevant:

D "The corporation . . . may subject to the provisions of this Act from time to time make and maintain in connexion with the above-mentioned works to be executed by them . . . [i.e., the quay or river wall] all necessary and convenient wharves . . . cranes . . . and other works buildings and conveniences."

E Section 22 of the Special Act deals with the power to lease warehouses and cranes, and so far as is relevant reads as follows:

"Notwithstanding anything contained in the Harbours, Docks, and Piers Clauses Act, 1847, the corporation may from time to time lease or grant the use or occupation of . . . cranes . . . acquired or provided by them for the purposes of this Act or of any of the recited Acts for such period or periods F not exceeding in any case seven years at such rents and on such terms and conditions as shall be agreed between the corporation and the corporations companies or persons taking the same."

The reference at the outset of s. 22 to the Clauses Act is a reference to s. 23 of that Act which gives a power to undertakers to "lease or grant the use or occupation of [inter alia] cranes . . . at such rents, and upon such terms and conditions G as shall be agreed upon", but limits such leases to three years instead of the seven years provided for by the Special Act.

Section 30 of the Special Act, which I must read in detail for the corporation relies strongly on it, is as follows:

"The corporation from time to time may (subject as hereinafter mentioned) make such reasonable charges as they think fit for services rendered by them H in respect of shipping unshipping landing relanding [and a number of other works relating to loading and unloading of ships which clearly cover the provision of stevedoring services] and for any other service with respect to goods shipped or unshipped or warehoused or deposited at the quay or river wall by this Act authorised or the existing quay or river wall . . ."

I So far s. 30 deals with and confers on the corporation a right to charge for their services. The section then goes on:

". . . and the corporation may render any such services when they think proper . . ."

That empowers the corporation to render the services for which the early part of the section authorises them to charge. The section continues:

". . . and may provide all such trucks planks gear machinery and appliances and labour as may be necessary to effect the purposes aforesaid."

The third portion of s. 30 therefore gives the corporation the right to acquire whatever machinery or plant may be needed for the purposes of the services authorised to be rendered and charged for. Then follow two provisos: A

> "Provided that as regards the articles mentioned in Sch. 4 to this Act the corporation shall not demand or take for the use of their cranes any sums exceeding those specified in that Schedule. Provided further that any person shall be at liberty to perform any of the services matters and things in this section mentioned with respect to all goods belonging to him without any interference by the corporation and without being liable to pay any charge to them in respect of such services matters or things." B

It is evident from the reference in the proviso to the use of cranes that the draftsman of the Act regarded the provision of the use of cranes as being one of the services with which s. 30 deals. C

It is, I think, desirable to look very briefly at Sch. 4, where one finds the heading,

> "Craneage rates. Rates of craneage on heavy machinery etc. For lifting shipping or unshipping from or to the quay boilers cylinders engines locomotives machinery and other packages or articles by the corporation's cranes including the use of slings and the necessary labour." D

Then are set out the various rates per ton which represent the maximum which the corporation can charge under s. 30 for use of the cranes for lifting the various materials including the use of slings and the necessary labour.

Those I think are the relevant provisions of the Special Act, and I turn next to the Clauses Act to look at certain of the sections which are relevant to the matter which I have to decide. Section 1 deals with the incorporation of the Clauses Act in the Special Act. It reads as follows: E

> "This Act shall extend only to such harbours, docks, or piers as shall be authorised by any Act of Parliament hereafter to be passed which shall declare that this Act shall be incorporated therewith; . . ." F

and the Special Act falls within that category—

> ". . . and all the clauses of this Act, save so far as they shall be expressly varied or excepted by any such Act shall apply to the undertaking authorised thereby, so far as they are applicable to such undertaking, and shall, with the clauses of every other Act incorporated therewith, form part of such Act, and be construed therewith as forming one Act." G

Section 2, which deals with interpretations, provides:

> "The expression 'the special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed authorising the construction or improving of an harbour, dock, or pier, and with which this Act shall be incorporated; [and] . . . the expression 'the harbour, dock, or pier' shall mean the harbour, dock, or pier, and the works connected therewith, by the special Act authorised to be constructed . . ." H

I can go from there straight to s. 21 of the Clauses Act which forms part of the fasciculus of sections dealing with warehouses, cranes, and like buildings or machines and conveniences. Section 21 reads as follows: I

> "The undertakers may, as well upon the said lands as upon any other lands acquired by them under the provisions of this and the special Act, construct such warehouses, storehouses, sheds, and other buildings and works as they may deem necessary for the accommodation of goods shipped or unshipped within the harbour, dock, or pier, and may erect or provide such cranes, weighing and other machines, conveniences, weights, and measures as they think necessary for loading, unloading, measuring, and weighing such goods."

A That section seems to draw a distinction between buildings and works on the one hand dealt with in the first part of the section, and cranes, weighing and other machines, conveniences, weights and measures dealt with in the second part of the section.

Section 22—on the plaintiffs' case this is the vital section in the Clauses Act—is as follows:

B "The undertakers or their lessees shall provide proper servants and labourers for working such cranes at all reasonable times for the use of the public."

Section 33, which forms part of a fasciculus of sections relating to the rates to be taken by the undertakers, reads:

C "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

Finally, s. 83, which confers the bye-law-making power on the corporation, deals with a number of different subjects with respect to which bye-laws may be D made. One of those specific subjects is

"For regulating the use of the cranes, weighing machines, weights and measures belonging to the undertakers, and the duties and conduct of all weighers and meters employed by them."

That, it is to be observed, follows the latter half of s. 21 of the Act, the part which E deals with the provision of cranes. There are several other headings under which bye-laws may be made, of which the first is "For regulating the use of the harbour, dock, or pier", an expression which includes the works connected therewith.

The Wisbech harbour, which has existed since its construction under the Special Act in 1889, and indeed existed in some other form for centuries before that, F used until the war to be used for unshipping of goods with the use of ships' own tackle, and no cranes, I understand, were at that time provided by the corporation under the permissive powers to which I have referred. In about 1946 the quay was rebuilt at a greater height from the water level, and as a result it became necessary, if various kinds of cargo were to be loaded and unloaded, that cranes should be provided. At intervals between 1947 and 1954 the corpor- G ation acquired seven cranes for use at the quay. Those cranes were acquired with borrowed money and the borrowing required authorisation. In the case of two of the cranes the corporation when invited, as they were by the relevant government department, to state statutory authority under which the purchase was to be made, referred in two cases to s. 9 of the Special Act and s. 30 of the Special Act, and in the other five cases merely to their general powers without specifying H the section. At the date of those acquisitions of cranes the corporation had no intention of engaging itself in the stevedoring or ships' agency business, or of rendering any other services than that of providing cranes for the use of the public.

The plaintiffs, as I have said, are shipbrokers and ships' agents who have carried on in business for many years past, and used to undertake as part of their ships' I agency business stevedoring. They used the cranes provided by the corporation at fixed hourly charges for the use of the cranes, plus the wages of the driver, which were also fixed, I think, under some agreement negotiated by the trade union or by the National Dock Labour Board. In 1960, however, the corporation decided to enter into the stevedoring and ships' agency business on their own account, relying on the powers conferred on them by s. 30 of the Special Act. In the course of that business, and to promote that business, they decided to refuse the use of the cranes to anyone but themselves. The object of that—and it was a natural enough object—was to try to acquire for themselves at the

expense of the plaintiffs among others such stevedoring business as was available from ships using the port. A

The plaintiffs claim in this action that the corporation has no power to do this. They concede that the corporation is entitled to embark on stevedoring business and perform the services appropriate to stevedores under s. 30 of the Special Act; but, say the plaintiffs, the corporation must give the public, as well as the corporation themselves, opportunity to use the cranes for stevedoring business, at any rate at a time when the cranes are not in use by the corporation for the purpose of loading or unloading ships. The plaintiffs' claim is based on s. 22 or alternatively on s. 33 of the Clauses Act. It seems to me that their case really stands on s. 22, which deals specifically with the working of cranes, rather than on s. 33, which appears to me to be primarily an access section. B

On its true construction, s. 33, which says, C

> "Upon payment of the rates made payable . . . the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers"

is dealing with the question of access to the installations in the geographical areas of the harbour or pier. It means that the public can go on to those premises for the purpose of doing and there do the things specified in the section, that is to say shipping and unshipping of goods and embarking and landing of passengers, much in the same way as the public have access to a public highway for the purpose of proceeding to and fro thereon. I am fortified in that view by the speech of LORD MACMILLAN in *London & North Eastern Ry. Co.* v. *British Trawlers' Federation, Ltd.* (1) where he says: D E

> "The harbour is to be open to all for the purpose of unshipping goods. It is manifest that this must include the consequential purpose of removing the goods unshipped and such removal necessitates the employment of the appropriate vehicles."

Then he deals with the contention of the appellants in that case. He goes on (2): F

> "The answer is that the right of access conferred by s. 33 of the [Harbours, Docks, and Piers Clauses Act, 1847] includes, by virtue of the definition in s. 2, access to the authorised works connected with the harbour, and the fish markets are among the harbour works which Parliament has authorised . . . Accordingly, so long as the appellants carry on these fish markets as part of their harbour undertaking they have no more power to restrict the access of appropriate vehicles to these markets for the removal of fish purchased there than they have to restrict the access of appropriate vehicles to the ship's side for the removal of goods unloaded, always subject, of course, but subject only, to the rights of regulation by bye-law which they possess." G

Thus s. 33 is primarily an access section, and the right of use of cranes is specifically dealt with by s. 22 of the Clauses Act. H

The effect, in my judgment, of s. 21 and s. 22 of the Clauses Act is that the undertakers are not under any obligation to provide cranes; s. 21 is an authorising section; but if they do provide cranes then s. 22 requires them to provide proper servants and labourers for working such cranes at all reasonable times for the use of the public. There may well be alternative ways by which undertakers can fulfil this obligation; it may well be they can fulfil it by providing the corporation's own servants to operate the cranes, retaining those servants under their own control, in which case no doubt the corporation provide a service in relation to the cranes. It may be, however, that they would fulfil the obligation in s. 22 by making arrangements with an independent contractor I

(1) [1934] All E.R. Rep. at p. 589; [1934] A.C. at p. 301.
(2) [1934] All E.R. Rep. at p. 589; [1934] A.C. at p. 302.

A to be employed by any member of the public wanting to work the crane, in which case it might be doubtful whether it could properly be said that the corporation were performing themselves a service in relation to the crane. In whichever way the obligation is fulfilled, however, s. 22 of the Clauses Act in my view, unless it is inconsistent with the Special Act, places on the corporation the obligation to make cranes available with drivers at all reasonable times for the use of the B public, including the plaintiffs, and they have no right so long as cranes are provided to restrict their use to the corporation themselves for the purpose of carrying on stevedoring activities. I see no inconsistency in the Special Act with those provisions of s. 21 and s. 22 of the Clauses Act.

The corporation rely strongly on s. 30 of the Special Act, to which I have already referred, and contend that that section gives the corporation a discretion C whether to render services and to provide gear, machinery, appliances and labour; that that discretion relates also to the use of cranes, and that it is therefore inconsistent with the obligation which s. 22 of the Clauses Act in my view imposes—to provide the use of cranes to the public for the purpose of undertaking their own unloading activities. Section 30 is an enabling section dealing with all kinds of services, wide enough, I agree, as the proviso shows, to include providing D cranes and drivers for the use of the public. No doubt s. 30 assumes that the corporation are under no obligation to provide cranes or to render the services, and there is no obligation on the corporation to provide cranes under s. 9 of the Special Act or s. 21 of the Clauses Act. It is in their option whether they provide them or not. What in my view s. 22 of the Clauses Act does require is that if the corporation choose to provide or erect cranes, then they must make them avail- E able for the use of the public at all reasonable times, although, no doubt, exercising their powers under s. 30, they can themselves use the cranes for their stevedoring services.

What the corporation is claiming to do is, although the cranes are not needed by the corporation themselves for carrying out stevedoring services, to refuse other persons, including the plaintiffs, the right to use the cranes. I do not F think that Act gives them that power. I think it is contrary to the requirements of s. 22 of the Clauses Act, and that there is no inconsistency between s. 22 of the Clauses Act and s. 30 of the Special Act.

It seems to me that it is quite immaterial whether the corporation bought the cranes under s. 9 of the Special Act, s. 21 of the Clauses Act or s. 30 of the Special Act; once having provided them, and as long as they are there, they are gov- G erned by the requirements of s. 22. It seems to me therefore that the plaintiffs are entitled to the declaration for which they ask (3).

Declaration accordingly.

Solicitors: *Edward & Butler* (for the plaintiffs); *Sharpe, Pritchard & Co.* (for the defendant corporation).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(3) See p. 342, letter H, ante.

McKIE (INSPECTOR OF TAXES) *v.* WARNER.

A

[CHANCERY DIVISION (Plowman, J.), July 6, 7, 1961.]

Income Tax—Income—Accommodation provided for employee—Employee charged only part of rent—Whether difference income of employee—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 161 (1).

Income Tax—Deduction in computing profits—"Expenses incurred wholly, exclusively and necessarily in the performance of . . . duties"—Excess of rent of living accommodation provided by company over taxpayer's contribution—Residence required in London flat—Entertainment of customers there—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch.* 9, *Rules applicable to Sch. E, r.* 7.

B

On appointing one of their employees, the taxpayer, as their export sales supervisor, a company considered it essential that he should reside in London to be able to carry out his duties satisfactorily and told him to look for a flat that suited him. One being found, they took a lease of it at a yearly rent of £500 plus excess rates over £64 6s. 9d. a half year, and charged the taxpayer £150 per annum for the flat, that being the sum which they considered proper having regard to the salary that he was receiving. The company thus bore expense of some £350 per annum in respect of the flat. It was part of the taxpayer's duties to entertain at the flat foreign buyers visiting the country, and a room was available for visitors wishing to sleep there overnight, although it was also used from time to time by a member of the taxpayer's family.

C

D

Held: the taxpayer was chargeable to tax in respect of the £350 per annum difference between the rent paid by the company and the sum received from the taxpayer for the following reasons—

E

(i) the expense so incurred by the company in the provision of living or other accommodation for the taxpayer was within s. 161 (1) of the Income Tax Act, 1952, as a matter of the construction of that subsection, irrespective of what the facts relating to the accommodation so provided were; accordingly the £350 p.a. was deemed to have been an expense incurred by the taxpayer and repaid to him by the company.

F

(ii) the expense (£350 p.a.) thus notionally incurred by the taxpayer was not deductible from his emoluments as notionally increased by its reimbursement since (a) the notional expense was not an expense "necessarily" incurred (viz., incurred by reason of the necessities of the work) within r. 7 of Sch. 9 to the Income Tax Act, 1952; and (b) neither was the notional expense incurred wholly or exclusively in the performance of the taxpayer's duties, within the meaning of r. 7, as the flat was also his home when not on duty.

G

Nolder v. *Walters* ((1930), 15 Tax Cas. 380) distinguished.

[As to expenses allowances and benefits in kind to holders of an office, employment, etc., see 20 HALSBURY'S LAWS (3rd Edn.) 314-316, paras 577, 578; and for cases on the subject, see 28 DIGEST (Repl.) 242-247, *1059-1099.*

H

For the Income Tax Act, 1952, s. 161 and Sch. 9, Rules applicable to Sch. E, r. 7, see 31 HALSBURY'S STATUTES (2nd Edn.) 156, 524.]

Cases referred to:

Brown v. *Bullock,* ante, p. 129.

Durbidge v. *Sanderson,* [1955] 3 All E. R. 154; 36 Tax Cas. 239; [1955] 1 W.L.R. 1087; 28 Digest (Repl.) 244, *1072.*

I

Nolder v. *Walters,* (1930), 15 Tax Cas. 380; 28 Digest (Repl.) 244, *1074.*

Ricketts v. *Colquhoun,* [1926] A.C. 1; 95 L.J.K.B. 82; 134 L.T. 106; 90 J.P. 9; 10 Tax Cas. 118; 28 Digest (Repl.) 242, *1059.*

Case Stated.

The respondent taxpayer appealed to the General Commissioners of Income Tax for St. George, Hanover Square, Middlesex, against assessments made on

A him under Sch. E to the Income Tax Act, 1952, in respect of his emoluments as export sales supervisor of Jack Olding & Co., Ltd. for the years ended Apr. 5, 1953, to Apr. 5, 1957, inclusive. The questions for determination by the commissioners were: (i) whether certain expenses incurred by the company in connexion with the provision of a flat for the taxpayer fell to be included in the emoluments of his employment under Ch. II of Part 6 of the Act, and B (ii) if so, whether those expenses or any part of them were allowable as a deduction in computing the taxpayer's emoluments to be assessed to tax under para. 7 of Sch. 9 to the Act. The company had considered it essential that the taxpayer should reside in London to carry out his duties satisfactorily and rented the flat at £500 (plus rates in excess of £64 6s. 9d. a half year) charging the taxpayer £150 a year for his occupation. It was part of the taxpayer's duties to entertain C foreign buyers visiting this country at the flat, a bedroom being available for their accommodation, although used also from time to time by a member of the taxpayer's family. As from Sept. 1, 1952, the taxpayer was paid £250 per annum as a contribution towards his expenses of entertaining and accommodating buyers (which exceeded that figure).

The taxpayer contended: (i) that his occupation of the flat was not a benefit D to him and that accordingly the expense incurred by the company in providing it did not fall within s. 161 (1) of the Act of 1952; (ii) that the flat was part of the company's business premises and the expense incurred by the company in the provision of living accommodation for the taxpayer was exempt from s. 161 (1) by s. 161 (3); and (iii) alternatively, if the company did incur expense in the provision of a benefit for the taxpayer within the meaning of the section, E that expense if incurred by the taxpayer would have been money incurred necessarily in the performance of his duties within the meaning of para. 7 of Sch. 9 to the Act. The Crown contended inter alia: (i) that the expense incurred by the company in the provision of the flat for the taxpayer in so far as not made good by him to the company fell to be included in the emoluments of his employment pursuant to s. 161 of the Act; (ii) that the flat was not part of the com- F pany's business premises and s. 161 (3) therefore did not apply; and (iii) that no deduction in respect of the expense incurred by the company fell to be made from the emoluments under para. 7 of Sch. 9. The commissioners held that the difference between the amount paid by the company and the £150 paid by the taxpayer in respect of the flat was properly assessed and was not exempted by s. 161 (3); but that that difference was allowable under para. 7 of Sch. 9 as an G expense wholly, exclusively and necessarily incurred by the taxpayer in the performance of his duties. The Crown appealed by way of Case Stated to the High Court.

R. W. Goff, Q.C., and *A. S. Orr* for the Crown.
Heyworth Talbot, Q.C. and *H. M. Allen* for the taxpayer.

H **PLOWMAN, J.:** Mr. J. P. F. Warner, the respondent taxpayer in this appeal, was assessed to tax under Sch. E to the Income Tax Act, 1952, in respect of his emoluments as export sales supervisor of a company called Jack Olding & Co., Ltd., for the years ended Apr. 5, 1953, to Apr. 5, 1957, inclusive. He appealed against those assessments to the General Commissioners of Income Tax, and the questions for their determination were, first of all, whether certain I expenses incurred by the company in those years in connexion with the provision of a flat for the taxpayer fell to be included in the emoluments of his employment taxable under Sch. E, and, secondly, if so, whether they were allowable as a deduction in computing his taxable emoluments under that Schedule. The General Commissioners answered both those questions in the affirmative, and the taxpayer in effect appeals against their answer to the first question, and the Crown appeals against their answer to the second question.

The facts found by the commissioners can be summarised as follows. In 1950 the taxpayer, who was then already in the company's employment, was appointed

export sales supervisor to assist the manager of a department then newly formed to deal with the export of Vickers tractors, of which the company had just recently been appointed world-wide distributors. That department was run from premises at 141, Park Lane. At that time, the taxpayer was living at Little Hadham, in Hertfordshire, with his wife and children; and the company considered it essential that he should reside in London to enable him to carry out his duties satisfactorily. So they told him to look for a flat that suited him. His wife in fact found a flat of comparable size to their house at Little Hadham, and the flat so found was flat 17 at 169, Queensgate, London, S.W.7. On Dec. 12, 1950, the company took a lease of that flat.

The terms of the lease, so far as material, were these. The term was one year certain and thereafter quarterly at a yearly rent of £500 and an additional rent equal to the excess of the rates over a sum of £64 6s. 9d. per half year. The lease contained a covenant by the company not to use or occupy the premises for any other purposes than as a private residence for the occupation of the taxpayer and members of his family only, and such other persons as might be approved by the landlords. It follows from that that, so far as the provisions of the lease were concerned, the use of the premises for business purposes was prohibited. The lease also contained an absolute covenant by the company against assigning, underletting or parting with possession of the premises.

The taxpayer agreed with the company to pay to it £150 a year for his occupation of the flat plus the cost of gas, electricity and other services at the premises. This sum of £150 per annum was the sum that the company thought proper having regard to the salary that the taxpayer was then earning. If his salary had been greater, the contribution which he would have been required to make might have been larger. This agreement about paying the company £150 a year was embodied in a letter dated Dec. 18, 1950, and addressed by the taxpayer to the company, which was in these terms:

> "Re flat 17-169, Queensgate, South Kensington: I hereby acknowledge that the above flat is let to me in consequence of my employment with you as an export sales supervisor from Dec. 25, 1950, until the expiration of three months' notice in writing given by either of us to the other. I am to pay or contribute to you a sum at the rate of £150 per annum for my occupation of the flat. Gas, electricity, etc., will be my responsibility and I will pay any such accounts direct to the companies concerned. I agree that during my occupation of the flat I will not do permit or suffer to be done anything which may constitute or lead to a breach of any of the agreements on your part contained in the tenancy agreement under which you hold the flat."

His tenancy from the company, or occupancy with the permission of the company, is not necessarily conterminous with his employment.

In due course, the taxpayer and his family moved into the flat, and they moved not because he wanted to leave Little Hadham, but because the company wished him to do so. It was part of the taxpayer's duties to entertain at his flat foreign buyers who were on a visit to this country, to meet them on their arrival, accompany them to their point of departure and generally look after them during their stay in London, and a room was available in the flat for any of such visitors who wished to sleep there overnight, as did sometimes happen. But the room was also used from time to time by a member of the taxpayer's family. Then, as from Sept. 1, 1952, the company paid him an entertainment allowance of £250 a year.

The first question which fell to be determined by the commissioners was, in effect, whether the difference between the £500 a year which the company was paying for the flat and the £150 a year which the taxpayer was paying the company—i.e., the sum of £350 a year—fell to be included in his emoluments. The commissioners decided that it did, and I have to decide whether they were right.

A The matter turns on the true construction of s. 161 (1) of the Income Tax Act, 1952. That subsection is as follows:

> "Subject to the following provisions of this Chapter, where a body corporate incurs expense in or in connexion with the provision, for any of its directors or for any person employed by it in an employment to which B this Chapter applies, of living or other accommodation, of entertainment, of domestic or other services or of other benefits or facilities of whatsoever nature, and, apart from this section, the expense would not be chargeable to income tax as income of the director or employee, paras. 1 and 7 of Sch. 9 to this Act, and s. 27 of this Act, shall have effect in relation to so much of the said expense as is not made good to the body corporate by the C director or employee as if the expense had been incurred by the director or employee and the amount thereof had been refunded to him by the body corporate by means of a payment in respect of expenses."

The submission of counsel for the taxpayer on the construction of that subsection is this, that, having regard to the use of the words "or of other benefits or facilities" in the context in which I have just read them, a limitation must be put on the D generality of the earlier part of the subsection which deals with the provision of living or other accommodation and certain other matters, and that the limitation to be put on it is one which would confine it to a case in which such living or other accommodation in fact provided a benefit for the employee in question. Then counsel went on to address argument to me on the question of fact which he said so arose. In my judgment, this question is purely one of the construction E of the section, and no question of fact arises at all. When the section speaks of a body corporate incurring expense in the provision for any person employed by it of living or other accommodation or of other benefits or facilities, it seems to me to follow as a matter of construction that living or other accommodation provided by the body corporate must be a benefit within the meaning of the subsection irrespective of what the facts relating to it are. Therefore, on the F first question which I am called on to decide, I hold that the commissioners were right in concluding that the provision of this flat was a benefit for the taxpayer within the meaning of s. 161 (1).

The General Commissioners, having answered that question in the affirmative, then had to consider whether this £350 a year was allowable to the taxpayer as a deduction against his taxable emoluments, and that question turns on the G true construction of r. 7 of Sch. 9 to the Act of 1952, which is as follows:

> "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise H to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

It has been pointed out many times, and it is unnecessary for me to refer to any of the occasions because it is notorious, that it is very difficult for a taxpayer I under Sch. E to bring his expenses within this paragraph. In order to succeed in a claim under the rule, the taxpayer has to prove, first of all, that the expense is one which he was necessarily obliged to incur and, secondly, that it was incurred wholly, exclusively and necessarily in the performance of his duties.

As regards the first of those two requirements, the authorities show that the word "necessarily" in the expression "necessarily obliged to incur" refers to the necessities of the office or the employment. In order to qualify, the expense must have been necessitated by the duties of the employment. The fact that it was required by the employer is not sufficient, nor is the fact that it was thought

to be necessary by the employee. In this connexion, I need only refer to a sentence taken from the judgment of DONOVAN, L.J., in the recent case of *Brown* v. *Bullock* (1), which was in the Court of Appeal for judgment on June 26 of this year, where he said in connexion with r. 7 that the General Commissioners accepted a contention which in his view was not correct, and then he proceeded to enunciate the test (2):

> " The test is not whether the employer imposes the expense, but whether the duties do, in the sense that, irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay."

Then, as regards the second requirement, the authorities show that the expression " in the performance of the said duties " is a very stringent one; it has quite a different connotation from what I might call the corresponding provision in s. 137 of the Act relating to expenses for purposes of Sch. D, where the relevant words are " for the purposes of "; and in r. 7, the necessity for expenditure " in the peformance of the duties " means that the sum in question must be defrayed in the actual discharge of the duties—" in doing the work of the office " is the expression which ROWLATT, J., used in *Nolder* v. *Walters* (3). But, even if the expenditure was necessarily incurred in doing the work of the office, it must also have been defrayed wholly in discharge of the duties and exclusively in discharge of the duties.

Counsel for the Crown has submitted that this sum of £350 a year which I am considering fails to qualify under either limb of r. 7. As regards the first limb, he submits that the function of export sales supervisor did not necessarily involve residence in this flat nor, indeed, in any particular place; in other words, the taxpayer was not employed to live in the flat, but he lives in the flat because he is employed. He lives there because the company considered it essential and not because the job necessitated it. Counsel also pointed out that it was not even a term of his employment that he should reside there and that, as already mentioned, his occupation of the flat is not tied to the term of his employment.

As regards the second limb, counsel for the Crown submits that the taxpayer is not performing the duties, not doing the job, of export sales supervisor by living in the flat, so that he cannot be taken to be incurring the expense of £350 " necessarily in the performance of the said duties ", and still less, continues the argument, is the expense " wholly " or " exclusively " incurred in the performance of his duties, because there is an element of expense which has no connexion with the business at all. There are days and nights when the taxpayer is off duty and the flat is simply his home, the place where he ceases to be export sales supervisor and becomes simply a husband and a father.

In answer to those contentions, counsel for the taxpayer founds himself mainly on the finding of the commissioners that it was part of the taxpayer's duties to entertain at this flat. I may say that, apart from this question of entertainment, it would appear to me that the argument of counsel for the Crown is obviously right and amply justified. Apart from this question of entertainment, it seems to me that the taxpayer fails to bring himself within either limb of r. 7 of Sch. 9.

The question then is, does this question of entertainment really make all the difference? I need not repeat the facts found by the commissioners in relation to the matter, because I have already cited them. Counsel for the taxpayer cited the decision of ROWLATT, J., in *Nolder* v. *Walters* (4). The headnote of that case sufficiently states the facts:

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(1) Ante, p. 129. (2) Ante, at p. 133. (3) 15 Tax Cas. at p. 387.
(4) 15 Tax Cas. 380.

A "An aeroplane pilot employed by a limited company claimed deductions in the assessment of his remuneration to income tax under Sch. E in respect of various items of expenditure, *Held*, that no deduction could be allowed in respect of (a) the upkeep of a motor car to convey the pilot between the aerodrome and his home, or (b) a telephone at his home: but that a decision of the General Commissioners allowing a deduction for an excess of actual B subsistence expenses when away from home on duty over subsistence allowance granted by the company could not be disturbed as being erroneous in law."

That was a decision on the question of the difference between the pilot's actual subsistence expenses and his subsistence allowance, which, as WYNN-PARRY, J., pointed out in *Durbidge* v. *Sanderson* (5), ROWLATT, J., had reached with some C hesitation. WYNN-PARRY, J., said (6):

"In the judgment in each of those cases [of which *Nolder* v. *Walters* (7) was one], there is clearly a suggestion that judges who are invited to follow them should only do so with considerable hesitation. I share that view, particularly after the detailed analysis which counsel for the Crown made of the various judgments and opinions in *Ricketts* v. *Colquhoun* (8)."

D

But, accepting the decision in *Nolder* v. *Walters* (7) as it is, it seems to me that it is quite a different case from the present one. In *Nolder* v. *Walters* (7) the pilot was on duty all the time he was travelling, and ROWLATT, J., as I understand it, said that, because he was travelling on duty, he was entitled to claim the difference between the two sums that I have mentioned. That might provide E an analogy, possibly, to the present case if the taxpayer were on duty all the time he was at the flat, but quite clearly, in my judgment, he was not on duty all the time he was at the flat. There were occasions, no doubt, when his duty was to entertain customers or potential customers of his company, but for a great deal of the time he was not doing the work of his employment by living in the flat at all. Therefore, it does not seem to me that *Nolder* v. *Walters* (7) stands F in the way of what I consider to be the proper conclusion from the facts found in this case, which is that these expenses were not expenses deductible under r. 7 of Sch. 9.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *B. Hazell Smith* (for the taxpayer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law*.]

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(5) [1955] 3 All E.R. 154; 36 Tax Cas. 239.
(6) [1955] 3 All E.R. at p. 159; 36 Tax Cas. at p. 244.
(7) 15 Tax Cas. 380.
(8) [1926] A.C. 1; 10 Tax Cas. 118.

A

Re BRISTOL SOUTH EAST PARLIAMENTARY ELECTION.

[QUEEN'S BENCH DIVISION (Gorman and McNair, JJ.), July 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 28, 1961.]

Peerages—Inalienability—Inability to renounce or surrender.

Elections—Parliamentary—Disqualification of candidate—Peer—Disqualification attributable to status and not dependent on receiving writ of summons to House of Lords—Disqualification made known to electors before votes cast—Majority of votes cast for disqualified candidate—Validity of election of sole opponent.

B

Elections—Election court—Jurisdiction—Succession to peerage—Election petition alleging disqualification of candidate for election to Parliament—Jurisdiction to determine succession to peerage.

C

A peer cannot alienate, renounce, surrender or extinguish his peerage (see p. 361, letter F, and p. 362, letter I, post).

Norfolk (Earldom) Case ([1907] A.C. 10) and dicta of VISCOUNT BIRKENHEAD, L.C., and LORD WRENBURY in *Viscountess Rhondda's Case* ([1922] 2 A.C. at pp. 362, 393) followed.

D

By the common law of Parliament the disqualification of a peer of the United Kingdom for membership of the House of Commons is imposed by his status as a peer and not by any incompatibility between duties arising from a writ of summons to attend the House of Lords and duties of service in the House of Commons (see p. 370, letter E, post); accordingly, in the case of conferment of a peerage by letters patent or of succession to a peerage by inheritance, the disqualification arises on the creation of or succession to the peerage and does not depend on the issue of a writ of summons to the House of Lords (see p. 371, letter I, post).

E

Earl of Beauchamp v. *Madresfield* ((1872), L.R. 8 C.P. 245) considered and applied.

Dictum of LORD WRENBURY in *Viscountess Rhondda's Case* ([1922] 2 A.C. at p. 393) applied.

F

Bedford (Borough) Case, Marquis of Tavistock's Case ((1833), Per. & Kn. 143) explained, distinguished and doubted.

Observations on the expressions "lord of parliament" and "peer of the realm", appearing in early authorities (see p. 364, letter A, post).

Although a question of disturbance of a dignity was outside the cognisance of a court of law, yet the fact that a candidate for election to the House of Commons had succeeded by inheritance to a peerage, so as to be disqualified for election, was determinable by the election court (see p. 373, letter B, post).

G

Earl Cowley v. *Countess Cowley* ([1901] A.C. 450) considered.

In 1942 William Wedgwood Benn was raised to the peerage of the United Kingdom under the title Viscount Stansgate by letters patent which granted the dignity to him and the heirs male of his body lawfully begotten and provided that his heirs male successively "may" have hold and possess a seat place and voice in the House of Lords. In 1959, the respondent, his eldest surviving son, was elected member of Parliament for the constituency of Bristol South East and duly took his seat. Lord Stansgate died on Nov. 17, 1960, and on Apr. 13, 1961, the House of Commons, confirming the report of its committee of privileges, resolved that the respondent had ceased to be a member of that House on succeeding to the Viscounty of Stansgate on Nov. 17, 1960, and further resolved that a writ should be issued for the election of a new member for Bristol South East. At the by-election held at Bristol South East on May 4, 1961, the respondent and the petitioner were the only candidates. The respondent received a majority of the votes recorded at the election and on May 5, 1961, was returned as the duly elected member of Parliament. Prior to the date of the by-election, the

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I

A petitioner had sent out notices to all persons entitled to vote stating that the respondent was a peer of the United Kingdom, and had been so found by the House of Commons; that by reason of his status as a peer he was incapacitated and disqualified from being elected a member of Parliament and that all votes given for the respondent would therefore be thrown away and be null and void. Similar notices were published in newspapers B circulating in the constituency and were posted at the entrance to polling stations. Further, before the election the petitioner issued a notice to the press stating that the respondent had succeeded to the Viscounty of Stansgate on Nov. 17, 1960, and was consequently disqualified from membership of the House of Commons but that if the respondent gained the largest number of votes at the election the petitioner would present an election C petition seeking his return as the legitimate member. In reply to the petitioner's notice to all electors the respondent circulated notices to the press and another document in which he disputed the petitioner's claims. At the date of the by-election the respondent had neither applied for nor received a writ of summons to attend the House of Lords. On a petition to the election court,

D **Held:** on the evidence before the court, the facts which in law created the respondent's incapacity to be elected a member of Parliament were known to the electors before they cast their votes and the court was therefore bound to declare that the votes cast for the respondent had been thrown away and that the petitioner was duly elected as the member of Parliament for the constituency (see p. 379, letter E, post).

E *Beresford-Hope* v. *Lady Sandhurst* ((1889), 23 Q.B.D. 79) followed.

[As to the disabilities of peers, see 29 HALSBURY'S LAWS (3rd Edn.) 251, 252, paras. 520, 521; and as to the disqualification of peers for sitting in the House of Commons, see 28 HALSBURY'S LAWS (3rd Edn.) 337, para. 547.

As to jurisdiction in peerage claims, see 29 HALSBURY'S LAWS (3rd Edn.) 256, 257, paras. 533, 534.

F For cases on jurisdiction in peerage claims, see 37 DIGEST 42, 43, *210-237*. For cases on persons disqualified for membership of the House of Commons, see 36 DIGEST (Repl.) 378, 379, *232-238*.

As to votes given to a disqualified candidate, see 14 HALSBURY'S LAWS (3rd Edn.) 305, para. 549; and for cases on notice of disqualification in parliamentary elections, see 20 DIGEST 107, 108, *865-877*.]

G

Cases referred to:

Abergavenny's (Lord) Case, (1610), 12 Co. Rep. 70; 3 Cru. Dig. 172; 77 E.R. 1348; 37 Digest 31, *18*.

Beauchamp (Earl) v. *Madresfield*, (1872), L.R. 8 C.P. 245; 2 Hop. & Colt. 41; sub nom. *Beauchamp (Earl)* v. *Madresfield Overseers, Salisbury (Marquis)* H v. *South Mimms Overseers, Salisbury (Marquis)* v. *Bontems, Salisbury (Marquis)* v. *Bulwer*, 42 L.J.C.P. 32; 27 L.T. 606; 37 J.P. 39; 20 Digest 9, *29*.

Bedford (Borough) Case, Tavistock's (Marquis) Case, (1833), Cockb. & Rowe 37, 95; Per. & Kn. 112, 143; 20 Digest 10, *31*.

Beresford-Hope v. *Sandhurst (Lady)*, (1889), 23 Q.B.D. 79; 58 L.J.Q.B. 316; I 61 L.T. 150; 53 J.P. 805; 20 Digest 132, *1057*.

Cowley (Earl) v. *Cowley (Countess)*, [1901] A.C. 450; 70 L.J.P. 83; 85 L.T. 254; 37 Digest 43, *211*.

Cox v. *Ambrose*, (1890), 60 L.J.Q.B. 114; 55 J.P. 23; 20 Digest 132, *1058*.

Etherington v. *Wilson*, (1875), L.R. 20 Eq. 606; *revsd.* C.A., (1875), 1 Ch.D. 160; 45 L.J.Ch. 153; 33 L.T. 652; 40 J.P. 164; 8 Digest (Repl.) 429, *1191*.

Fermanagh and South Tyrone Election, The, (1955), 105 L.Jo. 594.

Gosling v. *Veley*, (1847), 7 Q.B. 406; 16 L.J.Q.B. 201; 8 L.T.O.S. 555; 11 J.P. 372; 11 Jur. 385; 115 E.R. 542; *on appeal*, (1853), 4 H.L. Cas. 679; 20 Digest 107, *865*. A

Grey de Ruthyn Case, (1640), Collins's Baronies by Writ, 195, 256; Cro. Car. 601; 79 E.R. 1117; 37 Digest 41, *179*.

Hobbs v. *Morey*, [1904] 1 K.B. 74; 73 L.J.K.B. 47; 89 L.T. 531; 68 J.P. 132; 20 Digest 125, *1004*. B

Jeffrey's Case, (1585), Petyt's Lex Parliamentaria, 185.

Launceston Case, Re, Drinkwater v. *Deakin*, (1874), L.R. 9 C.P. 626; 43 L.J.C.P. 355; 30 L.T. 832; 38 J.P. 808; 20 Digest 107, *876*.

Norfolk (Earldom) Case, [1907] A.C. 10; 76 L.J.P.C. 9; 95 L.T. 682; 37 Digest 29, *8*.

Onslow's Case, (1562), Petyt's Lex Parliamentaria, 184. C

Oxford (Earldom) Petitions, (1625), Collins's Baronies by Writ, 173; Co. Litt. 27a; sub nom. *Willoughby of Eresby & Oxford (Earl) Case*, W. Jo. 96; 82 E.R. 50; 37 Digest 40, *158*.

Popham's Case, (1580), Petyt's Lex Parliamentaria, 185.

Purbeck's Case, (1678), Collins's Baronies by Writ, 293; Cruise on Dignities, 113; sub nom. *R.* v. *Purbeck (Viscount)*, Show. Parl. Cas. 1; 1 E.R. 1; 37 Digest 41, *177*. D

R. v. *Boscawen*, (1714), cited 2 Cowp. 537; 20 Digest 107, *867*.

R. v. *Hawkins*, (1808), 10 East, 211; *affd.* sub nom. *Hawkins* v. *R.*, (1813), 2 Dow. 124; 3 E.R. 810; 20 Digest 108, *877*.

R. v. *Monday*, (1777), 2 Cowp. 530; 98 E.R. 1224; 20 Digest 137, *1115*.

R. v. *Parry, R.* v. *Phillips*, (1811), 14 East, 549; 104 E.R. 712; 13 Digest (Repl.) 235, *595*. E

R. v. *Tewkesbury Corpn.*, (1868), L.R. 3 Q.B. 629; 37 L.J.Q.B. 288; 18 L.T. 851; 32 J.P. 580; 20 Digest 132, *1056*.

R. v. *Withers*, (1735), cited 2 Cowp. at p. 537; 2 Burr. at p. 1020; 98 E.R. 1228; 20 Digest 132, *1053*.

Rhondda's (Viscountess) Case, [1922] 2 A.C. 339; 92 L.J.P.C. 81; 128 L.T. 155; 37 Digest 36, *69*. F

Taylor v. *Bath Corpn.*, (1741), 3 Lud. E.C. 324; cited in 2 Cowp. at p. 537; 98 E.R. 1228; 20 Digest 132, *1054*.

Ulster By-Election, The, (1955), 105 L.Jo. 482.

Election petition. G

By this petition presented on May 8, 1961, and amended on May 24, 1961, the petitioners Malcolm Archibald James St. Clair and John Malcolm Harris asked that it be determined that Anthony Neil Wedgwood Benn, hereafter referred to as the respondent, was not duly elected or returned as member of Parliament for the constituency of Bristol South East at the by-election held there on May 4, 1961, and that the first-named petitioner, Mr. St. Clair, was duly elected and ought to have been returned as member of Parliament for the constituency, and asked for such further or other relief as might be just. The petition alleged as follows: H

1. The first-named petitioner was a candidate at the parliamentary election for Bristol South East held on May 4, 1961, which was commenced by writ dated Apr. 18, 1961, and claimed to have a right to be elected and returned at the election; the second-named petitioner was an elector entitled to vote and who did vote at the election. I

2. At the election held on May 4, 1961, the first-named petitioner and the respondent, otherwise the second Viscount Stansgate of Stansgate in the peerage of the United Kingdom, were the only candidates, and on May 5, 1961, the returning officer declared as was the fact that the respondent had received 23,275 votes and the first-named petitioner had received 10,231 votes and returned the respondent to the Clerk of the Crown as having been duly elected.

A 3. The respondent is and was at all material times a peer of the United Kingdom.

4. On Apr. 13, 1961, the House of Commons resolved that it took note of the fact that the respondent on succession to the Viscounty of Stansgate on Nov. 17, 1960, ceased to be a member of the House and agreed with the Committee of Privileges in their report, ordered to be printed on Mar. 14, 1961. In their B report the committee concluded that, (a) the respondent was disqualified from membership of the House of Commons on Nov. 17, 1960, by succession to the Viscounty of Stansgate; (b) the instrument of renunciation executed by the respondent had no legal effect (a peer could not surrender or renounce his peerage); (c) the House of Commons Disqualification Act, 1957, did not give any option to the respondent to renounce the viscounty.

C 5. On Apr. 18, 1961, the House of Commons resolved that a warrant should be issued to make out a new writ for the election of a member to serve in Parliament for the constituency of Bristol South East in the room of the respondent who by the resolution of the House of Apr. 13, 1961, had ceased to be a member.

6. The petitioners say that the respondent is and was at all material times thereby incapacitated and disqualified from being elected a member of Parlia- D ment in the election held at Bristol South East on May 4, 1961.

7. The first-named petitioner or persons on his behalf took steps to bring the respondent's incapacity and disqualification to the notice of persons entitled to vote in the election in the following manner: (i) A notice (printed at p. 378, letter I, to p. 379, letter D, post) was sent with the first-named petitioner's election address to all persons entitled to vote in the election; (ii) a notice in similar terms E was published in certain newspapers circulating in the constituency, namely, in the "Bristol Evening Post" on Apr. 25, 1961, and in the "Western Daily Press and Times & Mirror" on Apr. 26, 1961; (iii) notices in similar terms were posted where they could be seen by persons entering the polling stations provided for the purposes of the election; (iv) the first-named petitioner referred to the respondent's incapacity and disqualification in various public speeches and state- F ments made in the constituency after Nov. 17, 1960, and prior to May 4, 1961.

8. The respondent's incapacity and disqualification was a matter of notoriety in the constituency at the time of the election and was well known to all persons entitled to vote in the election, and by reason of the notoriety and the steps taken by the first-named petitioner referred to in para. 7 the persons who voted for the respondent at the time of voting well knew of his incapacity and dis- G qualification.

9. By reason of the matters aforesaid all the votes given for the respondent were thrown away and were null and void.

The notice referred to in para. 7 (i) read:

"Parliamentary By-Election. Date of Election . . . Thursday, May 4, H 1961. Bristol South-East Constituency. Whereas Anthony Neil Wedgwood Benn, second Viscount Stansgate of Stansgate in the peerage of the United Kingdom, of Stansgate, Southminster, Essex and 12 Holland Park Avenue, London, W.11, a candidate at the election above-named and now about to be held, is a peer of the United Kingdom and was so found by the Committee of Privileges of the House of Commons on Mar. 22, 1961, and such I finding was confirmed by the House of Commons on Apr. 13, 1961: and whereas by reason of his status as a peer of the United Kingdom, the said Anthony Neil Wedgwood Benn, second Viscount Stansgate of Stansgate is by law incapacitated and disqualified from being elected a member of Parliament in the said constituency.

"Now take notice, that all votes given for the said Anthony Neil Wedgwood Benn, second Viscount Stansgate of Stansgate, at the said election will by reason of the said incapacity and disqualification be thrown away, and be null and void.

"Dated twenty-eighth this day of April 1961. (Signed) Malcolm A. J. St. Clair (Address) Upton House, Tetbury, Gloucestershire. (Description) Farmer. A candidate at the said election. (Signed) C. P. B. Moggridge (Lieutenant-Colonel). Election agent for Malcolm A. J. St. Clair of Upton House, Tetbury, Gloucestershire a candidate at the said election. To the electors of the Bristol South-East Constituency."

The facts appear in the judgment.

Sir Andrew Clark, Q.C., H. P. J. Milmo, Q.C., and *D. G. Widdicombe* for the petitioners.

The respondent appeared in person.

R. H. W. Dunn for the Director of Public Prosecutions.*

Cur. adv. vult.

July 28. **GORMAN and McNAIR, JJ.**, shared the reading of the following judgment of the court: This is a petition under Part 3 of the Representation of the People Act, 1949, in respect of a parliamentary election for the constituency of South East Bristol, which was held on May 4, 1961. The relevant provisions of that statute are as follows:

"107. Method of questioning parliamentary election.—(1) No parliamentary election and no return to Parliament shall be questioned except by a petition complaining of an undue election or undue return (hereinafter referred to as a parliamentary election petition) presented in accordance with this Part of this Act.

"108. Presentation and service of parliamentary election petition.—(1) A parliamentary election petition may be presented by one or more of the following persons—(a) a person who voted as an elector at the election or who had a right so to vote; or (b) a person claiming to have had a right to be elected or returned at the election; . . . (2) The member whose election or return is complained of is hereinafter referred to as the respondent.

"110. Constitution of election court and place of trial.—(1) A parliamentary election petition shall be tried by two judges on the rota for the trial of parliamentary election petitions and the judges for the time being on that rota shall, unless they otherwise agree, try the election petitions standing for trial according to their seniority. The judges presiding at the trial of a parliamentary election petition are hereinafter referred to as the election court. (2) The election court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a judge of the High Court . . . and shall be a court of record.

"124. Conclusion of trial of parliamentary election petition.—(1) At the conclusion of the trial of a parliamentary election petition the election court shall determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected or whether the election was void, and shall forthwith certify in writing the determination to the Speaker, and the determination so certified shall be final to all intents and purposes."

The petition in this case was presented on May 8, 1961, and amended on May 24, 1961. [GORMAN, J., read the petition (see p. 356, letter H, to p. 357, letter G, ante) and continued:] On June 2, 1961, the respondent admitted certain facts for the purposes only of this petition:—1. Paragraph 1 of the amended petition. 2. Paragraph 2 of the amended petition subject to a reservation that the respondent denies that he is second Viscount Stansgate of Stansgate in the peerage of the United Kingdom. 3. Paragraph 4 of the amended petition subject to a reservation that the respondent denies that the House of Commons was correct in so resolving and that the Committee of Privileges was right in its conclusions. 4. Paragraph 5 of the amended petition. 5. Paragraph 7 of the amended petition subject to a

* See footnote (79), p. 380, post.

A reservation that the respondent denies that he was or is incapacitated and disqualified as alleged therein or at all. 6. That the allegation of and the respondent's denial of the incapacity and disqualification referred to in para. 8 of the amended petition were matters of notoriety and were well known as stated in para. 8. 7. That William Wedgwood Benn first Viscount Stansgate of Stansgate died on Nov. 17, 1960. 8. That on Nov. 17, 1920, the said William Wedgwood B Benn, first Viscount Stansgate of Stansgate, was married to Margaret Eadie Holmes. 9. That the said William Wedgwood Benn, first Viscount Stansgate of Stansgate contracted no other marriage during his lifetime. 10. That the first son of the said marriage, Michael Julius Wedgwood Benn, was killed in action on June 23, 1944. 11. That the said Michael Julius Wedgwood Benn died without ever having married. 12. That the respondent Anthony Neil Wedgwood Benn, C is the second son of the said marriage. 13. That at the time of the death of William Wedgwood Benn, first Viscount Stansgate of Stansgate, on Nov. 17, 1960, the respondent Anthony Neil Wedgwood Benn was his eldest surviving son lawfully begotten. The facts admitted in paras. 7 to 13 (inclusive) were also formally proved before us.

On the hearing before us, the respondent said: "I think it might be for the D convenience of the court if I explained that in my response to this petition I shall be making no issue whatsoever on the validity or otherwise of the instrument of renunciation, and no reference whatsoever to the application or non-application of the House of Commons Disqualification Act, 1957 . . . I think I cannot go beyond the point I have already made, that is, that I shall not be raising any question in my response to this petition as to whether the instrument of renun- E ciation is valid or not nor on the House of Commons Disqualification Act."

On Jan. 12, 1942, William Wedgwood Benn was raised to the peerage under the title of Viscount Stansgate of Stansgate. The letters patent were in terms:

> "George the Sixth by the Grace of God of Great Britain Ireland and the British Dominions beyond the Seas King Defender of the Faith to all lords spiritual and temporal and all other our subjects whatsoever to F whom these presents shall come greeting Know ye that we of our especial grace certain knowledge and mere motion do by these presents advance create and prefer our right trusty and well beloved counsellor William Wedgwood Benn Companion of Our Distinguished Service Order upon whom has been conferred the decoration of the Distinguished Flying Cross to the state degree style dignity title and honour of Viscount Stansgate G of Stansgate in our county of Essex and for us our heirs and successors do appoint give and grant unto him the said name state degree style dignity title and honour of Viscount Stansgate to have and to hold unto him and the heirs male of his body lawfully begotten and to be begotten willing and by these presents granting for us our heirs and successors that he and his heirs male aforesaid and every of them successively may have hold and H possess a seat place and voice in the Parliaments and public assemblies and councils of us our heirs and successors within our United Kingdom amongst other viscounts And also that he and his heirs male aforesaid successively may enjoy and use all the rights privileges pre-eminences immunities and advantages to the degree of a viscount duly and of right belonging which other viscounts of our United Kingdom have heretofore used and enjoyed I or as they do at present use and enjoy."

At the general election on Nov. 8, 1959, the respondent was elected member of Parliament for the constituency of South East Bristol and duly took his seat. On Nov. 22, 1960, by writing under his hand the respondent purported to renounce and surrender the peerage by the following "Instrument of Renunciation."

> "Whereas on the fifteenth day of February nineteen hundred and fifty five before witnesses I, Anthony Neil Wedgwood Benn, did declare my

irrevocable desire to cease to be the heir male to the name, state, degree, style, dignity, title and honour of the Viscount Stansgate of Stansgate in the county of Essex; and whereas my late father, the said Viscount Stansgate of Stansgate died on the seventeenth day of November nineteen hundred and sixty; Now therefore I, Anthony Neil Wedgwood Benn, do hereby declare that by virtue of the above recited declaration and by virtue of this document I am not now, nor have ever been, nor am in any way entitled to the name, state, degree, style, dignity, title and honour of Viscount Stansgate of Stansgate in the county of Essex which I have absolutely and irrevocably renounced and surrendered. Furthermore being a member of the House of Commons at the time of the decease of my father the late Viscount Stansgate, I am not by law required to accept any place in the House of Peers by virtue of which I would be disqualified from sitting and voting as a member of the House of Commons."

On Nov. 29, 1960, the respondent petitioned the House of Commons requesting the appointment of a select committee to examine and report on his submission that he should remain a member of the House of Commons. It was ordered by the House of Commons that the petition be referred to the Committee of Privileges. On Mar. 14, 1961, the Committee of Privileges reported to the House of Commons, and it was ordered that the report be printed. On Apr. 13, 1961, the report was debated in the House of Commons and it was resolved—

"That this House takes note of the fact that Mr. Anthony Neil Wedgwood Benn on succession to the Viscounty of Stansgate on the 17th November, 1960, ceased to be a member of this House and agrees with the Committee of Privileges on their report."

On Apr. 18, 1961, the House of Commons resolved that a new writ should be issued for the election of a new member for the constituency of South East Division of Bristol. On Apr. 21, 1961, the respondent and Mr. Malcolm St. Clair (one of the petitioners to the petition before this court) were nominated for the ensuing by-election. On May 4, 1961, polling took place in the said by-election. The votes recorded in the by-election were: The respondent, 23,275 votes; Mr. St. Clair, 10,231 votes. On May 5, 1961, the returning officer returned the respondent to the Clerk of the Crown as being duly elected for the said constituency. It is, as we have said, this by-election which is the subject of this election petition before this court.

On the hearing before us the submissions advanced by the petitioners were, in outline, as follows:—(1) A peer of the United Kingdom cannot be a member of the House of Commons. The disqualification for membership of the House of Commons arises on the succession to the peerage and does not depend in any way on an issue of a writ of summons to the House of Lords in a case such as this where the succession is by descent. (2) The respondent succeeded to the peerage on the death of the first Viscount Stansgate of Stansgate on Nov. 17, 1960. (3) The respondent was disqualified for membership of the House of Commons on such succession and was accordingly disqualified from being a candidate at the election. (4) A peer can neither alienate, renounce, surrender nor extinguish his peerage by any means. (5) By reason of the circumstances of this by-election the court should declare that Mr. Malcolm St. Clair be the member for this constituency.

The submissions advanced by the respondent were, in outline, as follows: (1) The disqualification of peers for membership of the House of Commons is based on the incompatibility of parliamentary service. (2) The writ of summons to the House of Lords transforms an inherent right or privilege conferred by the letters patent on United Kingdom peers into an incompatible duty. (3) The writ of summons is the condition precedent to the disqualification of a member of Parliament on the grounds of United Kingdom peerage for until the writ of

A summons has issued no incompatibility of service arises. (4) The writ of summons is also the only way of establishing in law the fact of succession to a United Kingdom peerage for male persons of full age. (5) The writ of summons is also the indispensable legal pre-requisite to establish the right of a United Kingdom peer to sit in the House of Lords as lord of Parliament. (6) There is a well established convention of the constitution that writs of summons are not issued B to any person in such a way as to disqualify them involuntarily from the House of Commons. (7) The courts of law have no original jurisdiction in peerage matters even when incidently arising in course of litigation. (8) The respondent on May 4, 1961, was not in receipt of a writ of summons and was therefore not disqualified from standing as a candidate nor from sitting and voting as a member of Parliament. (9) This court should not declare Mr. St. Clair as C member of Parliament for this division. The submissions were amplified in the course of the hearing before us.

It will be observed that the main difference between the petitioners and the respondent as to the disqualification for membership of the House of Commons and for standing as a candidate was: Did such disqualification arise on succession to the peerage or did it arise on the granting of a writ of summons to the D House of Lords?

In the course of the hearing before us certain evidence was called by the petitioners of the circumstances relating to the conduct of the election which, they submitted, gave this court the right in law to declare that Mr. St. Clair was the member of Parliament for this constituency.

The respondent did not contend that the instrument of renunciation which E he had signed in this case amounted to a renunciation of the peerage. The respondent said:

> "It is really not for me to say whether I think a peerage can be surrendered. All that I can say is that in this case I am placing no reliance whatsoever on the instrument of renunciation which I have executed. It is not for me to say whether or not a peerage can be surrendered."

F It is nevertheless appropriate to consider whether in law a peer has the right to renounce or surrender a peerage. We have stated earlier in this judgment that the petitioners submitted that it was settled law that a peer can neither alienate, renounce, surrender, nor extinguish his peerage. The Committee for Privileges of the House of Lords considered this matter in the *Norfolk (Earldom) Case* (1). In this case the Committee for Privileges considered three earlier G decisions which were referred to in COLLINS ON PROCEEDINGS, PRECEDENTS, AND ARGUMENTS ON CLAIMS AND CONTROVERSIES CONCERNING BARONIES BY WRIT AND OTHER HONOURS. These were the cases of the *Oxford (Earldom) Petitions* (2), the *Grey de Ruthyn Case* (3), and *Purbeck's Case* (4). In *Purbeck's Case* (5) the EARL OF SHAFTESBURY, who gave the leading opinion, said:

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> "Forasmuch as upon the debate of the petitioner's case, who claims the title of Viscount Purbeck, a question in law did arise, whether a fine levied to the King, by a peer of the realm of his title and honour, can bar and extinguish that title? The lords spiritual and temporal in Parliament assembled, upon very long debate, and having heard His Majesty's attorney general, are unanimously of opinion and do resolve and adjudge, that no I fine now levied, nor at any time hereafter to be levied to the King, can bar such title of honour, or the right of any person claiming, such title under him that levied, or shall levy such fine."

The *Norfolk (Earldom) Case* (1) is of very great importance in considering the right of a peer to renounce his peerage. The headnote to the case is:

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(1) [1907] A.C. 10. (2) (1625), Collins's Baronies by Writ, 173.
(3) (1640), Collins's Baronies by Writ, 195.
(4) (1678), Collins's Baronies by Writ, 293.
(5) (1678), Collins's Baronies by Writ at p. 305.

"A peer cannot surrender his peerage to the Sovereign in any manner; and this law must be applied to a surrender made in 1302. In 1302 Roger Le Bygod, Earl of Norfolk, surrendered the earldom to Edward I. In 1312 Edward II granted to Thomas de Brotherton and to the heirs of his body the earldom so surrendered. Thomas de Brotherton was frequently summoned by writ to Parliament and sat there. Lord Mowbray, having proved his pedigree as senior co-heir of Thomas de Brotherton, alleged that the earldom had fallen into abeyance, and claimed that the abeyance should be determined in his favour as senior co-heir:—Held, that the surrender by Roger le Bygod was invalid; that the charter of 1312 was consequently invalid; that the sitting in Parliament under the King's writ could not create an earldom; and that Lord Mowbray had not made out his claim."

The EARL OF HALSBURY stated (6):

"My Lords, in this case the claimant seeks to establish his right to the Earldom of Norfolk, an earldom created in the person of Hugh le Bygod in 1135. It may be assumed that he has satisfactorily established his pedigree, but in the course of it he is compelled to admit that he is not heir to the earldom so created, but has to rely on a surrender of the earldom to the King in 1302 and a grant in 1312 to Thomas de Brotherton of the earldom so surrendered. Now the claimant has undoubtedly proved his descent from Thomas de Brotherton, but the fatal blot in his case is that the surrender upon which he relies is invalid in law. It is settled law 'that no peer of this realm can drown or extinguish his honour (but that it descend to his descendants) neither by surrender, grant, fine nor any other conveyance to the King.' This has been repeatedly held to be the law for some centuries, and finally in the Report on the Dignity of a Peer it is stated that such must now be held to be the law: vol. 2 of the Third Report on the Dignity of a Peer, pp. 25, 46."

LORD ASHBOURNE and LORD DAVEY delivered opinions to the like effect.

We were further referred to *Viscountess Rhondda's Case* (7) where VISCOUNT BIRKENHEAD, L.C., said (8):

"Of the two views, I adopt without hesitation the latter. A peerage held by a peeress in her own right is one to which in law the incident of exercising the right to receive a writ is not, and never was, attached. A right to sit and vote is personal to the holder of a peerage who possesses it. It is a right which can neither be denied nor surrendered nor exercised by deputy. The right really consists in the exercise, and a common law right to do something which the common law forbids to be done is, when so defined, a contradiction in terms."

LORD WRENBURY said (9):

"A peerage is an inalienable incorporeal hereditament created by the act of the Sovereign which, if and when he creates it, carries with it certain attributes which attach to it not by reason of any grant of those attributes by the Crown, but as essentially existing at common law by reason of the ennoblement created by the grant of the peerage."

LORD WRENBURY dissented in the decision of the court but not on this matter.

We have considered the submissions made to us on this question and we are of the view that the submissions of the petitioners are right in law.

The main question of law which this court has to determine is (subject to the procedural point taken by the respondent that no civil court (including this court) has jurisdiction to determine the fact of succession) whether the respondent, if in fact he succeeded to the Viscounty of Stansgate on the death of his

(6) [1907] A.C. at p. 11. (7) [1922] 2 A.C. 339. (8) [1922] 2 A.C. at p. 362. (9) [1922] 2 A.C. at p. 393.

A father, the first viscount, is disqualified from being a candidate at a parliamentary election or from sitting in the House of Commons notwithstanding he has not applied for or received a writ of summons to attend the House of Lords. This is a pure question of law to be determined according to the common law of Parliament, namely, that branch of the common law which relates to Parliament. The common law of Parliament is to be found in the decisions of the courts, the B opinions of writers of authority, the reports of the committees of both Houses, particular emphasis being placed on the opinions of the legal members of the House of Lords' committees when advising on matters of privilege (see per LORD BIRKENHEAD, L.C., in *Viscountess Rhondda's Case* (10)), and in the reports of the election committees before the appointment in 1868 (11) of the election judges. But it must be emphasised that neither the reports of committees of C the two Houses nor resolutions of either House can alter the law. To use the trenchant phrase of LORD CAMPBELL in 1858 (128 Hansard, 3rd Series, at p. 928),

> "The resolutions of the House of Lords or of the House of Commons affecting to alter the law would in Westminster Hall be regarded as so much waste paper."

D Furthermore, though the court accepts without hesitation the sincerity of the respondent's claim that as a devoted House of Commons' man he would suffer hardship in being deprived of his opportunity of rendering further service to the House of Commons and to the constituents of Bristol South East if by the fact of succession he were debarred from the House of Commons, these considerations cannot affect the duty of the court to apply the law once it has been ascertained. E It is not the function of this court to express any view at all whether or not the law should be changed.

Before considering the authorities in detail one general observation may be made. The hereditary principle is still firmly embodied in the constitution. Though by legislation starting with the Parliament Act, 1911, the powers of the House of Lords have been curtailed, it still remains the law that the composition of the House of Lords is largely based on the hereditary principle, namely, that F persons of a certain class, that is to say, persons who by creation by letters patent or by succession have become peers of the realm have the right and duty to sit in the House of Lords. A peerage (and for this purpose we confine our consideration to United Kingdom peers) constitutes a complex of rights, privileges and duties. As stated, in *Viscountess Rhondda's Case* (12) LORD WRENBURY used these words:

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> "A peerage is an inalienable incorporeal hereditament created by the act of the Sovereign which, if and when he creates it, carries with it certain attributes which attach to it not by reason of any grant of those attributes by the Crown, but as essentially existing at common law by reason of the ennoblement created by the grant of the peerage."

H If then a peerage as a whole is inalienable, it would seem strange that a peer should be entitled by his own act in refusing to apply for a writ of summons to disembarrass himself from part of the attributes assigned by the common law to the incorporeal hereditament to which he has succeeded.

How then does the matter stand on authority? It is true so far as the researches of those who appeared before us go that no court has expressly decided whether I or not a person who has become a peer of the United Kingdom by succession can by refraining from applying for a writ of summons save himself from disqualification to sit in the House of Commons. Throughout the authorities there has been, at any rate until the case of *Lord Wolmer* (13) in 1895, the fundamental assumption that a peer will automatically apply for a writ of

(10) [1922] 2 A.C. at p. 380. (11) Viz., by the Parliamentary Elections Act, 1868.
(12) [1922] 2 A.C. at p. 393.
(13) Referred to in ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (11th Edn.) at p. 194; see p. 366, letter C, post.

summons. This is in our view the true explanation of the fact that in many of the early authorities the expression "lord of parliament" is used rather than "peer of the realm"; but the expression "lord of parliament" is not used for the purpose of drawing a distinction between lords of parliament and peers of the realm. But, subject to this reservation and with this explanation, it seems to the court that the authorities, whether embodied in decisions of the courts or in the writings of authors of authority, are all one way, with one possible exception to which we shall refer later.

In COKE UPON LITTLETON, Vol. 1, p. 16b, one finds LORD COKE stating the position as follows:

> "The true division of persons is, that every man is either of nobility, that is, a lord of parliament of the upper house, or under the degree of nobility, amongst the commons, as knights, esquires, citizens and burgesses of the lower house of Parliament, commonly called the house of commons, and he that is not of the nobility is by intendment of law among the commons."

To which passage the chairman of the House of Commons of 1894 Committee on the vacating of seats, Mr. Curzon, in a memorandum handed in on July 19, 1894, added the following comment:

> "And surely the converse must necessarily be true that he who by succession becomes a peer belongs to the nobility and is by the intendment of law amongst the lords."

A further passage in COKE'S INSTITUTES (Part IV) at p. 1 (on which the respondent strongly relied) may here be quoted:

> "And the King and these three estates are the great corporation or body politik of the kingdom: and do sit in two houses, viz., the King and the lords in one house called the lords' house and the knights, citizens and burgesses in another house, called the house of commons: . . . And whosoever is not a lord of parliament and of the lords' house, is of the house of commons either in person, or by representation, partly coagmentative, and partly representative."

It is in our judgment quite plain that in these passages LORD COKE is not drawing any distinction between peers of the realm who acquire nobility by creation or succession and lords of parliament, but is indeed emphasising the fact that by acquiring nobility a person acquires a special status by virtue of his entitlement to a seat in the House of Lords, and that this status distinguishes him from that class of person who is entitled to be a member of or represented by a member of the House of Commons.

SIR JOHN SIMEON in his work on ELECTIONS (2nd Edn., 1795) (14) in dealing with disqualification from sitting in the House of Commons states as follows:

> "Another general disqualification is being bound to serve the state in another capacity incompatible with the character of representative of the people. Thus peers of Parliament who compose a distinct and separate part of the constitution were always deemed ineligible and incapable of sitting in the House of Commons."

This passage is quoted textually and adopted by MALE in his TREATISE ON THE LAW AND PRACTICE OF ELECTIONS published in 1818.

In the third report of the Lords' Committee touching the Dignity of a Peer of the Realm published on July 29, 1822, and known as the Redesdale Report, the following definition of "Peer of the Realm" is to be found:

> "The term 'peer of the realm', during a long period, and until the legislative union of the two kingdoms of England and Scotland, by which they became one kingdom, was used as the distinguishing appellation of each of

(14) The passage is also in the original edition (1789), pp. 26, 27.

A the temporal lords of Parliament; forming, as for many years before that union they had formed, with the spiritual lords, a distinct House of Parliament; that house having a character, and powers, and privileges, different, in many points, from those which belong to the other house, now called 'The Commons House of Parliament'; and the temporal lords having also a character materially distinct from that of the spiritual lords; that B distinct character being peculiar to their character of 'peers of the realm'. The Union of England and Scotland first, and the Union of Great Britain and Ireland afterwards, have had the effect of creating a clear distinction between the character of peer of the realm and that of temporal lord of parliament; but a distinction previously existed, in some degree, in the cases of minors, and of women claiming to be peeresses in their own rights; and with respect C also to such persons as, being peers of the realm by right, might not have thought fit to qualify themselves to sit and vote as lords of parliament."

Subsequent passages of the same report, however, make it plain that the distinction between peers of the realm and lords of parliament which arose after the legislative union of England and Scotland by the Act of Union of 1706 into D the new realm of Great Britain and the legislative union between Ireland and the realm of Great Britain by the Union with Ireland Act, 1800, into the realm of the United Kingdom of Great Britain and Ireland arose from the fact that by the terms of these legislative unions not all peers of Scotland and Ireland respectively became entitled to sit in the House of Lords as lords of parliament. So far as peers of the realm of England were concerned no change was made except E that they became peers of the two new realms successively. With regard to the last sentence in this definition relating to "such persons as, being peers of the realm by right, might not have thought fit to qualify themselves to sit and vote as lords of parliament", there is nothing in the report which we have been able to find which elucidates the meaning of this passage, and it would in our judgment be unsafe to infer that the author of this report intended to refer to those peers F who had not applied for a writ of summons. It may equally refer only to cases in which the peer had not thought fit to attempt to establish his succession or identity or who may have been under some other disability such as alienage or bankruptcy or incapacity to take the oath imposed as a bar by 30 Car. II, stat. 2, c. 1, of which he had not thought fit to free himself.

In SIR WILLIAM ANSON'S famous work on the LAW AND CUSTOM OF THE G CONSTITUTION first published in 1886, it is stated at p. 73 (ch. V, s. I, sub-s. 4) as follows:

> "A peerage is a disqualification. An English peer may not be a member of the House of Commons, nor may a Scotch peer, even though he be not one of the representative peers of Scotland. But an Irish peer may sit for any county H or borough of Great Britain so long as he is not one of the twenty-eight representatives of the Irish Peerage in the House of Lords (39 & 40 Geo. III, c. 67, art. 4)."

The same passage occurs in the second edition published in 1892. In the third edition, published in 1897, also written by SIR WILLIAM ANSON, there is a footnote to the passage at p. 78 to the following effect:

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> "It has been contended that a peer of the United Kingdom is not disqualified as such, and that until he has received a writ of summons as a lord of parliament he may sit in the House of Commons. In 1895 this point was raised by Lord Wolmer, member for West Edinburgh, on succeeding to the Earldom of Selborne; but the House, upon receiving a report from a select committee that Lord Wolmer had succeeded to a peerage of the United Kingdom, at once directed that a new writ should be issued. Hansard 4th Series xxxiii 1058, 1728."

But there is no suggestion that SIR WILLIAM ANSON (or any of the distinguished lawyers who have been responsible for the preparation of subsequent editions) expressed any dissent from the conclusions of the select committee of 1895. A

In ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (1st Edn. 1844) the following passage occurs:

> "An English or Scottish peerage is a disqualification but an Irish peer unless elected as one of the representative peers of Ireland may sit for any place in Great Britain. English peers are ineligible for the House of Commons as having a seat in the upper house: and Scottish peers, as being represented there by virtue of the Act of Union." B

In SIR T. LONSDALE WEBSTER'S eleventh edition (1906) the first edition published after the 1895 select committee's report, there was added at p. 194 a passage dealing with *Lord Wolmer's* case and the report of the 1895 committee substantially to the same effect as the note in ANSON above quoted, and again in this edition and in the current 1957 edition no suggestion is made that the 1895 decision was wrong in law. C

Finally, in all editions of HALSBURY'S LAWS OF ENGLAND dealing with the disqualification of members of the House of Commons (see 3rd Edn., Vol. 28, 337, para. 547), it is stated that: D

> "Every peer of the United Kingdom or Scotland, whether he is a lord of parliament or not, and every representative peer of Ireland is disqualified for sitting in the House of Commons."

Though this sentence is grammatically not very clear, we consider without doubt that it should be read as if the words "whether he is a lord of parliament or not" should be taken as referring to Scottish peers and intended to make the point that Scottish peers whether or not elected as representative peers are disqualified from membership of the House of Commons. E

We now turn to the one passage in the text-books which seems to us to be out of line with this current of authority. In the SIMONDS' edition of HALSBURY'S LAWS OF ENGLAND, viz., 3rd Edn., Vol. 14, 11, para. 13, the following passage occurs dealing with the closely related question of the right of peers to vote at parliamentary elections: F

> "A peer of Parliament is legally incapable of voting at a parliamentary election, even though his name may have been placed upon the register without objection. The writ of summons to the House of Lords must be issued before the disqualification attaches." G

The first sentence is to be found in the second edition, vol. 12, 176, para. 354, but not the second sentence (15). The authority for the second sentence is stated to be the *Bedford (Borough) Case, Marquis of Tavistock's Case* (16). (The case is also more fully reported in Perry & Knapp's Election Cases at p. 143.) The facts of this case may be shortly stated. A parliamentary election for the borough of Bedford was held on Dec. 12 and 13, 1832, and an election petition H

(15) The same view as that stated in the second sentence cited above was also taken in SCHOFIELD'S PARLIAMENTARY ELECTIONS (3rd Edn., 1959) 19, and PARKER'S ELECTION AGENT (6th Edn., 1959) 264.

(16) (1833), Cockb. & Rowe at p. 95. The reports of this case, viz., that cited in this footnote and the report in Perry & Knapp's Election Cases cited above, refer to the writ as a writ of summons, as it was indeed described in the warrant for its issue; neither report mentions that it was a writ in acceleration. The warrant directed a writ to issue summoning the Marquis of Tavistock, by the name and title of Baron Howland, to be present with the King and peers of the realm at Parliament holden at Westminster on Jan. 29, 1833, "in as ample and honourable a manner and form to all intents and purposes as any baron of this realm hath at any time heretofore been inrolled or created by writ." According to the statement of counsel supporting the validity of the vote of the Marquis of Tavistock the writ of summons was not issued until Jan. 15 or 16, 1833. As regards writs in acceleration, see 29 HALSBURY'S LAWS (3rd Edn.) 249, para. 511. I

A by the unsuccessful candidate was in due course referred to an election committee of the House of Commons. Amongst the votes challenged was the vote of the Marquis of Tavistock. On Dec. 11 the King issued to the Lord Chancellor his warrant to make out a writ of summons to Francis Russell, the eldest son of the Duke of Bedford, who had the courtesy title of the Marquis of Tavistock. Included in the dignities of the Duke of Bedford was the barony of Howland of B Streatham in the county of Surrey. The writ of summons so directed to the Marquis of Tavistock was in law a writ of acceleration, namely a writ by which the eldest son of a living peer could be called to the House of Lords in advance of his father's death by a writ in respect of an inferior dignity held by the father. In ignorance of the fact that the warrant for the issue of the writ of acceleration had been published in the London Gazette on Dec. 11, the Marquis of Tavistock C voted at the election but on his return to Woburn he became aware of the entry in the London Gazette; he applied in writing to the returning officer to have his vote struck out. The returning officer did not in fact strike out the vote; but when the election petition was heard the marquis himself intervened to have his vote struck out. Mr. Russell on behalf of the party interested in maintaining the validity of the vote argued that (17):

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> "The Marquis was not a peer at the time he voted, for no writ had then issued. But even if it had, he could not have been considered a peer until he had taken his seat in the House of Lords."

In support of this argument he relied on *Lord Abergavenny's Case* (18) which was a straightforward case of barony by writ and sitting. The committee ruled (19) E that the vote was good but gave no reasons for their decision. If they decided on the ground that a person called up in the barony of his father was not ennobled until he sat on the analogy of the case of the baronies by writ of summons and sitting, their decision may or may not have been correct. But it is in our view no authority at all for the wide proposition stated in HALSBURY, or for the submission founded thereon by the respondent, that on succession to a peerage the F disqualification does not attach until the writ of summons has been issued.

We now turn to the decisions of the courts. Of these, the most important is the *Earl of Beauchamp* v. *Madresfield* (20). The actual point for decision was whether a peer who had in fact taken his seat in the House of Lords was entitled to vote at a parliamentary election. The revising barrister having decided that he was not entitled in law to have his name inserted in the register expunged it. G A Divisional Court consisting of BOVILL, C.J., KEATING, BRETT, and GROVE, JJ., upheld the decision of the revising barrister. Seeing that the Earl of Beauchamp had actually taken his seat in the House of Lords and therefore must have been in receipt of a writ of summons it clearly does not as a matter of decision cover the present case even though it is conceded, and in our judgment rightly conceded, that so far as disqualification by peerage is concerned the same principles must H govern the question of disqualification from sitting as a member of the House of

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(17) (1833), Cockb. & Rowe at p. 97. (18) (1610), 12 Co. Rep. 70.

(19) (1833), Cockb. & Rowe at p. 97; Per. & Kn. at p. 146. In so far as argument advanced in a case may be relevant to indicate what its decision rejected, when no reasons are given, it may be observed that the argument of counsel (Mr. Ryland) contending that the Marquis of Tavistock's vote was invalid included a submission as I follows:—"He was a peer at the time that he voted, and therefore his vote must be struck off the poll . . . We admit that for certain purposes he was not a peer, but can any authority be produced that he was not a peer so as to be incapacitated from voting . . . If that was the law, every eldest son of a nobleman would retain his right of voting at elections after his father's death, until he chose to take his seat in the House of Lords . . ." (Per. & Kn. at p. 146). By deciding that the vote cast was valid, and thus rejecting the submission, it may be that the committee found tenable the final proposition that was submitted by counsel as untenable. That proposition presents the legal issue in the present case. Accordingly it seems that to this extent the decision in the *Bedford (Borough) Case, Marquis of Tavistock's Case* is overruled by the decision in the present case. (20) (1872), L.R. 8 C.P. 245.

Commons as govern the question of disqualification from voting at a parliamentary election. But though the point in issue is not the same as in the present case, it may be found on an examination of the arguments and the judgments that the ratio decidendi of the judgment is to be found in the wider proposition that no English peer may vote at a parliamentary election. Counsel for Lord Beauchamp, having stated (21) that the question intended to be raised was whether a peer of Parliament was entitled to be placed on the register, was constrained to admit (21) that every principle of the constitution and all the authorities on the subject were opposed to such a right. He referred (22) to the resolution of the House of Commons in 1699 in the case of the Earl of Manchester that "no peer of this kingdom hath any right to give his vote at the election for any member to serve in Parliament", to the resolution of the House in 1700 that "if a peer or lord lieutenant of a county concerns himself in elections, it is an infringement of the liberties of the Commons", and (23) to two resolutions of the House of Apr. 27, 1802 (that is to say, two years after the Union with Ireland Act, 1800), to the following effect:

> "(1) that no peer of this realm, except such peer of that part of the United Kingdom called Ireland as shall for the time being be actually elected and shall not have declined to serve for any county, city or borough of Great Britain, hath any right to give his vote in the election of any member to serve in Parliament",

and

> "(2) that it is a high infringement of the liberties and privileges of the Commons of the United Kingdom for any lord of parliament or other peer or prelate, not being a peer of Ireland at the time elected and not having declined to serve any county, city, or borough of Great Britain, to concern himself in the election of members to serve for the Commons in Parliament, except only any peer of Ireland at such elections in Great Britain respectively where such peer shall appear as a candidate or by himself or any other be proposed to be elected . . ."

Bovill, C.J., after setting out the effect of the resolutions of 1699 and 1700, continued as follows (24):

> "It is not now necessary to enter into the reasons for the exclusion of peers from voting at or interfering in elections for members of the other House: there were, no doubt, constitutional reasons to justify it. These resolutions were passed, not for the purpose of determining who should in future be allowed to vote, but for the purpose of declaring what was the law upon the subject. The House of Commons alone could not, without the assent of the other branch of the legislature, make a law to determine its own constitution; but it was competent to the House, sitting as a court, as it undoubtedly was, to determine as to the right of voting; and they were bound to declare the law. Acting upon these resolutions, the House of Commons and the election committees have decided in one uniform stream of authorities from that time to the present, that peers have 'no right' to vote."

Later (24) he adds:

> "Whenever a peer has voted at an election, upon a scrutiny before the House his vote has invariably been disallowed . . ."

Keating, J. (25), holding that there was abundant authority, including that of Lord Coke, to justify the resolution of 1699, continued (25):

> "above all, we find it clothed with the strongest of all authority, viz.

(21) (1872), L.R. 8 C.P. 245.
(22) (1872), L.R. 8 C.P. at p. 246.
(23) (1872), L.R. 8 C.P. at p. 247.
(24) (1872), L.R. 8 C.P. at p. 251.
(25) (1872), L.R. 8 C.P. at p. 252.

A uninterrupted usage for more than a century and a half; and no single authority of any weight is to be found the other way."

BRETT, J. (26), though reluctant to give any judgment in view of the admission by counsel, was prepared to

"hold that, independently of the resolution [of 1699 of the House of Commons] we are justified by the current of decisions in holding that peers have B no right to vote. If they have no right to vote, they can have no right to be upon the register."

GROVE, J., contented himself with saying (27) that:

"The total absence of authority in favour of the claim, and the concessions made by the counsel for the appellants, abundantly justify the conclusion C at which we have arrived, quite irrespectively of the constitutional reasons which might be advanced in opposition to the claim."

We find it quite impossible to believe that judges of this eminence could per incuriam have stated that peers of the realm were disqualified when they meant only to say that peers of the realm who have sat in the House of Lords were so D disqualified. We accordingly conclude that the true ratio decidendi of this case is that no English peer may vote at a parliamentary election. Finally in *Viscountess Rhondda's Case* (28), a decision of the Committee for Privileges of the House of Lords, LORD BIRKENHEAD, L.C., in the leading judgment, after an exhaustive review of the precedents including the resolutions of 1699, 1700 and 1802, stated in terms (29) that:

E "These resolutions are declaratory of the common law and without any doubt they embody the law of Parliament."

This judgment was expressly concurred in by LORD BUCKMASTER, LORD SUMNER, LORD CARSON and LORD ATKINSON. Though LORD HALDANE and LORD WRENBURY dissented on the actual motion before the committee there is no suggestion in their speeches that they dissented from LORD BIRKENHEAD'S statement as F set out above.

Against this consistent stream of authority the respondent sought to show that the disability of a peer to sit in the House of Commons arose not from his status as a peer but from the incompatibility of duties imposed by the issue of a writ of summons to serve in the House of Lords. This submission involved a historical survey of the origin and function of the writ of summons. Shortly stated, this G historical survey showed that in the early days before the division between the two Houses was established the writ of summons was everything. By the writ of summons the King summoned to his council those whom he chose as best fitted by reason of their standing in the country to advise him on matters of state. The writ of summons originally conferred no status. The fact that a man was called to one council did not confer on him, still less on his descendants, a H right to be called to subsequent councils. It was only as the power of the barons increased that the position was established that the issue of a writ of summons followed by sitting in the House of Lords conferred a hereditary right for the person obeying the summons and his heirs general to sit in the House of Lords. But it is, we think, clear that with the institution of the system of creating peers of the realm by letters patent issued by the Crown (the first letters patent I being issued in 1387), it was the letters patent that conferred the right on the holders of the letters patent and on the specific class of heirs named in the patent—generally heirs male of the body.

"The letters patent require the supplement of a writ. But they give a right to demand that writ, and impose a liability to receive it and to act upon it."

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(26) (1872), L.R. 8 C.P. at p. 253.
(27) (1872), L.R. 8 C.P. at p. 255.
(28) [1922] 2 A.C. 339.
(29) [1922] 2 A.C. at p. 368.

See per LORD BIRKENHEAD, L.C., in *Viscountess Rhondda's Case* (30). The writ of summons also performed the function of notifying the recipient of the place and time of his commanded attendance. A further development is to be noted. Whereas the writ of summons could originally be issued by the king to whomsoever he desired to attend, by a firmly based constitutional convention it was established that letters patent with the accompanying writ could only be issued to a consenting party. The historical origin of this convention is obscure, but it may well be that it was founded in part at least on the claim enforced by the emerging powers of the two Houses that the king should not be able at will to withdraw members from the House of Commons or to place his own men in the House of Lords. A further interesting instance of the emerging power of the House of Commons is to be found in the cases of *Onslow* (1562), *Jeffreys* (1585) and *Popham* (1580), cited in GEORGE PETYT'S LEX PARLIAMENTARIA (1689), at pp. 184, 185. Each of these being already elected members of the House of Commons was summoned by writ of summons to attend and advise the House of Lords. The House of Commons successfully claimed them back for service in the House of Commons.

The respondent also relied on the fact that the Long Parliament after the abolition of the House of Lords as a legislative chamber but not of the dignity of peerage admitted to the House of Commons three undoubted peers, the Earl of Pembroke, Lord Howard, and the Earl of Salisbury, after their election to the House of Commons. From this it was argued that the House of Commons could not have taken the view that the status of peerage alone disqualified from sitting in the House of Con mons. Interesting as this historical survey has been, it does not seem to the court to afford any sound basis for the contention that by the law of Parliament today it is incompatibility of service arising from obedience to the writ of summons which imposes the disqualification rather than the status of the peer. Indeed it may well be that the idea underlying the disqualification by status is that the status itself comprising as it does the right if not the duty to attend in the House of Lords gave rise to incompatibility. But we think that there was great force in the submission of counsel for the petitioners that while, no doubt, the incompatibility of service in both Houses was the original reason for the rule of common law for which he contended, namely, that status disqualifies, it is essential not to confuse the reasons for a rule coming into force with the rule itself. We refer in this connexion to a passage in the report from the Select Committee on Peerages in Abeyance, 1926, in para. 9 to the following effect:

> "Whether the conclusions of modern historical research are or are not correct we are neither concerned nor competent to decide. We have been assured and we believe it to be the case that they are now accepted by the great majority of historical scholars. The law, however, if settled, cannot be unsettled in this way."

We have referred earlier in this section of our judgment to the decline in the importance of the writ of summons. This has been a progressive movement, and without going into the detail of Speaker Onslow's opinion (31) expressed in May, 1760, to Lord Egmont, as reported by HATSELL IN HIS PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS, vol. 2 (4th Edn. 1818), 393, as to the practice of the House of Commons relating to the vacating of seats of peers "called to the Upper House" or to the adoption of their view by the Select Committee of the House of Commons appointed in 1894 to inquire into the law and practice of Parliament in reference to the vacating of seats in the House of Commons, it is sufficient to state that by at least the early years of

(30) [1922] 2 A.C. at p. 359.

(31) This contains at p. 394 the passage ". . . for the attendance in both Houses of Parliament is considered as a service, and the two services are incompatible with each other. But this fact [i.e., the calling up to the House of Peers] is seldom inquired into by the House . . ."

A the nineteenth century it had become part of the common law of Parliament that the writ of summons, though the best evidence of succession, had ceased to be the only method by which the disqualification by status could be established.

The respondent further sought to support his argument as to the continued validity of the writ of summons as the sole means of establishing the right to sit B in the House of Lords by reference to two statutes from which it was argued inferences to that effect could properly be drawn. The first was the Recess Elections Act, 1784, which (omitting immaterial words) provides by s. 2 that

> "it may be lawful for the speaker of the House of Commons for the time being, during any recess of the said House . . . and he is hereby required C to issue his warrant to the clerk of the crown, to make out a new writ for electing a member of the House of Commons in the room of any member of the said House . . . who shall become a peer of Great Britain . . . as soon as he shall receive notice . . . that a writ of summons hath been issued under the great seal of Great Britain, to summon such peer to Parliament . . ."

D In our judgment no such inference can properly be drawn. We accept as accurate the comment made by MR. CURZON in his memorandum to the 1894 Committee already referred to above that

> "the Act, in providing for the issue of writs during the recess, prescribed the same cautious procedure which the House habitually observed during sessions but it in no way dealt with or circumscribed the ancient privilege E of the House in matters of election."

Reliance was also placed on s. 134 (1) of the Representation of the People Act, 1949, which provides:

> "If before the trial of an election petition a respondent other than a returning officer . . . (b) where the petition questions a parliamentary election or return, is summoned to Parliament as a peer of Great Britain by F a writ issued under the great seal of Great Britain or the House of Commons have resolved that his seat is vacant . . ."

certain consequences shall follow. This is an obscure and ungrammatical provision, and it would in our view be unsafe to draw any inference in favour of the respondent from its terms. It may be—though we express no opinion on it —that the last few words, "or the House of Commons have resolved that his seat G is vacant", were expressly designed to cover the case where the House had so resolved as they did in *Lord Wolmer's* case that the seat was vacant notwithstanding that no writ of summons had been issued.

We fully appreciate the force of the respondent's argument that in order to avoid any possibility of conflict between the decision of the House of Commons H and the decision of the Crown on the advice of the lord chancellor or the Select Committee of Privileges as to the fact of succession it would be convenient to lay down as a matter of law that the issue of the writ of summons was the sole determining factor: but we are unable for the reasons stated above to hold that this is the law.

Our conclusion on this branch of the case accordingly is that, if the respondent I has in fact succeeded to the Viscounty of Stansgate, and it is open for us so to find, he became by that succession disqualified for being a candidate at the election or from sitting in the House of Commons notwithstanding that he had not applied for or received a writ of summons to attend the House of Lords.

We think it right to say that this conclusion seems to us to be in accordance with sound constitutional doctrine. So long as the hereditary principle is maintained as part of the fabric of the constitution—and we express no opinion whether it should be so maintained—it would seem to us to be wholly inconsistent with that principle that the successor to a hereditary peerage should

have a free option as to which House he desires to sit in. By the fact of succession he has entered a particular class of persons on whom the duty of attending the House of Lords (unless granted leave of absence) is imposed by law and immemorial usage; and no modern constitutional convention to the contrary has in our view been established.

We now turn to the point which we reserved earlier, namely, the procedural point taken by the respondent that no civil court—including this court—has jurisdiction to determine the fact of succession. The respondent's broad submission on this point was that as the Crown is the sole fountain of honour, questions of succession can only be determined by the appropriate constitutional machinery, viz., the lord chancellor or in disputed cases a reference from the Crown to the Committee of Privileges on whose determination the writ of summons issued and that, as he had taken no steps to prove to the Crown his succession and, consequently, no writ of summons had been issued, the court had no jurisdiction to determine this fact.

It will be appreciated that, if this submission is correct, in law, it would be impossible for this court to determine the question which it is charged with the duty of determining. For this submission, however, the respondent relied on the decision of the House of Lords in *Earl Cowley* v. *Countess Cowley* (32) to which we shall now direct our attention. The headnote of this case is as follows:

> "Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title. Only the House of Lords can try questions of right in matters of peerage or dignities connected therewith."

LORD MACNAGHTEN stated the facts of the case in these words (33):

> "And then he claims an injunction from a court of law to prevent his late wife using that designation [Countess Cowley] on the ground that it is an invasion or disturbance of the dignity which belongs to him as an incorporeal hereditament. The answer seems to be twofold. If it be a disturbance of a dignity, that is a matter not within the cognisance of a court of law. The right to a peerage can only be tried before the peers . . . There is another answer which to my mind is equally conclusive. It is that Lord Cowley has not suffered either legal wrong or damage."

LORD HALSBURY, L.C., said (34):

> "I do not know what jurisdiction the Divorce Court had in dealing with this matter at all. It seems to have been assumed that it had reference to the divorce; but Mr. Haldane has very candidly admitted that it is not a question of divorce at all, nor has the Divorce Court by any stretch of its jurisdiction any right to determine this question simply because there has been a divorce suit."

LORD HALSBURY had earlier said (34) in speaking of the right claimed by the wife, "it seems to me absolutely clear that no such suit could be entertained." LORD JAMES OF HEREFORD said (35):

> "To establish the alleged disturbance I understood Mr. Haldane to argue at the bar that the respondent by virtue of her marriage with a commoner has lost her rights to bear the title of nobility. It will be observed that this proposition in no way calls in aid the fact of a divorce having

(32) [1901] A.C. 450. (33) [1901] A.C. at p. 455. (34) [1901] A.C. at p. 453. (35) [1901] A.C. at p. 457.

A been decreed. If the respondent had been a widow, the same question as that now before your Lordships would have arisen."

LORD JAMES OF HEREFORD further said (36):

"I further concur with the views which have been expressed by my noble and learned friend on the Woolsack and LORD MACNAGHTEN, that the juris-
B diction to try all questions of right connected with peerage and all dignities connected with peerage lies in this House and not in a court of law."

In reliance on this case the respondent submitted that the judgments placed an indubitable bar on this court's deciding the question of succession. In our judgment it is clear that the question at issue in the *Cowley* case (37) to which
C the observations on which the respondent relied were directed was the question of the disturbance of the dignity held by Earl Cowley. No such issue arises in the matter before us, and we accordingly reject the respondent's submission based on this case.

There being no bar in our way, we have reached the clear conclusion on the facts of this case and on the letters patent that the respondent did succeed to
D the peerage, the Viscounty Stansgate of Stansgate, on the death of his father on Nov. 17, 1960. Accordingly, the respondent was disqualified from being a member of the House of Commons and from being a candidate at the Parliamentary election.

We therefore declare that the respondent was not duly elected or returned at the parliamentary election for the constituency of South East Bristol held on
E May 4, 1961.

The next question we have to consider is whether the petitioner, Mr. St. Clair, is entitled to the seat.

It was submitted to us on his behalf that in the circumstances of this case, he, the candidate with the next highest number of votes to the respondent, and in fact the only other candidate, was in law entitled to be declared to have been
F duly elected as a member of Parliament for the constituency. The respondent, on the contrary, submitted that the circumstances of the case did not in law justify the declaration sought by the petitioners. We were referred to a number of cases on this question: *R.* v. *Hawkins* (38); *R.* v. *Parry, R.* v. *Phillips* (39); *Gosling* v. *Veley* (40); *R.* v. *Tewkesbury Corpn.* (41); *Re Launceston Case, Drinkwater* v. *Deakin* (42); *Etherington* v. *Wilson* (43); *Cox* v. *Ambrose* (44); *Beresford-Hope* v. *Lady Sandhurst* (45); *Hobbs* v. *Morey* (46); *The Ulster By-*
G *Election* (47); *The Fermanagh and South Tyrone Election* (48). We have taken all these cases into our consideration and, before considering the facts proved or admitted in the present case, we propose to consider some of these cases in a little detail.

The facts as stated in the headnote in *R.* v. *Hawkins* (38) are as follows:

H "One who has not taken the sacrament within a year, being incapable of being elected into a corporate office by stat. 13 Car. 2, c. 12, his disqualification was held not to be removed by the annual act of indemnity (47 Geo. 3, stat. 2, c. 35) . . . the fact being, that the defendant and another were candidates at the time of election, when forty electors were assembled; and after two electors had voted for each candidate, the
I candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affirmative; whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted

(36) [1901] A.C. at p. 458. (37) [1901] A.C. 450. (38) (1808), 10 East, 211.
(39) (1811), 14 East, 549. (40) (1847), 7 Q.B. 406. (41) (1868), L.R. 3 Q.B. 629.
(42) (1874), L.R. 9 C.P. 626. (43) (1875), L.R. 20 Eq. 606.
(44) (1890), 60 L.J.Q.B. 114. (45) (1889), 23 Q.B.D. 79. (46) [1904] 1 K.B. 74.
(47) (1955), 105 L.Jo. 482. (48) (1955), 105 L.Jo. 594.

for the defendant, being twenty in number, except two or three; and sixteen afterwards voted for the other . . ." A

LORD ELLENBOROUGH, C.J., said (49):

"On this state of facts it is clear, that at the time of the election, namely, on Dec. 18, 1806, the defendant Hawkins was incapable of being elected into the office of alderman of the borough by the express prohibition of the stat. 13 Car. 2; it having been admitted by himself at the time, and it being now stated as a fact by the special verdict, that he had not taken the sacrament within a year next before such day of election." B

He continued (50):

"Was he, Spicer, then duly elected on Dec. 10, 1806? That question depends on the effect of the notice given to the electors of the incapacity of the other candidate, Hawkins, to be elected. There is no objection to the due holding of the assembly to elect: forty persons duly qualified to vote are stated to have been present; viz., the mayor, the justice, four aldermen, and thirty-four free burgesses: Hawkins and Spicer are proposed as candidates; and after two persons had voted for Hawkins, and two for Spicer, notice is given of the fact creating Hawkins' incapacity (which fact he at the time himself acknowledges), and that all votes given for him after that notice would be void and thrown away; and the incapacitating clause of the statute of Car. 2 is publicly read: and all this is found to have been in the presence and hearing of all who afterwards voted for Hawkins, except two or three. After this notice, twenty persons voted for Hawkins, and sixteen for Spicer; these numbers, with the two votes before given to each of the candidates, making up the full amount of forty. If the law be, that at the election of corporate officers, the votes given for an incapable candidate, after notice of such incapacity, are to be considered as thrown away, i.e., as if the voters had not given any vote at all; then this will be a good election of Spicer; unless the time when notice of his incapacity was given, namely, after two persons had given their votes for each of the candidates, can be considered as making any difference. The general proposition that votes given for a candidate, after notice of his being ineligible, are to be considered the same as if the persons had not voted at all, is supported by the cases of [*R.*] v. *Boscawan* [(1714)], Easter, 13 Anne, [*R.*] v. *Withers* [(1735)] Easter 8, G. 2, *Taylor* v. *Bath Corpn.* [(1741)] M. 15 G. 2, all which are cited in [(1777) 2] Cowper 537, in [*R.*] v. *Munday* (51)." C D E F G

It is not necessary to deal in detail with *Gosling* v. *Veley* (52) except to quote a passage from the judgment of LORD DENMAN, C.J. (53), as follows:

"Where the disqualification depends upon a fact which may be unknown to the elector, he is entitled to notice; for, without that, the inference of assent could not be fairly drawn, nor would the consequence as to the vote be just. But, if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given: no one can doubt that, if an elector would nominate and vote only for a woman to fill the office of mayor or burgess in parliament, his vote would be thrown away: there the fact would be notorious; and every man would be presumed to know the law upon that fact." H I

Drinkwater v. *Deakin* (54) is an important case. The headnote is in terms:

"There being two candidates at a parliamentary election, one of them was guilty of a corrupt practice by giving leave, on the day of nomination,

(49) (1808), 10 East, at p. 215.
(50) (1808), 10 East, at p. 216.
(51) Named *R.* v. *Monday* in 2 Cowp. 537.
(52) (1847), 7 Q.B. 406.
(53) (1847), 7 Q.B. at p. 439.
(54) (1874), L.R. 9 C.P. 626.

A to his tenants to kill rabbits on his estate, for the purpose of influencing their votes at the election. A notice was given to the electors on the morning of the polling day, before the polling, by the agent of the other candidate, in the following terms: 'Colonel D. having, for the purpose of influencing voters at this election, given to all his tenants on the Warrington estate and voters in this borough a right to trap and shoot rabbits, has, I believe, B been guilty of a corrupt practice, and, as agent of H.C.D., Esq., a candidate at this election, I hereby give you notice that, under these circumstances, the said Colonel C. is disqualified from being a candidate, and that all votes given for him will be thrown away.' Colonel D. obtained the majority, and was declared elected, but, being petitioned against, was unseated, on the ground of the above-mentioned corrupt practice. The C petitioner claimed the seat on the ground that the votes given to the respondent being given with knowledge of his disqualification, were thrown away, and consequently the petitioner was in a majority:—*Held*, that bribing by a candidate at an election, though it renders his election void if he be found guilty of it on petition, does not incapacitate the candidate at that election in the sense that the votes given for him by voters with D knowledge of it will be thrown away, and that no disqualification arises in that sense of the term until after the candidate has been found guilty of bribery on petition, and consequently, that the petitioner was not entitled to the seat."

LORD COLERIDGE, C.J., said (55):

E "The real matter we have to determine is, whether the petitioner, Mr. Drinkwater, is or is not entitled to be declared elected for the borough of Launceston. Three propositions have to be made out in order to arrive at this conclusion,—1. That Colonel Deakin was at the time of the election in point of law disqualified; 2. That, notice of that fact having been conveyed to the voters in a form sufficiently definite, any vote given after such notice F was in law thrown away. The peculiar circumstances of this case made it necessary to contend farther, that,—3. The uncertainty or obscurity of the legal question on which the disqualification depends makes no difference:—Given the fact of legal disqualification, as the result of argument however elaborate and decisions however conflicting, and given the fact of notice, the voter gives his vote at his own risk and on his own responsi- G bility. The law as to the disqualification of the candidate, and the notice of such disqualification to the voter, is to be collected from the decisions of courts of law and of parliamentary election committees, which latter, if not binding upon this court, by s. 26 of 31 & 32 Vict., c. 125 are yet to be treated with respect as expositions of the law of parliament, which is part of the common law itself. And, if there be any difference discoverable in H the authorities between the rules applied to parliamentary elections and the rules applied to elections of other sorts, there seem to be reasons of good sense why a somewhat less rigid and technical rule as to the throwing away of votes should obtain in the case of parliamentary constituencies."

BRETT, J., summarises his views (56) as follows:

I "I accept that which seems to me to have been always admitted to be the law before the case of *R.* v. *Tewkesbury Corpn.* (57), viz. the proposition which I have expressed, as generally applicable to all cases where notice of the law as affecting any subject-matter is material, that is to say, where by the law, if certain facts exist incapacity exists, and where by the law, if the law were known to the elector, his vote would be thrown away if he persisted in voting for the disqualified candidate, he cannot, if the

(55) (1874), L.R. 9 C.P. at p. 633. (56) (1874), L.R. 9 C.P. at p. 642.
(57) (1868), L.R. 3 Q.B. 629.

facts exist to his knowledge, or if he have notice of the facts equivalent to knowledge, which by law produce incapacity for election in the candidate, render his vote valid by asserting that he did not know that the facts by law produced such incapacity, or that his vote would be thrown away if he voted for such candidate. Applying those principles to the present notice, if it were the law that personal bribery rendered the person guilty of it incapable of being a candidate I should have thought that the notice was sufficient."

Etherington v. *Wilson* (58) was merely an application of these principles. *Cox* v. *Ambrose* (59) was a further case in which the principles of *Drinkwater* v. *Deakin* (60) were applied in the case of a municipal election.

We now come to the decision of the Court of Appeal in *Beresford-Hope* v. *Lady Sandhurst* (61) which dealt with the claim of a woman to be entitled to be elected to a county council. The headnote of the case is in terms:

"At an election of members of a county council under the Local Government Act, 1888, the respondent obtained a majority of votes over the petitioner and was declared to be elected. On a petition claiming the seat on the ground that the respondent, being a woman, was disqualified:—Held, that an appeal lies in such case, by special leave, from the Divisional Court to the Court of Appeal:—Held also (affirming the judgment of the Queen's Bench Division) that women are incapacitated from being elected members of a county council:—Held further, that the votes given to the respondent were thrown away and that the petitioner was duly elected."

But it is only the third finding that is relevant in the present case. The judgment of the first court, the Divisional Court, was given by STEPHEN, J., and he said (62):

"A second question in the case is whether the votes for Lady Sandhurst were thrown away, so that Mr. Beresford-Hope was duly elected, or must there be a new election? The following facts were proved to us upon this subject. In the first place it was admitted that all those who voted for Lady Sandhurst knew that she was a woman. In the second place it was shown to our satisfaction that the question whether as a woman she was incapacitated from election was a subject of common public discussion at the time and place of her election. It was not proved specifically that notice was given to the individual voters. We think, however, that it must be taken that the fact which, if we are right, constituted the disqualification was known to all, and that the voters were also aware that the legal consequence might, though they may not have been aware that it actually did, constitute disqualification. The question whether in such a case the voters voted at their peril, or whether there should be a new election, is not altogether clear. The general principle is laid down in the case of *Gosling* v. *Veley* (63) and is there stated as follows: 'Where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, may be capable of being made good, according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed and the votes for him were a nullity.' To this general principle the judgment proceeds to add an illustration so apposite to the present case that in quoting it we wish distinctly to state that we do not regard it as more than a singularly pointed illustration: 'But, if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given: no one can doubt that, if an elector would nominate and

(58) (1875), L.R. 20 Eq. 606.
(59) (1890), 60 L.J.Q.B. 114.
(60) (1874), L.R. 9 C.P. 626.
(61) (1889), 23 Q.B.D. 79.
(62) (1889), 23 Q.B.D. at p. 84.
(63) (1847), 7 Q.B. 406.

A vote only for a woman to fill the office of mayor or burgess in Parliament, his vote would be thrown away: there the fact would be notorious, and every man would be presumed to know the law upon that fact.'

"This case has been to some extent departed from in the case of *R.* v. *Tewkesbury Corpn.* (64), decided in 1868. The effect of this case is not unfairly represented by saying that a vote is not to be taken to be thrown away B because the voter knows of a disqualifying fact, but does not know that it is by law disqualifying. This decision, however, appears to have been discredited to some extent by *Drinkwater* v. *Deakin* (65) decided in 1874, in which the present Master of the Rolls says (66): 'When the validity or invalidity of an act depends on a question of law, no one can make such act valid in law when it would otherwise be invalid by saying he did not know C the law.' DENMAN, J., agreed in this judgment, and LORD COLERIDGE said (67): 'I entirely agree . . . in the general law laid down as to the throwing away of votes in the judgment in *Gosling* v. *Veley* (68).' *Etherington* v. *Wilson* (69) is a further authority on this subject. Upon these grounds we think that the votes given for Lady Sandhurst were thrown away, and that Mr. Beresford-Hope was duly elected."

D

The decision of the Divisional Court was upheld by the Court of Appeal. In the Court of Appeal LORD COLERIDGE, C.J., said (70):

"This case comes before us upon appeal from a decision of my brothers HUDDLESTON and STEPHEN in the Court below, that, under the circumstances which I will very shortly mention, the respondent in this appeal is entitled E to the seat for the county council, in the contest for which he received a minority of votes, on the ground that the candidate who received the majority of votes was incapacitated by law from being a candidate for the office of county councillor, and that votes given for her were thrown away, and the ground upon which she was incapacitated, is, that she was a lady."

F He continued (71):

"Then comes the second question, whether the result of unseating the respondent is to seat the appellant, although he had the minority of votes against her. Now that is a matter which has been disputed upon two grounds. First of all, it has been said, that having the right to draw inferences of fact, we must draw the inference that everybody who voted for Lady G Sandhurst was aware of her incapacity, so that their votes were thrown away. I do not think it is necessary to decide that. If it were necessary, I should say that upon the whole we had the power of drawing inferences of fact, but I do not think, for the purpose of this judgment, it is necessary to decide that question, because it appears to me to be undisputed, and the facts of the case are sufficient to show, that the incapacity was an incapacity of status. H The fact from which the incapacity arose must have been known to every one who voted for Lady Sandhurst; therefore every one voted at his peril, because there existed that fact to which the law annexes the incapacity of being elected. I apprehend that both in *Gosling* v. *Veley* (68) and in *Drinkwater* v. *Deakin* (65), and in other cases it has been laid down over and over again, that if the fact exists which creates an incapacity, and it is known, I and must be known, to those persons who voted for a candidate who is so incapacitated, votes given under those circumstances are thrown away. As it is put in one of the judgments, such votes are fairly enough thrown away, because the persons would not do the only thing they ought to do to give effect to their votes, namely, to vote for a properly qualified candidate. The

(64) (1868), L.R. 3 Q.B. 629.
(65) (1874), L.R. 9 C.P. 626.
(66) (1874), L.R. 9 C.P. at p. 642.
(67) (1874), L.R. 9 C.P. at p. 641.
(68) (1847), 7 Q.B. 406.
(69) (1875), L.R. 20 Eq. 606.
(70) (1889), 23 Q.B.D. at p. 90.
(71) (1889), 23 Q.B.D. at p. 93.

distinction which is drawn in the case of *Drinkwater* v. *Deakin* (72) and in other cases is not a subtle one, it is a perfectly plain one. Where the incapacity is an incapacity of status so annexed by law to the candidate it requires no proof; the fact of its being an incapacity to which the law annexes the legal consequence is known to every person who votes, and the persons who vote and who are aware of the fact to which incapacity is attached, must in reason be held to be aware of the consequence which attaches to their voting. The case of *Drinkwater* v. *Deakin* (72) and other cases of the same kind are cases where the fact of incapacity had to be ascertained. In the case of *Drinkwater* v. *Deakin* (72) the fact of the incapacity was not, in the judgment of the court, ascertained. In that case it was held that there must be sufficient and conclusive notice given to a sufficient number of people to invalidate the election and to seat the rival candidate. On that case I decide without hesitation, that the votes given for Lady Sandhurst were thrown away. I accept to the fullest degree the conclusions of the Clitheroe Committee. I thought in the course of the argument, and think still, that the conclusions of the Clitheroe Committee are binding upon us, and as regards the statement of that conclusion, or the reasons given for it, the law has been stated by judges of great authority in almost the same language time after time. I think therefore that for these reasons, and upon those authorities which I have alluded to, the votes given for Lady Sandhurst were thrown away, and that the petitioner is entitled to the seat."

LORD ESHER, M.R., said (73):

"As to the second point, I think the case is absolutely determined by the express decision of both the judges who decided the case of *Drinkwater* v. *Deakin* (72). The words cannot be plainer as used by both, and it would be necessary to overrule that decision unless we hold that all that is necessary to be made known to the electors to determine whether their votes are thrown away or not, is to make out clearly that the facts are known to a sufficient number of them; the facts upon which the law determines that the person for whom they did in fact vote was a person incapable of being elected. I think, therefore, on both points, the decision of the Divisional Court was right, and that this appeal ought to be dismissed."

LINDLEY, L.J., said (74):

"On the second point I have nothing to add but this, that on considering the earlier cases on that point, I think they are considerably qualified by the late case of *Drinkwater* v. *Deakin* (72). The facts are told to the elector of the incapacity of being elected on the part of the respondent, I will not say told to him, but he must be taken to know them, and really does know them. The question as to whether he really knows the law on the subject or not is another thing."

LOPES, L.J., said (75):

"With regard to the second point, I think the present case is well within the decision in *Drinkwater* v. *Deakin* (72)."

At the hearing of this present petition evidence was called, which we accept, in support of the allegation made in para. 7 (i), (ii) and (iii) of the petition (76). It was further proved that the first-named petitioner issued to the press a notice in the following terms:

"The following statement was issued today by Mr. Malcolm St. Clair, prospective Conservative candidate for Bristol South East:—'I would naturally prefer to become member of Parliament for Bristol South East

(72) (1874), L.R. 9 C.P. 626.
(73) (1889), 23 Q.B.D. at p. 97.
(74) (1889), 23 Q.B.D. at p. 98.
(75) (1889), 23 Q.B.D. at p. 99.
(76) See p. 357, letter D, ante.

A by securing the largest number of votes at a properly contested election. But in view of the reported intention of the former member, now Viscount Stansgate, to offer himself for election, I feel it is my duty to make my attitude clear in the event of his nomination. I am taking steps to fight the by-election in the normal way, on the assumption that only candidates properly qualified to sit in the House of Commons will be nominated. B Should Lord Stansgate be nominated, however, I shall give formal notice to the electorate during the by-election campaign that he is a disqualified person and that any votes for him will be votes thrown away. If Lord Stansgate were nevertheless to gain the largest number of votes, and I came second, I should then present an election petition, seeking my return as the legitimate member. My reasons for this are those advanced by such C authorities as Sir Lionel Heald, Q.C., M.P., the former attorney-general. As Sir Lionel has put it: "Whatever views may be held as to the desirability of new legislation relating to the House of Lords, it is now beyond doubt that Mr. Anthony Wedgwood Benn succeeded on Nov. 17, 1960, to the Viscounty of Stansgate and is consequently disqualified from membership of the House of Commons." Whether Lord Stansgate can bring him- D self to sign the statutory form of consent of a candidate for nomination stating that to the best of his knowledge and belief he is not disqualified for membership of the House of Commons is, of course, a matter for himself.' "

With reference to the facts admitted by the respondent as to para. 8 of the petition (77), it was admitted by the petitioners that the respondent had circulated notices in the press, and in a document styled "The Bristol Cam- E paigner" in reply to the document dated Apr. 28, 1961, and referred to in para. 7 (i) of the petition.

We are satisfied on the evidence before us that it was made known to the electors of the constituency of South East Bristol before they cast their votes that the respondent, on the death of his father, on Nov. 17, 1960, was the eldest surviving son of his father, and that it was claimed by the first petitioner F that the respondent was disqualified from being a member of the House of Commons (a claim which the respondent disputed), and that the House of Commons had accepted the report of their Committee of Privileges which had so decided.

Accordingly, applying the decision of the Court of Appeal in *Beresford-Hope* v. *Lady Sandhurst* (78), by which we are bound, and having reached the decision G that the respondent was so disqualified, we have no option but to declare that the votes cast for the respondent were thrown away and that Mr. Malcolm James St. Clair was duly elected at the said election.

[On the question of costs, counsel for the petitioners referred to s. 135 of the Representation of the People Act, 1949, and asked for an order that the H respondent should pay the petitioners' costs, to be taxed. The respondent submitted that no award should be made on costs as the case was a matter of the highest constitutional importance, and raised issues broader than those affecting either the petitioner, Mr. St. Clair, or the respondent which in the interest of the community should be properly settled. The respondent further submitted that he was in duty bound to defend the petition to prove whether I in 1961 the rights of electors were to take precedence over the hereditary system or not, and that their Lordships had reached a judgment of the highest constitutional importance, that the hereditary system must take precedence over the electors of Bristol. In reply, counsel for the petitioners submitted that the case was a straight fight between two individuals, and there was no ground for departing from the normal rule that a successful plaintiff or petitioner was entitled to his costs.

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(77) See p. 357, letter F, ante. (78) (1889), 23 Q.B.D. 79.

The COURT ruled that no reason existed to depart from the normal order that costs should follow the event and, accordingly, ordered the respondent to pay the petitioners' costs, but not the costs of the Director of Public Prosecutions (79).]

Declaration accordingly.

Solicitors: *Lewis & Lewis and Gisborne & Co.* (for the petitioners); *Director of Public Prosecutions.*

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

DSANE *v.* HAGAN AND ANOTHER.

[CHANCERY DIVISION (Buckley, J.), July 11, 26, 1961.]

Practice—Setting aside judgment—Summary judgment—Specific performance—Purchaser's action—Appearance not entered by vendor—Judgment obtained under R.S.C., Ord. 14A*—Judgment not carried into effect—Action commenced to have judgment set aside on ground of vendor's contractual incapacity and of undue influence—Application by purchaser to have statement of claim struck out—Whether second action appropriate procedure—Whether judgment under R.S.C. Ord.* 14A *was a judgment by default within R.S.C., Ord.* 27, *r.* 15.

By an agreement in writing in September, 1957, Mrs. H. agreed to sell some freehold property to the purchasers. In January, 1958, the purchasers commenced an action against Mrs. H. for specific performance of the contract. She did not enter an appearance. On Apr. 15, 1958, the purchasers obtained judgment against her for specific performance under R.S.C., Ord. 14A.* The formal order embodying the judgment was perfected but was not carried into effect. Mrs. H. died on Oct. 23, 1959. The plaintiff, her sole executrix, commenced an action to have the judgment and the contract set aside, alleging in her statement of claim that throughout the negotiations for, and at the time of the exchange of, the contract for sale, Mrs. H., as the purchasers knew, lacked capacity to contract by reason of mental disorder and alternatively that the purchasers obtained the contract by undue influence. The purchasers sought to have the statement of claim struck out on the ground that the matters therein alleged were res judicatae and that it disclosed no reasonable cause of action. The purchasers contended that the judgment was final unless it could be set aside under R.S.C., Ord. 27, r. 15†, as a judgment by default, in which case the plaintiff should not proceed in the present action but should apply under R.S.C., Ord. 27, r. 15, in the previous action.

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(79) The Representation of the People Act, 1949, s. 159 (2), requires the Director of Public Prosecutions to attend the trial of every election petition.

*R.S.C., Ord. 14A, r. 1 (1), provides: "In any action in the Chancery Division commenced by a writ of summons indorsed with a claim for specific performance of an agreement, whether in writing or not, for the sale or purchase of property . . . the plaintiff may (whether the defendant has appeared or not), on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the court or a judge for judgment and the court or judge may thereupon give judgment in the action unless the defendant . . . satisfies the court or judge that he has a good defence to the action on the merits, or discloses facts sufficient, in the opinion of the court or judge, to entitle him to defend."

†For R.S.C., Ord. 27, r. 15, see p. 382, letter H, post, and see the ANNUAL PRACTICE, 1961, p. 614.

A **Held:** the statement of claim would not be struck out because—

(i) the judgment obtained under R.S.C., Ord. 14A was not a judgment in default within R.S.C. Ord. 27, r. 15, since for the purpose of obtaining such a judgment it was irrelevant whether the defendant had or had not entered appearance and the fact that the defendant did not avail herself of any opportunity to show cause why she should be allowed to defend did not con-
B stitute "default" on her part; accordingly, if Mrs. H. had applied under R.S.C., Ord. 27, r. 15, in the specific performance action to have the judgment against her set aside the court would not have had jurisdiction to accede to the application, and it was no valid objection to the present action that her executrix, the plaintiff, had not applied under that rule instead of instituting this action.

C *Spira* v. *Spira* ([1939] 3 All E.R. 924) considered.

(ii) the issues of lack of contractual capacity and undue influence were not res judicatae, for they had not been raised in the specific performance action.

(iii) the statement of claim set up a case involving serious questions of fact and law on which there was a possibility that the plaintiff might succeed
D in obtaining relief.

[As to setting aside a judgment in default, see 22 HALSBURY'S LAWS (3rd Edn.) 788, para. 1667; and for cases on the subject, see DIGEST (Pleading) 160-161, *1423-1434*.

As to setting aside consent judgments, see 22 HALSBURY'S LAWS (3rd Edn.) 792, para. 1672.]

E Cases referred to:

Ainsworth v. *Wilding*, [1896] 1 Ch. 673; 65 L.J.Ch. 432; 74 L.T. 193; Digest (Practice) 622, *2591*.

Huddersfield Banking Co., Ltd. v. *Lister (Henry) & Son, Ltd.*, [1895] 2 Ch. 273; 64 L.J.Ch. 523; 72 L.T. 703; Digest (Practice) 622, *2588*.

F *Spira* v. *Spira*, [1939] 3 All E.R. 924; Digest Supp.

Procedure Summons.

In an action begun by writ the plaintiff, Edith Dsane, claimed as sole executrix of Edith Laura Hewson, deceased, and in her own right as being beneficially entitled to the whole estate of Edith Laura Hewson, (i) that a judgment for specific performance obtained by the defendants in the present action, Oswald
G Quarcoo Hagan and Luana Hagan, in a previous action in the Chancery Division of the High Court wherein they were plaintiffs and Edith Laura Hewson was defendant, and they, as purchasers, claimed specific performance of an alleged contract for the sale of land by her as vendor, might be set aside with all consequential orders and directions, and (ii) that the alleged contract, viz., an agreement in writing whereby Edith Laura Hewson was expressed to agree to
H sell to the defendants in the present action certain freehold property, might be set aside and cancelled with all consequential orders and directions. The defendants applied under R.S.C., Ord. 25, r. 4, or alternatively under the inherent jurisdiction of the court for an order that the statement of claim in the present action be struck out, on the ground that the matters therein alleged were res judicatae and that it disclosed no reasonable cause of action, and that the
I action might be dismissed. The facts appear in the judgment.

M. Browne for the defendants, the purchasers.

J. Maurice Price for the plaintiff, the executrix of the vendor.

Cur. adv. vult.

July 26. **BUCKLEY, J.**, read the following judgment: The defendants in this action seek to have the plaintiff's statement of claim struck out on the ground that the matters therein alleged are res judicatae and that it discloses no reasonable cause of action.

In or about September, 1957, a certain Mrs. Hewson agreed in writing to sell for £900 to the present defendants, whom I will call "the purchasers", certain freehold property at Hornsey. On Jan. 13, 1958, the purchasers commenced an action against Mrs. Hewson in the High Court for specific performance of the contract. Mrs. Hewson did not enter an appearance in that action and on Apr. 15, 1958, the purchasers obtained judgment against her for specific performance under R.S.C., Ord. 14A. The formal order embodying that judgment has been perfected, but it has not yet been carried into effect. Mrs. Hewson died on Oct. 23, 1959, and the present plaintiff, her sole executrix, has obtained a grant of probate of her will.

In her statement of claim in the present action the plaintiff alleges that throughout the negotiations for the contract for sale, and at the time of the exchange of the contract for sale Mrs. Hewson, as the purchasers knew, lacked capacity to contract by reason of mental disorder. Alternatively, she alleges that the purchasers obtained the contract by undue influence. As to the judgment in the specific performance action, the plaintiff's allegation is:

> "Mrs. Hewson did not enter an appearance in the said action and the said order was obtained in default of appearance."

There is no allegation that Mrs. Hewson's failure to enter an appearance was due to any lack of understanding or any incapacity on her part, nor is there any allegation of any irregularity in the method by which the purchasers obtained their judgment. The plaintiff does, however, claim in the present action to have the judgment set aside and to have the contract set aside.

Counsel for the purchasers says that the judgment they have obtained is final, unless it can be set aside either (a) under R.S.C., Ord. 27, r. 15 as a judgment by default, in which case he contends that the plaintiff ought not to be allowed to proceed with her present action but should apply under that rule in the specific performance action, or (b) as having been obtained by fraud, in which case he concedes that the plaintiff would have been right in raising a new action. There being no allegation in the present case, at any rate in terms, that the judgment was obtained by fraud, counsel's main contention has been that this is a case to which R.S.C., Ord. 27, r. 15, applies and that the only way open to the plaintiff of getting the judgment set aside is by means of an application under that rule, on which he suggests that his clients would be more advantageously placed than in defending this action. Were I to hold that in the present case the plaintiff cannot proceed by way of a separate action I might, I suppose, leave the fate of any application she might make in the specific performance action to be decided on such application, but as the matter has been argued before me and as I have formed a clear view on the question I think that I should say what that view is.

R.S.C., Ord. 27, r. 15, is in the following terms:

> "Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit."

Was the judgment in question here, which as I have said was obtained under R.S.C., Ord. 14A, a "judgment by default" within the meaning of that rule? In *Spira* v. *Spira* (1) a judgment obtained under R.S.C., Ord. 14 was held not to have been a "judgment by default" for the purposes of R.S.C., Ord. 27, r. 15. Counsel for the purchasers seeks to distinguish that case from this on the grounds that R.S.C. Ord. 14 is only applicable where the defendant has entered an appearance, whereas R.S.C., Ord. 14A, although in other respects very similar in its terms to R.S.C., Ord. 14, is applicable whether the defendant has or has not entered an appearance, and that Mrs. Hewson in fact had not entered an appearance. She was in this respect in default and hence, says counsel for the purchasers, the judgment is properly described as a "judgment by default". The question

(1) [1939] 3 All E.R. 924.

A for decision in *Spira* v. *Spira* (2) was a different one. In that case the defendant had entered an appearance but had filed no evidence on the summons under R.S.C., Ord. 14. The question was whether his failure to file evidence constituted a default. It was held not to have done so. The reason for the decision may, I think, be stated as being that since R.S.C., Ord. 14 merely gives a defendant an opportunity to show cause why he should be permitted to defend the action, his B failure to avail himself of the opportunity could not be aptly described as a default. A parallel position would have arisen in the present case if Mrs. Hewson had entered an appearance but had filed no evidence on the summons under R.S.C., Ord. 14A. In that state of affairs I think that *Spira* v. *Spira* (2) would be authority for the view that the judgment against her would not have been a judgment by default within the meaning of the rule. Can the fact that not only C did she file no evidence on the summons (which she could not have done without first entering an appearance), but that also she entered no appearance make the judgment "by default"? In my judgment, the words "judgment by default" in this rule indicate a judgment obtained by a plaintiff in reliance on some default on the part of the defendant in respect of something which he is directed to do by the rules. A judgment obtained in default of appearance under R.S.C., D Ord. 13 would, I think, clearly be such a judgment. To an application under R.S.C., Ord. 14A, however, it is irrelevant whether the defendant has entered an appearance or not. If the action is for the type of relief indicated in the rule and if the plaintiff swears the necessary affidavit verifying the cause of action and stating that he believes that there is no defence to the action, the court is concerned to see whether the defendant avails himself of the opportunity to show E cause why he should be permitted to defend the action. If the defendant does not do so, the court is not concerned under the rule to ascertain whether the defendant has or has not entered an appearance. If the court grants the plaintiff judgment under the rule, the plaintiff's success owes nothing to the fact, if it be the fact, that the defendant had not entered an appearance: the defendant's default in entering an appearance is not a circumstance on which the plaintiff F relies for obtaining his judgment. In my opinion, therefore, such a judgment cannot properly be described as a "judgment by default". For these reasons I am of opinion that, if the plaintiff in the present action had applied under R.S.C., Ord. 27, r. 15, in the specific performance action to have the judgment in that action set aside, the court would have had no jurisdiction to accede to the application. It has not been suggested that any other form of summary procedure G is open to the plaintiff. It follows that, unless the plaintiff can get the judgment set aside, either by way of appeal or in proceedings by writ, she cannot do so at all.

Counsel for the purchasers contends that if R.S.C., Ord. 27, r. 15, is not available to the plaintiff she cannot get the judgment set aside (a) because to attempt to do so is an attempt to canvass again a subject which has already been litigated— H in other words, because the issues involved are res judicatae—and (b) because the judgment creates an estoppel which can only be avoided on the ground of fraud. In my judgment, the issues of lack of contractual capacity and undue influence are not res judicatae. These issues, which would have been raised in the specific performance action, if at all, by Mrs. Hewson by way of confession and avoidance, were not raised or adjudicated on in that action. They may I nevertheless have become irrelevant because of the judgment if the judgment cannot be set aside.

Counsel for the plaintiff contends, and I think rightly, that fraud is not the only ground on which a judgment which is not a judgment by default can be set aside. Certainly a consent order can be set aside on any grounds which would justify setting aside the underlying agreement between the parties. As LINDLEY, L.J., said in *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.* (3):

(2) [1939] 3 All E.R. 924. (3) [1895] 2 Ch. at p. 280.

"A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual."

Fraud is not essential in such a case: mutual mistake, for example, will suffice. A claim to have such an order set aside must be made in a fresh action (*Ainsworth* v. *Wilding* (4)).

In the present case the judgment sought to be set aside is not a consent order. It is, however, a judgment given summarily without the court having gone into the merits of the case. For aught I know, the summons under R.S.C., Ord. 14A was not served on Mrs. Hewson personally but by filing under R.S.C., Ord. 67, r. 4, and it seems probable that when she was served with the writ in the action and thereafter she was inops consilii, for it appears from certain correspondence to which I was referred that she withdrew her instructions from the solicitors who were previously advising her on Nov. 19, 1957. The specific performance action was not commenced until 1958. In circumstances such as these I think that it would be, at the least, unfortunate if the court could not, under its inherent jurisdiction, recall its own judgment and allow the merits of the case to be litigated, if the circumstances are such as to suggest that the party who has obtained that judgment ought not fairly to be allowed to enforce it. In saying this I do not disregard the salutary maxim, interest reipublicae ut sit finis litium, but the court has never, I think, allowed that maxim to prevent the court from protecting itself from being deceived (5), and it seems to me to be at least arguable that, if the contract were obtained by fraud or was to the knowledge of the purchasers unenforceable for lack of capacity on the part of Mrs. Hewson, the purchasers were guilty of deceiving the court on the hearing of the summons under R.S.C., Ord. 14A. Such an argument would, I think, be open to the plaintiff on her present statement of claim.

In these circumstances it would, in my judgment, be wrong for me to put an end to this action in limine by striking out the statement of claim, since it appears to me, without attempting to assess the plaintiff's prospect of success in the action or to pre-judge any question of fact or law which may be open to the parties at the trial, that the statement of claim sets up a case involving serious questions both of fact and law on which there is a possibility that the plaintiff may make good her right to relief. I shall accordingly dismiss the summons.

Application dismissed.

Solicitors: *Sampson & Co.* (for the defendants, the purchasers); *D. H. P. Levy & Co.* (for the plaintiff).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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(4) [1896] 1 Ch. 673. (5) See, e.g., *Meek* v. *Fleming*, at p. 153, letter F, ante.

A

ALLEN v. ALLEN.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), July 11, 12, 1961.]

Husband and Wife—Property—Matrimonial home—Purchase by husband—Wife contributing to household expenses—Intention—Whether wife had beneficial interest in property.

B

In deciding the rights of divorced parties to a marriage to the matrimonial home, which was occupied by them during the marriage and of which the legal title was vested in the husband, there is no principle of law that if the wife has contributed over a period to living expenses so as to enable the husband to complete the acquisition of the property, then the intention that ought to be inferred is that the house was acquired as their joint property, with the consequence that the wife is beneficially interested therein; but the beneficial title to the property depends, in the absence of agreement between the parties, on the intention established by the evidence, or to be inferred from facts so established, in the particular case.

C

Cobb v. *Cobb* ([1955] 2 All E. R. 696) and *Fribance* v. *Fribance* ([1957] 1 All E. R. 357) considered.

D

[As to a wife's rights to the matrimonial home, see 19 HALSBURY'S LAWS (3rd Edn.) 849, para. 1388; and for cases on the subject, see 3rd DIGEST Supp.]

Cases referred to:

Cobb v. *Cobb*, [1955] 2 All E. R. 696; [1955] 1 W.L.R. 731; 3rd Digest Supp.

Fribance v. *Fribance*, [1957] 1 All E. R. 357; [1957] 1 W.L.R. 384; 3rd Digest Supp.

E

Appeal.

This was an appeal by Raymond Clifford James Allen, the plaintiff, from a judgment of His Honour JUDGE ARMSTRONG at Poole County Court given on Nov. 9, 1960, dismissing the plaintiff's claim against Nellie May Allen, the defendant, for possession of a dwelling-house, No. 138, Alder Road, Parkstone, Poole.

F

On the marriage of the husband and the wife in June, 1936, they lived in the husband's mother's house, and subsequently they continued to occupy it throughout the whole of their married life. The husband agreed at the time of the marriage to buy the house from his mother. The house was subject to a building society mortgage which he took over. The legal title to the house was vested on the purchase in the husband alone. The husband's mother left the house. The marriage was dissolved by decree nisi on the husband's petition in 1959, and the decree was made absolute in March, 1960. The husband then brought an action in the county court for possession of the house. At the hearing the husband stated in evidence that the wife never contributed to the cost of the house, that he paid all the mortgage instalments, and that his wife paid the money over but did not have to make it up out of her own resources. The wife stated in evidence that before marriage it was agreed that she should go out to work to help to pay for the house; that she had gone out to work for some years after marriage, and that she helped with all expenses, such as electricity and gas. The county court judge said that neither of the parties were witnesses on whom the court could completely rely and he concluded on the facts that his impression from the evidence was that the wife was right when she said that she went out to work because they were setting up the new home and furnishing it; that the result was that he felt bound to regard the house as a matrimonial asset to which both parties had contributed, but that it was not possible to say what the extent of their contribution was. He therefore decided that the wife had made out a case for some beneficial interest in the house as the matrimonial home and that the claim for possession must fail.

G

H

I

M. O'C. Stranders, Q.C., and *C. I. Poole* for the appellant husband.

C. A. Settle, Q.C., and *M. R. Hoare* for the respondent wife.

LORD EVERSHED, M.R., referred to the nature of the questions between the parties (viz., as to their rights in the house at Poole where they lived during the marriage), to the county court judge's view of their reliability as witnesses, and to a sentence in his judgment from which some words appeared to have been omitted and which caused uncertainty whether it was his view that both husband and wife had contributed to the purchase of the house from their own resources in some proportions. HIS LORDSHIP continued: All that I can clearly assert on these findings is: first, that the husband had acquired the house from his mother, that it was in his name solely and that he was solely responsible to the mortgagee for the payment off of the balance of the purchase price: second, that the wife did, over what exact period does not matter, earn her living and contribute certainly to living expenses and household expenses generally.

Now the citation from the judgment of DENNING, L.J. (1) read bereft of its context, might lead a reader to think that it was the view of this court, and that it was the law, that if a husband and wife were both wage earners, it prima facie followed as a matter of course and without more that any property they acquired during marriage, the house they lived in or the furniture they used, ought to be regarded as jointly acquired. I think it right to say that for myself I do not accept that view, and I do not think that it is the law; nor do I think such a wide proposition can be justified by *Cobb* v. *Cobb* (2) and the later case of *Fribance* v. *Fribance* (3). I draw attention to a passage in the judgment of MORRIS, L.J. in the latter case (4). He cited first from the judgment of ROMER, L.J., in *Cobb* v. *Cobb* (2), the citation being (5):

> "... I know of no power that the court has under s. 17 [of the Married Women's Property Act, 1882] to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; ..."

Then MORRIS, L.J. said (4):

> "It seems to me, therefore, that one must approach this case by considering, on the evidence, in the first place, whether it is shown that the husband and wife were both beneficially interested in this property that the husband took."

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(1) The citation that the learned county court judge made from the judgment of DENNING, L.J., in *Cobb* v. *Cobb* ([1955] 2 All E.R. at p. 698) was as follows: "Under s. 17 of the [Married Women's Property Act, 1882], the court can, on application, decide questions as to the title to or possession of property as between husband and wife. The first question in this case is, To whom does the house belong? The law in cases of this kind was considered by this court quite recently in *Rimmer* v. *Rimmer* ([1952] 2 All E.R. 863). I would like to repeat what I said there (ibid., at p. 868): 'In cases when it is clear that the beneficial interest in the matrimonial home or in the furniture belongs to one or other absolutely, or it is clear that they intended to hold it in definite shares, the court will give effect to their intention (see *Re Rogers' Question*, [1948] 1 All E. R. 328); but when it is not clear to whom the beneficial interest belongs, or in what proportions, then, in this matter, as in others, equality is equity.' I would only add that, in the case of the family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares. This is so, even though the conveyance is taken in the name of one of them only and their contributions to the cost are unequal, and all the more so when the property is taken, as here, in their joint names and was intended to be owned by them in equal shares. The legal title is in them both jointly, and the beneficial interest is in them both as equitable tenants in common in equal shares. They hold the house as trustees on the statutory trusts for sale. Until the place is sold, each of them is entitled concurrently with the other to the possession of the house and to the use and enjoyment of it in a proper manner, and neither of them is entitled to turn out the other." (2) [1955] 2 All E.R. 696. (3) [1957] 1 All E.R. 357.
(4) [1957] 1 All E.R. at p. 361. (5) [1955] 2 All E.R. at p. 700.

A He continued by observing that it was at that point, as it always will be, that the great difficulty arises, since it is plain enough that the husband and wife at the outset of their marriage are not likely to formulate in precise terms any arrangement they may have in mind or any expression of their intention. The court must do the best it can.

Counsel for the wife has said that where the court finds an agreement that B the furniture or other assets for the purpose of setting up the matrimonial home are to belong to one party or the other or both in agreed proportions, the court should give effect to that agreement. So much is not open to dispute and counsel for the wife was really repeating the language of DENNING, L.J. Counsel then said that in the absence of agreement the court must look to the intention. Again I agree. But it was the further submission of counsel that if all the court C can find is that the husband, let us say, says to his wife: "I am buying this house; it is going to be a considerable drain on my resources and I am afraid I must look to you to earn some money and help with the living expenses", then, without more, it should as a matter of law be concluded that the house was acquired jointly. With that submission I cannot agree. I hope that those statements will be of assistance to the learned judge, because I confess that D some of the later passages in his judgment have led me to think that he went overfar in his deduction from the citation from DENNING, L.J.

In that difficulty I come back to this. What did the learned judge intend to find was the true intention between husband and wife at the beginning of their marriage about this house purchase? That intention he has to deduce as best he can from the circumstances in the evidence given before him. If he intended E to find, e.g., that the two of them were putting all they earned into some joint pool, and then that out of that joint pool all the expenses, including the mortgage instalments, were met, I would say that the conclusion would rightly follow that the house was intended to be a joint venture. But did he intend to find that such was the intention or did he intend to find no more than that the husband, having to pay for the house, the wife was asked herself to earn money F towards other expenses? There broadly, I think, is the distinction, and in the hope that it may save further tribulation to these parties, it is my view that we should send this case back to the judge with the request that he should be good enough to formulate as precisely as he can what he did intend to find was the intention of these two people as regards the purchase of this house; and if he will be good enough so to inform us, the case will then come back to this court G so that we can state what we think is the correct conclusion in law.

HARMAN, L.J.: I only add this. Each of these cases depends on its own peculiar facts, and it seems to me to be dangerous to import the reasoning out of other cases. Otherwise I agree that LORD EVERSHED, M.R., has formulated the doubt which is in our minds which we find that we are unable to resolve H at the moment.

DONOVAN, L.J.: I agree with the course proposed.

Appeal adjourned and request remitted accordingly.

Solicitors: *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the husband); *Church, Adams, Tatham & Co.*, agents for *Dickinson, Manser & Co.*, Poole (for the wife).

[*Reported by* F. GUTTMAN, ESQ, *Barrister-at-Law.*]

A

NOTE.

FLACK AND ANOTHER *v.* WITHERS AND OTHERS.

[HOUSE OF LORDS (Lord Denning, Lord Goddard and Lord Guest), July 20, 1961.]

B

House of Lords—Compromise—Infant appellant—Leave to appeal to House of Lords granted by Court of Appeal—Settlement after petition lodged —Approval by House of Lords.

[As to the compromise of an action to which an infant is a party, see 21 HALSBURY'S LAWS (3rd Edn.) 326, para. 687; and for cases on the subject, see 28 DIGEST (Repl.) 698-701, *2083-2104.*]

C

Joint Petition.

Joint petition by the appellants, John Wetherall Flack, an infant, and Eleanor Flack, his next friend and the administratrix of the estate of John Porter Hughes Flack, deceased, and the respondents, William George Withers and C. G. Spencer, Ltd. for an order carrying into effect agreed terms of settlement. On Jan. 16, 1959, in an action tried before JONES, J., sitting with a jury, judgment was entered for the infant appellant for £14,245 with costs as damages in respect of injuries suffered by him in a road accident. An agreed sum of £350 was also adjudged payable to the infant appellant's father, John Porter Hughes Flack, with costs. The respondents appealed, and the Court of Appeal (ORMEROD and UPJOHN, L.JJ., SELLERS, L.J., dissenting), by an order dated Mar. 21, 1960, allowed the appeal on the ground that there was no evidence to support the jury's verdict. Leave to appeal to the House of Lords was granted and a petition by the then appellants was lodged on June 21, 1960. On July 31, 1960, the then appellant John Porter Hughes Flack died, and on Nov. 3, 1960, by order of the House of Lords, there was a revivor of the action in the name of the present appellant, Eleanor Flack, who, on Nov. 23, 1960, obtained leave to proceed in forma pauperis. On Mar. 7, 1961, she became an assisted person under the Legal Aid and Advice Act, 1949.

D

E

F

R. E. Hopkins for the appellants.

W. H. Griffiths for the respondents.

G

R. E. Hopkins: This petition is one in a somewhat unusual form. The researches of the Judicial Office reveal that only twice before has it been necessary to bring such a petition to your Lordships' House, once in 1945 and the second in 1949. The short effect of the matter is that an action which, with the leave of the Court of Appeal, was made the subject of a petition to your Lordships' House has, in fact, been settled, subject to the approval of the appropriate authority for that purpose, whoever that may be. The case was settled after the petition had been lodged and it seemed that the Court of Appeal was then functus officio, as it had delivered its judgment. One of the terms of settlement being that the respondents should pay the taxed costs of the infant appellant concerned, no inferior court had any authority to order that costs be taxed in your Lordships' House.

H

Subject to the approval of your Lordships' House, a settlement has been agreed whereby £7,000 will be paid by the respondents to the infant appellant, the special damages will remain untouched and the appellants will have all their costs in this House and in the courts below as between solicitor and client up to the date when that ceased to be the proper basis and after that on a common fund basis.

I

W. H. Griffiths agreed that an order should be made in the terms set out in the petition.

A Their Lordships ordered that the order appealed from be discharged and that an order be made in the terms of the joint petition.

Order accordingly.

Solicitors: *Hempsons* (for the appellants); *L. Bingham & Co.* (for the first respondent); *Hewitt, Woollacott & Chown* (for the second respondents).

B [*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

C

QUALTER, HALL & CO., LTD. *v.* BOARD OF TRADE AND ANOTHER.

[COURT OF APPEAL (Harman and Donovan, L.JJ., and Pennycuick, J.), July 14, 17, 1961.]

Company—Private company—Exempt private company—Loss of exemption—
D *Body corporate holder of shares—Exception for banking or finance company providing capital—Capital reorganisation—Arrangement with finance company to purchase new issue of shares from members entitled thereto—Companies Act,* 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 129 (4), *Sch.* 7, *para.* 7 (1), *para.* 9.

Statute—Construction—Headings—Central headings—Reference to these in
E *construing ambiguous paragraph.*

A company was an exempt private company within s. 129 of the Companies Act, 1948, that is, for present purposes, the company satisfied the basic conditions of exemption stated in Sch. 7 to the Act. On reorganisation of the capital of the company, involving a capitalisation of reserves, certain new preference and "A" ordinary shares, which were to be issued to share-
F holders as fully paid up on the capitalisation, were purchased by five banking or finance companies. By para. 1 of Sch. 7 to the Companies Act, 1948, the first basic condition for being an exempt private company is that no body corporate is the holder of any of the company's shares, but the condition is subject to exceptions, including an exception, enacted by para. 7 (1)*, where a "banking or finance company acquired the shares . . .
G or its interest therein in the ordinary course of its business as such and by arrangement with the relevant company . . ." This exception is excluded, by the proviso to para. 7 (1), if banking or finance companies have the right to exercise one-fifth or more of the total power "at any general meeting" of the company. Under new articles of association adopted by the company, preference shareholders and the "A" ordinary shareholders were entitled
H to vote at a general meeting of the company only if (a) as regards preference shareholders, the dividend on their shares was six months in arrear at the date of the notice convening the meeting, or (b) as regards both preference shareholders and the "A" ordinary shareholders, the meeting was called to consider a resolution, of a kind specified in the articles (viz., reduction of capital, winding-up, sale of the company's undertaking, variation of rights attached to shares etc.), which would affect the rights of these shareholders.
I On the question whether the company ceased to be an exempt private company,

Held: the company had ceased to be an exempt private company because—

(i) (PENNYCUICK, J., not concurring) in order to ascertain the scope of the relevant exception enacted in para. 7 (1) of Sch. 7 to the Companies Act,

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* The relevant terms of para. 7 (1) of Sch. 7 to the Companies Act, 1948, are printed at p. 391, letter I, post.

1948, it was legitimate to consider the cross-heading to para. 7, viz., "Exception for banking or finance company providing capital" (since, per HARMAN, L.J., para. 7 (1) was not clear in its meaning); the words "providing capital" in the heading to para. 7 (1) meant providing capital for the company, and did not include the purchase of shares from shareholders and, accordingly, the exception did not apply to the present case where no new capital was provided for the company (see p. 392, letter F, p. 393, letter E, and p. 395, letter E, post).

Dicta of LORD HERSCHELL in *Inglis* v. *Robertson & Baxter* ([1898] A.C. at p. 630) and VISCOUNT SIMONDS in *A.-G.* v. *H.R.H. Prince Ernest Augustus of Hanover* ([1957] 1 All E.R. at p. 53) applied.

(ii) even if the company had been prima facie within the exception in para. 7 (1), it would have been excluded from the exception by the proviso, because the proviso applied if there could be any general meeting at which the banking and finance companies would have the specified measure of voting control and did not predicate that such companies must have that measure of control at every general meeting (see p. 394, letter A, p. 395, letter H, and p. 396, letter C, post).

Decision of CROSS, J. ([1961] 1 All E.R. 210) affirmed on (i) but reversed on (ii) above.

[As to an exempt private company, see 6 HALSBURY'S LAWS (3rd Edn.) 357, 360, paras. 701, 707.

For the Companies Act, 1948, s. 129, and Sch. 7, para. 1, para. 7 (1), para. 9, see 3 HALSBURY'S STATUTES (2nd Edn.) 559, 857, 859, 860.]

Cases referred to:

A.-G. v. *H.R.H. Prince Ernest Augustus of Hanover*, [1957] 1 All E.R. 49; [1957] A.C. 436; [1957] 2 W.L.R. 1; 3rd Digest Supp.

Carlton, Re, [1945] 1 All E.R. 559; [1945] Ch. 280; 114 L.J.Ch. 219; 172 L.T. 376; *affd.* C.A. [1945] 2 All E.R. 370, n.; [1945] Ch. 372; 114 L.J.Ch. 289; 173 L.T. 186; 2 Digest (Repl.) 199, *188*.

Hammersmith & City Ry. Co. v. *Brand*, (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 11 Digest (Repl.) 106, *29*.

Inglis v. *Robertson & Baxter*, [1898] A.C. 616; 67 L.J.P.C. 108; 79 L.T. 224; 1 Digest 334, *489*.

Martins v. *Fowler*, [1926] A.C. 746; 95 L.J.P.C. 189; 135 L.T. 582; 42 Digest 655, *646*.

Toronto Corpn. v. *Toronto Ry. Co.*, *Toronto Ry. Co.* v. *Toronto Corpn.*, [1907] A.C. 315; 76 L.J.P.C. 57; 96 L.T. 794; 42 Digest 655, *640*.

Appeal.

This was an appeal by the plaintiff company from an order of CROSS, J., dated Dec. 7, 1960, and reported [1961] 1 All E.R. 210, declaring that the plaintiff company had ceased to be an exempt private company within the meaning of s. 129 (4) of the Companies Act, 1948. The defendants served a respondent's notice that the appeal ought to be dismissed on an additional ground based on the proviso to para. 7 (1) of Sch. 7 to the Act of 1948.

Sir Milner Holland, Q.C., and *R. B. S. Instone* for the company.

E. Blanshard Stamp for the Board of Trade and the Registrar of Companies.

HARMAN, L.J.: In this appeal the appellant company is fighting to preserve the status, which it admittedly had before its financial reorganisation in 1955, of an "exempt private company" within the meaning of the Companies Act, 1948, s. 129. The idea of limited liability in its origin, notably as embodied in early Victorian times in the Companies Act, 1862, was that the privilege of limiting its liability would be conferred on a corporate body in return for a disclosure to its customers, creditors and the public of its balance sheet and profit and loss account. "Private" limited companies only came over the horizon in

A 1907, but from that time until 1948 these bodies had the best of both worlds in that they enjoyed the privilege of limited liability without the obligation of disclosure. This anomalous privilege was largely corrected by s. 127 of the Act of 1948, but by s. 129 a privileged few were allowed to retain it, and a company which can bring itself within s. 129 and Sch. 7 to the Act is styled an "exempt private company" and retains the privilege of non-disclosure of B its affairs. This status, as I have said, was admittedly enjoyed by the appellant company until 1955 and it is not surprising that it desires to retain it, for virtually the only customer for its product, which is colliery equipment, is the National Coal Board which no doubt would prize the opportunity of looking into the prices charged.

The company is a family concern having some thirteen members and is, I C think, a director-controlled company. It had in 1955 large reserves which could be distributed by way of dividend to the members, but that would involve heavy charges to the Revenue. Moreover, like other concerns of this nature, the members were troubled by the prospect of the estate duty which would be leviable as the members died and which might make it impossible to retain the private nature of the business. Accordingly, the scheme in question was set on D foot and carried out with a view to providing the members with sums of capital cash which could be used to provide for death duties in due course while, as it was hoped, retaining the status of the company. The transaction has been fully described by the learned judge (1) and I do not think that it is necessary for me to rehearse it. In effect the scheme was to capitalise £75,000 of the reserves and to use them for paying up in full twenty-five thousand cumulative E preference shares and twenty-five thousand "A" ordinary shares and to allot these, together with twenty-five thousand already existing preference shares, to the members in proportion to their holdings of the "B" ordinary shares (which were the equity shares in the company) on the footing that the members should renounce their rights in favour of five finance companies who were willing to buy the shares at par, paying cash for them to the several members renouncing F them in their favour. The question is whether as a result of this transaction the company has, as the learned judge found, lost its status as an exempt private company.

Section 129 (1) of the Act provides that a company obtains exemption if, but only if, the conditions mentioned in s. 129 (2) are satisfied. These conditions are (a) that the conditions in Sch. 7 to the Act are satisfied, (b) that the number G of debenture-holders is not more than fifty, and (c) that no body corporate is a director of the company. Schedule 7, para. 1, provides that the basic conditions as to the shares and debentures of the company are (a) that no body corporate is the holder of any of the shares or debentures, and (b) that no person other than the holder has an interest in any of the shares or debentures. There follow six classes of exception to this rule. These are exceptions made in favour of the H company and are: (para. 2) To enable the company or its members to raise money by way of security for business loans by way of charge in favour of a banking or finance company as later defined. (para. 3) To facilitate operations under family settlements. (para. 4) To deal with cases of unsound mind. (para. 5) For trusts for employees. (para. 6) For shares held by other exempt private companies, and (para. 7), with which we are here concerned, is in the following I terms:

> "Exception for banking or finance company providing capital.
>
> "7.—(1) The first of the basic conditions shall be subject to an exception for any shares or debentures held by or by a nominee for a banking or finance company, where the banking or finance company acquired the shares or debentures or its interest therein in the ordinary course of its business *as such* and by arrangement with the relevant company or its promoters . . ."

(1) See [1961] 1 All E.R. at p. 213.

It is most persuasively argued for the company that the shares in question come within para. 7 (1) as having been acquired by one of the four acquiring companies (2) under the arrangement (these companies ranking admittedly as banking and finance companies within the definition of those words in para. 9 of the Schedule) in the ordinary course of its business as such. The first words to be construed are the words " as such ", and they must mean in my judgment " as a banking or finance company as defined by the Schedule ", and it would be illegitimate to inquire into the general meaning of those words. The definition reads, so far as material, as follows:

> " Meaning of ' banking or finance company '.
>
> " 9. In this Schedule the expression ' banking or finance company ' means any body corporate or partnership whose ordinary business *includes* the business of banking and any other body corporate whose ordinary business includes the business of lending money or of subscribing for shares or debentures . . ."

The crux of this argument is whether the words " as such " [in para. 7 (1)] are limited to the business of lending money or subscribing for shares or debentures, or whether, having regard to the use of the word " includes " [in para. 9], the reference may be extended to the general powers of such a company which may be assumed to extend to the acquisition of, as opposed to subscription for, shares. The company argues that the relevant word in para. 7 (1) is not " subscribed ", but is " acquired ", which is a wider word and is limited only on the face of it by the provision that the acquisition must be, as here it was, by arrangement with the company. The Board of Trade support a more limited meaning and rely first on the heading to the section which reads: " Exception for banking or finance company providing capital ". It is the Board of Trade's argument that this shows the limits of the exception, which is intended to allow such a company to raise money by issuing shares or debentures for cash to a finance company. In my judgment the words " provide capital " mean providing capital for the company, and indicate that the cash is to be paid into the company's coffers. The company argues that this is to cut down the plain meaning of para. 7 (1) by virtue of the heading and that this is an illegitimate method of construction. I would agree that if there were no doubt at all about the meaning of the paragraph, which is the particularity of the legislation, it would not be right to overrule it by the heading, which is its generality, but to my mind there is here at least a doubt as to the meaning of the words " as such " previously discussed, and the correct way of construing the paragraph is to read it in conjunction with the heading and make the two consistent if possible.

Headings of this kind are the equivalent of preambles to older statutes—see the judgment of the Privy Council in *Martins* v. *Fowler* (3). This matter was also discussed before COHEN, J., in *Re Carlton* (4) where he cited LORD HERSCHELL's opinion in *Inglis* v. *Robertson & Baxter* (5) to this effect:

> " These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connexion with them and interpreted by the light of them."

COHEN, J. (4) further cited LORD COLLINS in *Toronto Corpn.* v. *Toronto Ry. Co.* (6) citing *Hammersmith & City Ry. Co.* v. *Brand* (7):

> " . . . such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation."

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(2) There were five companies who acquired shares, but two-thirds were placed with four companies other than Estate Duties Investment Trust, Ltd.; see [1961] 1 All E.R. at p. 213, letters H, I. The vesting of the shares being issued seems in all five cases to have been effected by allotment pursuant to request (ibid., p. 214).

(3) [1926] A.C. at p. 750. (4) [1945] 1 All E.R. at p. 562; [1945] Ch. at p. 284.

(5) [1898] A.C. at p. 630. (6) [1907] A.C. at p. 324. (7) (1869), L.R. 4 H.L. 171.

A In the recent case of *A.-G.* v. *H.R.H. Prince Ernest Augustus of Hanover* (8) this subject was much discussed and VISCOUNT SIMONDS said (9):

> "My Lords, the contention of the Attorney-General was, in the first place, met by the bald general proposition that, where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish, at the outset, to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

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C

D It is, however, difficult to see why, if the legislature intended to confine the paragraph to cases of subscription for shares, it did not use the word "subscribed", the same verb as that used in para. 9, to describe that activity. It is furthermore not easy to find a reason for the final words "by arrangement with the . . . company" because a subscription must of necessity be by arrangement and the words on this interpretation seem to add nothing to what has gone before them.

E On the whole, though with much hesitation, I agree with the learned judge on this point. Looking at s. 129 and Sch. 7 as a whole, I cannot bring myself to think that the legislature intended so to widen the area of an exempt private company's activities as to cover the present transaction which in my view provided no capital for the company. It is true that £75,000 of the company's reserves was capitalised, but this the company could have done without any intervention by the finance companies. No new money flowed into its coffers. The only provision of capital was in favour of the shareholders. Furthermore I incline to think that the words "as such" tend to confine the meaning, for they are superfluous otherwise and add nothing to the words "in the ordinary course of its business".

F

G The Board of Trade argued both below and here a further and independent point depending on the proviso to para. 7, which, so far as relevant, is in these terms:

> "Provided that this exception shall not apply if the banking or finance company has the right . . . to exercise or control the exercise of one-fifth or more of the total voting power at any general meeting of the relevant company."

H

The question here was merely the meaning of the words "any general meeting". As a result of the arrangement made, the finance companies held shares which in certain events gave them the control of one-fifth or more of the total voting power. Article 72 of the articles of association adopted by the company as part of the scheme gives every member one vote for every share, but by a proviso confines the voting powers of preference shareholders and "A" ordinary shareholders (these being the classes held by the finance companies) as regards preference shares to occasions when dividends are six months in arrear and as regards both classes to meetings proposing reduction of capital or winding-up or a sale of the company's undertaking or the variation or abrogation of the rights attached to the shares and kindred matters. The question is whether

I

(8) [1957] 1 All E.R. 49; [1957] A.C. 436.
(9) [1957] 1 All E.R. at p. 53; [1957] A.C. at p. 460.

"any general meeting" means every general meeting or whether it includes those meetings only at which these classes of shareholders are entitled to vote. The learned judge favoured the former meaning, partly because the proviso was an exception to a privilege granted by the paragraph, and partly because in his opinion directors of the finance companies, if asked whether they were entitled to vote at any general meeting, would reply: "No, as things now are". This is a matter of first impression and for myself I prefer the second interpretation. I feel that the words must be taken to mean what they say, namely, "is there any general meeting at which the finance companies have the right to vote?" In my judgment if the other meaning were intended, the words would be "at general meetings". One of the basic conditions laid down is that no corporation is to be a member of an exempt private company. By this exception corporations are allowed to become members and it seems to me natural to confine that privilege to cases where the corporate bodies can in no circumstances obtain such a voting interest as might enable them to control the company. I, therefore, would dismiss the appeal.

DONOVAN, L.J.: The argument for the company is, on the face of things, without flaw. Estate Duty Investment Trust, Ltd. and the other bodies corporate who acquired shares in the appellant company are "finance companies" within the statutory definition contained in para. 9 of Sch. 7 to the Companies Act, 1948. They acquired these shares in the ordinary course of their business as such: and did so by arrangement with the company. The tests prescribed by para. 7 (1) of the Schedule are thus all satisfied. Nevertheless the fact remains that the company, Qualter, Hall & Co., received not a penny of fresh capital, and that it was the shareholders who received for themselves the money from Estate Duty Investment Trust, Ltd. and its associates. In these circumstances the argument is bound to be a little suspect.

It begins by ignoring the cross-heading: "Exception for banking or finance company providing capital". The justification for this is said to be that the sole function of the cross-heading is to resolve any ambiguities in the text, and here there are none. But the cross-heading is in the nature of a preamble and ought to be looked at in order to ascertain the true meaning of what follows it (see hereon *Martins* v. *Fowler* (10) and *A.-G.* v. *H.R.H. Prince Ernest Augustus of Hanover* (11)). If one begins with the cross-heading it cannot be seriously doubted that it refers to provision of capital for the company though the words "for the company" are not used. But in the context they must be implied. On that basis the enacting words which follow cannot have been intended to deal with the provision of capital for individual shareholders and to confer an exception in such a case.

But it is said the language of para. 7 (1) is such that, despite any conclusion to be drawn from the cross-heading, such a case is within the paragraph, provided that all the prescribed conditions are fulfilled. This argument is rested principally on the word "acquired" in the expression

> "where the banking or finance company acquired the shares or debentures . . . in the ordinary course of its business as such and by arrangement with the relevant company . . ."

It is contended that if the legislature intended to limit the exception to cases where a banking or finance company subscribed for new capital, it would have been simple to say so. The use of the word "acquired" shows that purchases of shares or debentures were to be covered as well. I think that too much can be, and is being, made of this point. Take, for example, the case where one large banking or finance company agreed to subscribe for all the shares or debentures, but tells the relevant company that it will hire off part of them to other banking or finance companies. With such a possibility in mind the draftsman may well

(10) [1926] A.C. at p. 750. (11) [1957] 1 All E.R. at p. 53; [1957] A.C. at p. 460.

A have thought that the word " acquired " was suitable to cover both the original subscription and the subsequent taking of part of the shares or debentures by the other companies. Moreover, as will be seen in a moment, this paragraph is not, with all due respect to the draftsman, a model of precision; and it may therefore be that the word " acquired " was used without any intention of widening the field covered by the word " subscribe ". In any event I should B hesitate to conclude that by the use of this one word the legislature had included within the scope of this exception a transaction which is, when the cross-heading is taken into account, plainly outside it. The Board of Trade contended that the word " acquired " was necessary in order to cover the case of debentures as well as shares; but I do not find the contention convincing, for the word " subscribe " is apt to apply to both. The Board of Trade further resisted the company's C case on the ground that the transactions which took place were not transactions by a finance company in the ordinary course of its business as such, meaning thereby its business of lending money or subscribing for shares or debentures. The company counters this by referring to the definition of " banking or finance company " in para. 9 of the Schedule which HARMAN, L.J., has already read. It is said that once a company is within this definition (as the appellant company D is) it matters not that capital it provided for the relevant company in the course of some quite different part of the finance company's business. This would be an odd result if true. For why should the legislature stipulate for a particular qualification to be possessed by a finance company if it is to come within the paragraph at all, and then make that qualification wholly irrelevant when it came to the actual provision of capital? I fully appreciate the force of the argument E based on the literal words of the definition, but where the argument leads to an irrational result, the question arises whether an interpretation which avoids it is reasonably open. If the words " as such " in their context can be properly interpreted as referring to that part of a finance company's business, which alone entitled it to be considered for the purpose of para. 7, the difficulty goes, and for myself I think that this is the right construction. In any event the point does F nothing conclusive for the company even if they were right about it. The argument does, however, show, as I have already suggested, that the paragraph is not a model of precise drafting.

I begin with the premise that taking the cross-heading into account the paragraph deals, and deals only, with the provision of capital for the relevant company; and limits to such cases the particular exceptions from the basic rules which the G paragraph goes on to provide. I do not find that the language by which these exceptions are conferred is such as to compel the conclusion that cases such as the present are included where no capital is provided for the relevant company. I reject the contention that a capitalisation by the company of its own undistributed profits is within the contemplation of the paragraph.

With regard to the alternative argument advanced by the Board of Trade H based on the proviso to para. 7 (1) and the words " any general meeting ", I agree with the conclusion reached by HARMAN, L.J., and have only this to add. Junior counsel for the company argued that the proviso applied only where a body corporate had a right to a constant proportion of the total voting power, and that this was not such a case. But the language of the proviso is not, in my judgment, directed to such a case alone, though prima facie it would cover it. I I think it contemplates also the case where, looking at numbers of votes alone, the banking or finance company can exercise or control the exercise of more than one-fifth of them. I agree that the appeal should be dismissed.

PENNYCUICK, J.: I agree that this appeal should be dismissed. The scope of para. 7 in Sch. 7 to the Companies Act, 1948, is marked out in the heading " Exception for banking or finance company providing capital " and the words " providing capital " naturally indicate in this context provision of capital to the company itself. This restricted scope is emphasised by the words " as

such " in sub-para. (1), read in conjunction with the definition in para. 9. On the other hand, the words " acquired " and " by arrangement with the relevant company or its promoters " seem to me to give rise to great difficulty. These words are on the face of them appropriate to cover the purchase of shares or debentures from an existing holder with the concurrence of the company. Indeed, I should have thought that the taking over of debentures from an existing holder who has called in his debt might be within the policy of the Schedule, notwithstanding that it does not involve provision of capital to the company. If the paragraph is treated as confined to the subscription for new shares or debentures, the word " acquired " is inappropriate and the words " by arrangement with the relevant company or its promoters " appear to have no significant meaning. I hesitate to put on the paragraph a construction which has this result. It is unnecessary for the decision of the appeal that I should express a concluded view on this point, and perhaps I may properly abstain from doing so.

On the construction of the proviso to para. 7 (1), I am in complete agreement with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *Wake, Smith & Co.*, Sheffield (for the company); *Solicitor, Board of Trade.*

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

SHAWINIGAN, LTD. *v.* VOKINS & CO., LTD.

[Queen's Bench Division (Megaw, J.), June 26, 27, 28, 29, 1961.]

Shipping—Lighterage—Exceptions—London Lighterage Clause—Unseaworthiness—Exemption from liability if loss or damage occasioned by unseaworthiness of craft—Whether unseaworthiness to be construed as at commencement of service or after—Exemption excluded if unseaworthy barge supplied recklessly—Meaning of " recklessly ".

The defendants carried on the business of supplying barges and lighters for the carriage of goods on the river Thames. Shortly before Nov. 23, 1957, the plaintiffs made an oral contract with the defendants, whereby the defendants agreed for reward to carry a quantity of resin, the property of the plaintiffs. The contract was subject to the terms of the London Lighterage Clause which excluded the defendants from liability for loss or damage, including damage caused by unseaworthiness of craft, except damage caused by unseaworthiness where the defendants " knowingly or recklessly supplied an unseaworthy barge for the service at the time of the commencement of the voyage to the ship, wharf or quay to load." In pursuance of the contract the defendants hired a barge from another company, who were of good repute and with whom the defendants had dealt for many years without cause for complaint. This hiring was by a contract which excluded the liability of the letting company for the consequences of any defect in their barges existing at the time of hiring or subsequently appearing. The defendants did not inspect the barge, save that their lighterman made an " in and out inspection " primarily for the purpose of ensuring that the defendants were not subject to claims for pre-existing defects. This inspection was not such as would reveal defective bottom plates. The resin was loaded on the barge on Nov. 25, 1957, when the resin was in good order and condition. On Nov. 27, 1957, the barge was found to have taken in a considerable quantity of water and as a result the resin was damaged. The barge was examined and found to have been unseaworthy at the time of loading owing to a defective bottom plate. In an action by the plaintiffs to recover the

A amount of the damage the defendants relied on the London Lighterage Clause.

Held: "recklessly" meant with gross carelessness, and involved an objective, not a subjective test (see p. 403, letters E and H, post), and the defendants' conduct did not amount to reckless conduct nor were they vicariously responsible for the conduct of the company that let the barge to B them even if that company's conduct had been reckless, which in fact it was not (see p. 405, letter D, post); accordingly the defendants were within the protection of the London Lighterage Clause, which applied whether unseaworthiness existed at or arose after the beginning of the barge's contractual service (see p. 401, letter E, post), and the plaintiffs were not entitled to recover damages.

C *Albert E. Reed & Co., Ltd.* v. *London & Rochester Trading Co., Ltd.* ([1954] 2 Lloyd's Rep. 463) considered.

[As to the position of a lighterman as a common carrier and his liability for loss in the absence of express stipulation, see 35 HALSBURY'S LAWS (3rd Edn.) 287, 288, text and notes (p) (q); as to the construction of exceptions and stipulations in charterparties, see ibid., p. 255, and, more generally regarding exceptions, 2 HALSBURY'S LAWS (3rd Edn.) 115, para. 225, text and notes (r)-(t).] D

Cases referred to:

Andrews v. *Director of Public Prosecutions*, [1937] 2 All E.R. 552; [1937] A.C. 576; 106 L.J.K.B. 370; 101 J.P. 386; 26 Cr. App. Rep. 34; sub nom. *R.* v. *Andrews*, 156 L.T. 464; Digest Supp.

E *Christel Vinnen, The*, [1924] All E.R. Rep. 197; [1924] P. 208; 93 L.J.P. 138; 132 L.T. 337; 16 Asp. M.L.C. 413; 41 Digest 423, *2654*.

Janice, The, [1957] 2 Lloyd's Rep. 48.

Laertes, The, (*Cargo Ex*), (1887), 12 P.D. 187; 56 L.J.P. 108; 57 L.T. 502; 6 Asp. M.L.C. 174; 41 Digest 424, *2656*.

Minister of Materials v. *Wold Steamship Co., Ltd.*, [1952] 1 Lloyd's Rep. 485.

F *Reed* (*Albert E.*) *& Co., Ltd.* v. *London & Rochester Trading Co., Ltd.*, [1954] 2 Lloyd's Rep. 463.

Waikato (*Cargo Owners*) v. *New Zealand Shipping Co.*, [1899] 1 Q.B. 56; 68 L.J.Q.B. 1; 79 L.T. 326; 8 Asp. M.L.C. 442; 41 Digest 424, *2658*.

Action.

In this action the plaintiffs, Shawinigan, Ltd., by writ issued on Oct. 10, 1958, G claimed damages against the defendants, Vokins & Co., Ltd. for breach of contract and (or alternatively) breach of duty in or about the carriage of the plaintiffs' goods in the barge Otter in November, 1957. The defendants carried on the business of supplying barges and lighters for the carriage of goods on the River Thames. They owned 190 barges, and they also hired barges on either a daily or period basis when requisite to enable them to carry out current operations. H Shortly before Nov. 23, 1957, the plaintiffs by their agents, the West Ferry Wharfage Co., Ltd., made an oral contract with the defendants whereby the defendants agreed for reward to carry a quantity of bagged synthetic resin, the property of the plaintiffs, by lighter from the motor vessel Rutenfjel in the London dock to Timothy's Wharf, Millwall. It was not disputed that the contract was subject to the terms and conditions of the London Lighterage Clause I which reads as follows:

"The rates charged by us are for conveyance only, and are exclusive of dock dues, demurrage, disbursements, or other charges. They are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained. The goods are carried only at owners' and/or customers' risk, excepting loss arising from

pilferage and theft of goods on board the barge whilst in course of transit, liability for such loss or damage being limited at our option to £20 per package or unit or to £50 per ton. Save as aforesaid we will not be liable for any loss of or damage to goods entrusted to us for lighterage or for any loss, damage or expense occasioned to the owners of the goods or to the customers, howsoever, whensoever or wheresoever such loss, damage or expense be occasioned, and whether or not such loss, damage or expense be occasioned by unseaworthiness of craft or by any negligence, wrongful act, or default of our servants or agents, or other persons for whose acts we might otherwise be liable, or be occasioned by any delay or failure in collecting, carrying or delivering the goods and although the barge for any reason may have deviated or departed from the intended transit with the goods and although the goods may have been loaded in the barge with other goods;

"Provided always that the foregoing exemption excluding us from any liability arising from unseaworthiness of craft shall not apply unless we are able to establish that we have not knowingly or recklessly supplied an unseaworthy barge for the service at the time of the commencement of the voyage to the ship, wharf, or quay to load. We will not be able to contribute in general average. We will not be responsible for any consequences arising from strikes, lock-outs, or other labour difficulties. We are to be at liberty to employ any lighter, tug or vessel belonging to other owners or to sub-let the whole or any portion of the contract and in either event the above terms and conditions shall apply to such employment or sub-letting and shall be deemed to have been agreed between the goods' owners or customer and such other owners or sub-contractors."

For the purpose of carrying out the contract with the plaintiffs, the defendants hired a barge called the Otter from Charles Hay & Sons, Ltd. (hereinafter referred to as "Hay's"), a company of long standing and good reputation. Hay's had let barges in this way to the defendants for many years and on no previous occasion had there been any complaint of unseaworthiness. In accordance with their usual practice Hay's incorporated a clause in their contract of hire to the defendants in the following terms:

"The letters, Charles Hay & Son, Ltd., hereby give notice that they will not be liable for the consequences of any defect, whether patent or latent, in their barges or the gear belonging thereto existing at the time of hiring or subsequently appearing therein. Hirers must, therefore, satisfy themselves by examination upon taking possession that the barge and gear are fit and safe for the purpose for which they desire to use them. By hiring the barge the hirers agree to accept and to indemnify and hold harmless the owners against all liability in respect of claims for general average contribution, losses, damages, accidents, towage, salvage, dock dues, and other liabilities of whatsoever nature or kind, which may happen to be or be chargeable against or caused by the barge or to or by the persons concerned and/or employed in connexion therewith during the period of hire (except damage to the barge by fire or salvage services arising therefrom) and also against liability for legal or other costs incurred or paid and arising out of any of the matters aforesaid as well as for breach of any existing statutory provisions and/or bye-laws made in connexion with the user of the craft so hired, but the letters are to be responsible for the consequences of any omission with respect to the registration of the barge."

The Otter was at least thirty-nine years old and during the previous ten to twelve years had undergone various repairs. In early November, 1957, the Otter had had a general overhaul at Hay's yards at a cost of over £1,000. At this overhaul the fact that a plate in the bottom of the barge was badly corroded had escaped notice. The plate was defective, being dangerously thin. Accordingly the barge Otter came away from the overhaul in an unseaworthy condition. There was

A failure to exercise due care on the overhaul. The defendants' lighterman, prior to loading the cargo of resin, inspected the Otter in accordance with the normal practice of inspection but found nothing to indicate the vessel was unseaworthy. This inspection was merely an " in and out " inspection primarily for the purpose of protecting the defendants against claims for pre-existing defects; the inspection was not such as would reveal this defect. There was no carelessness, so the B court found, in the practice with regard to such inspections or in this particular inspection. The resin was loaded on Nov. 25, 1957, when it was in good order and condition. The Otter was brought back to dock where the barge lay with the cargo from Nov. 25, 1957 to Nov. 27, 1957, when the lighterman found a considerable quantity of water had been taken in and that the cargo of resin was damaged. The cargo was delivered on that date in its damaged condition and on C Dec. 13, 1957, the Otter was surveyed. There was a hole in the bottom plating measuring $\frac{7}{8}$ in. $\times \frac{1}{2}$ in. situated $12\frac{3}{8}$ in. forward of No. 6 floor frame and $7\frac{3}{8}$ in. aft No. 7 floor frame and the plate at the edge of the hole was very thin.

By their statement of claim the plaintiffs alleged that by the contract the defendants impliedly undertook and warranted (a) that the goods carried would be delivered in the like good order and condition as when received and (b) that D the craft provided or used by them would be seaworthy and in every respect fitted for the service. The plaintiffs claimed damages for breach of contract or duty. The defendants pleaded that impliedly the contract of carriage was subject to the terms and conditions of the London Lighterage Clause. The defendants further pleaded that, if the Otter was unseaworthy, they did not knowingly or recklessly supply an unseaworthy barge, and were exempted from liability E by the clause, relying in particular on the following alleged facts—(i) the barge was hired from Hay's; (ii) Hay's were barge-owners of good reputation in the trade for providing barges in good condition; (iii) the defendants had hired barges from Hay's for about twenty years before the contract and on no occasion had a barge so hired been found to be defective; and (iv) the defendants' policy of inspection of hired barges by their lighterman, and that there had been such F inspection of the Otter. The defendants further pleaded that, if the state of mind of Hay's affected the defendants (as they, however, denied), they would rely on Hay's practice of overhaul and the fact that the Otter was overhauled in November, 1957.

J. F. Donaldson, Q.C., and *M. J. Mustill* for the plaintiffs.
H. V. Brandon, Q.C., and *J. Willmer* for the defendants.

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MEGAW, J., referred to admissions made by the parties, reviewed the facts, which were largely undisputed, stated the nature of the claim and that the plaintiffs would be entitled to recover damages unless the defendants could establish exemption under the London Lighterage Clause, and continued: The questions which I have to decide are: first, whether the London Lighterage H Clause is relevant at all having regard to the facts as proved or admitted; and secondly, if it is otherwise relevant, whether the defendants have discharged the onus which, under the clause, plainly rests on them, of establishing that—I quote from the proviso—they " have not knowingly or recklessly supplied an unseaworthy barge for the service at the time of the commencement of the voyage to the ship, wharf or quay to load."

I The first question is, I suspect, a brainchild of the ingenuity of counsel for the plaintiffs, though it is none the worse for that. If it is his brainchild, the midwife is the Court of Appeal decision in *The Christel Vinnen* (1). Counsel for the plaintiffs contended that the reference in the first paragraph of the London Lighterage Clause to " occasioned by unseaworthiness of craft " should be construed as referring to, and referring only to, unseaworthiness of a barge after she had started on her contractual service as provided by the contract

(1) [1924] All E.R. Rep. 197; [1924] P. 208; 16 Asp. M.L.C. 413.

between the defendants and the plaintiffs. If that construction were right, the clause would provide no defence to the defendants, however fully they might disprove knowledge or recklessness, because there is no evidence that the unseaworthiness developed subsequently to the vessel starting on her service. Indeed, I hold that she was unseaworthy when she started on her contractual service.

In the headnote to the report on *The Christel Vinnen* (2) there is no reflection of the first point, which perhaps is the point of most general importance decided by the Court of Appeal in that case. There, the shipowner relied on a clause protecting him from liability in respect of damage occasioned by a latent defect in the hull, even when occasioned by the negligence of the servants of the shipowner. The relevant part of the decision of the Court of Appeal, in a judgment of the court consisting of BANKES, SCRUTTON and ATKIN, L.JJ., the judgment being delivered by SCRUTTON L.J., is as follows (3):

> "It is clear law that exceptions do not apply to protect the shipowner who furnishes an unseaworthy ship, where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness. *Waikato* (*Cargo Owners*) v. *New Zealand Shipping Co.* (4) is an instance of ambiguity defeating the shipowner's probable intention: see the judgment of COLLINS, L.J. In *Cargo ex The Laeries* (5) the words which protected the shipowners were 'latent defects in machinery even existing at the time of shipment'. Such words are absent in the present case and latent defects may come into existence during the voyage. In our view, the shipowner here had not clearly excluded or modified the implied warranty of seaworthiness, and, consequently, the exception does not apply to protect him when water entering through unseaworthiness causes the damage, as is undoubtedly the case as to half the damage here."

Counsel for the plaintiffs says that equally in this case the exception relating to unseaworthiness does not say that it relates to or includes unseaworthiness existing at the time of the commencement of the barge's contractual service; it ought therefore to be read as relating only to unseaworthiness coming into existence after the contractual service began, after the barge commenced her voyage, if a voyage was involved to the Rutenfjel to receive the cargo from that vessel.

No case could be found on the relevant facts in which there had been an exception referring to unseaworthiness simpliciter from which guidance might be obtained. In the great majority of cases where express exceptions relating to unseaworthiness have been relied on by shipowners, the relevant clause has been phrased to refer to "at or before the commencement of a voyage", or some similar words.

Counsel for the defendants referred to two authorities. He pointed out that in *Albert E. Reed & Co., Ltd.* v. *London & Rochester Trading Co., Ltd.* (6), the point would have been relevant and conclusive if the argument of counsel for the plaintiffs were right. The point was not raised, nor was the possibility of such a point referred to by DEVLIN, J., in delivering his judgment. In *Minister of Materials* v. *Wold Steamship Co., Ltd.* (7), SELLERS, J., discussed *The Christel Vinnen* (8). Counsel for the defendants submitted therefore, though the point was not directly in issue, that the approach of the learned judge in that case would make minute the inference that a different conclusion would have been reached in *The Christel Vinnen* (8) if the exceptions clause had included a reference to unseaworthiness simpliciter.

(2) [1924] P. 208; [1924] All E.R. Rep. 197; 16 Asp. M.L.C. 413.
(3) [1924] All E.R. Rep. at p. 199; [1924] P. at p. 212; 16 Asp. M.L.C. at p. 414.
(4) [1899] 1 Q.B. 56; 8 Asp. M.L.C. 442.
(5) (1887), 12 P.D. 187; 6 Asp. M.L.C. 174.
(6) [1954] 2 Lloyd's Rep. 463. (7) [1952] 1 Lloyd's Rep. 485, see at p. 497.
(8) [1924] All E.R. Rep. 197; [1924] P. 208; 16 Asp. M.L.C. 413.

A I do not find much help in either of these authorities on this point. I have, however, come to the conclusion that counsel for the defendants is right, primarily because of the wording of the proviso in the London Lighterage Clause. Bearing in mind that a clause such as this must be construed strictly against the party relying on the exception, I nevertheless am of opinion that it would not be right to hold that the unseaworthiness for which exemption is given in the B first paragraph to the clause is something different from the unseaworthiness which is referred to in the proviso by the words

> "unless we are able to establish that we have not knowingly or recklessly supplied an unseaworthy barge for the service at the time of the commencement of the voyage to the ship, wharf or quay to load."

C It would, in my view, be unreasonable to hold that the effect of the clause is that the defendants are still liable for unseaworthiness which existed at the time of the commencement of the voyage, and that by proving the very fact of "not [having] knowingly or recklessly supplied" a barge which is unseaworthy "at the time of the commencement of the voyage" they achieve exemption only from unseaworthiness which develops thereafter. Moreover, the exemption in D the first paragraph is defined in the first few words of the proviso, as being "exemption excluding us from any liability arising from unseaworthiness of craft."

Counsel for the defendants also contends—though I do not myself attach much weight to this argument—that prima facie the meaning of "unseaworthiness" is unseaworthiness at the commencement of the voyage, whereas with E regard to the clause in *The Christel Vinnen* (9) there is no such prima facie meaning in relation to the words "latent defect".

I therefore hold that this first point raised on behalf of the plaintiffs fails and that the clause exempts the defendants from liability for unseaworthiness which existed at the commencement of the barge's voyage to the Rutenfjel, provided that the defendants can establish that they "have not knowingly or recklessly F supplied" a barge which was unseaworthy "for the service at the time of the commencement of the voyage".

The main question in this case has been as to the meaning of the word "recklessly" in the proviso in the London Lighterage Clause, and its applicability on the facts of this case. There was, as I understand it, no question of "knowingly" in this case. It was not suggested that the defendants, through anyone G whose knowledge might be treated as their knowledge, knew that the Otter was unseaworthy at the relevant time. In *Albert E. Reed & Co., Ltd.* v. *London & Rochester Trading Co., Ltd.* (10) to which I have already referred, a suggestion was put forward that some form of constructive knowledge might be relevant in considering "knowingly" in this clause. That suggestion was rejected by DEVLIN, J. (11). I need say no more about "knowingly".

H I come then to the word "recklessly". I think that it is desirable, in view of the arguments which have been submitted to me, first to consider the meaning of that word in the context of this clause, and then to review the applicability of that meaning to the facts of this case.

Counsel for the defendants has argued forcefully that "recklessly" is an adverb which connotes a state of mind; that it involves the elements of wilfulness, I deliberateness, wantonness. He says that recklessness in respect of an act is always and necessarily subjective. In order that an act can properly be described as "reckless" there must be a conscious realisation on the part of the doer of the act that he is doing something which involves a risk and a conscious decision to take that risk. Counsel for the defendants does not suggest that such realisation and such decision always involves recklessness. There must, as I understand his argument, also be a conscious realisation that he ought not to take the risk, that

(9) [1924] All E.R. Rep. 197; [1924] P. 208; 16 Asp. M.L.C. 413.
(10) [1954] 2 Lloyd's Rep. 463. (11) [1954] 2 Lloyd's Rep. at p. 475.

it is an unjustified risk, whatever may be meant by the words "ought" or "unjustified" in that context. In support of this submission counsel for the defendants has relied on a passage in the speech of LORD ATKIN in *Andrews* v. *Director of Public Prosecutions* (12), and counsel deduces from that passage that LORD ATKIN is to be regarded as having thought and said that "reckless" involved indifference to risk. I do not myself think that LORD ATKIN in that passage dealing with criminal liability, had in mind a precise definition or explanation of "recklessness" which was intended to be of universal application.

Counsel for the defendants also relies on the fact that, as he contends, DEVLIN, J., in *Albert E. Reed & Co., Ltd.* v. *London & Rochester Trading Co., Ltd.* (13) regarded a conscious state of mind as an essential of recklessness. In that case DEVLIN, J., had to consider this same London Lighterage Clause in relation to a barge, the Niagara, which developed a hole in the bottom and let in water, damaging the cargo. He held that the defendants, the owners of the barge, had failed to disprove that they recklessly supplied an unseaworthy barge. The principal ground for reaching that conclusion was, briefly, that Mr. Chapman, the shipwright foreman of the defendants, had failed to take action to renew or repair the plates in the bottom of the barge which he knew to have become worn or corroded to a thickness of one-sixteenth of an inch, which everyone else in that case agreed to be below the minimum safe thickness. The natural inference, said DEVLIN, J., was that he (i.e., Mr. Chapman) was running an unjustifiable risk, and plainly from his own evidence he was doing it deliberately. In those circumstances, the right inference to draw was that Mr. Chapman's mind in relation to this matter was a reckless one. The learned judge then went on to say (14):

> "I do not think it is necessary to draw a distinction whether he knew that the vessel was unseaworthy or not. I do not think he knew that the vessel was unseaworthy in the sense that he knew that when the barge went out on any particular occasion it was highly likely that she would make water through a hole which would arise; but I am satisfied that he did know that she might do so, and that he did not care whether she did so or not, not perhaps believing that to be blameworthy, but he did not care whether she did so or not, because he thought that nothing could be done about it until it had in fact occurred."

Earlier, DEVLIN, J., had said this (15):

> "The term 'recklessly', I think, does not really give rise to much difficulty. It means something more than mere negligence or inadvertence. I think it means deliberately running an unjustifiable risk. There is not anything necessarily criminal, or even morally culpable, about running an unjustifiable risk; it depends in relation to what risk is run; it may be a big matter or it may be a small matter."

With the very greatest respect, I do not get much help from this definition. What is meant by "deliberately running a risk"? In one sense every action in life involves a risk. If the defendants here had supplied one of their own barges which had not been examined on the blocks for a week or a month, they would, in one sense, have been running a risk, and running it deliberately. Yet it could scarcely be said, if there was nothing more, that they were acting recklessly in so doing.

The essence of the matter, therefore, as I see it, in the definition of DEVLIN, J., must be in the word "unjustifiable"—"deliberately running an unjustifiable risk". What is meant by "deliberately running an unjustifiable risk"? Is "unjustifiable" to be regarded subjectively or objectively? Counsel for the defendants says that it must be viewed subjectively. The test must be

(12) [1937] 2 All E.R. at p. 556; [1937] A.C. at p. 583.
(13) [1954] 2 Lloyd's Rep. 463. (14) [1954] 2 Lloyd's Rep. at p. 478.
(15) [1954] 2 Lloyd's Rep. at p. 475.

A whether the doer of the act himself realised when he did the act, not only that he was taking a risk, but that that risk was unjustifiable. That would mean that if a man drove a car exceptionally fast along a private highway he could not properly be said to be driving recklessly if he himself was so confident of his own skill, or so obtuse or so selfish that he regarded the risk as justifiable. That is a proposition which I cannot accept. If, however, the question whether B the risk is justifiable is to be viewed objectively by the standard of the reasonable man possessed of the knowledge and the circumstances which the doer of the act has or ought to have had, then I do not see that the deliberateness of the taking of the risk is an essential element. In my view, one who does something which he himself honestly, but foolishly, regards as involving no risk, may be reckless.

C The plaintiffs say that this question of recklessness must be viewed against a fourfold background: first, the contract to be performed by the barge was one between the goods owner, that is the plaintiffs, and the carrier, the defendants; the defendants were concerned with the interests of the plaintiffs, whose goods they were going to carry for reward in a barge. Second, the clause here is an exception to the absolute obligation to provide a seaworthy craft. Third, the D goods owner cannot know, and is not concerned with the question, whether the carrier is by nature optimistic or pessimistic about his barges; and, fourth, the goods owner cannot know, and is not concerned with the question, whether the barge belongs to the carrier or is hired by him, and, if hired, whether hired by the day or for a longer period; he cannot know whether in fact the carrier has seen fit to inspect the hired barge fully, including the bottom, when he takes E it on hire. The plaintiffs then submit that "reckless" means devoid of caution, regardless of consequences, rash or heedless. They submit that negligence of a high degree would amount to recklessness, though they concede that mere negligence does not amount to recklessness.

In my view, "recklessly" means grossly careless. Recklessness is gross carelessness—the doing of something which in fact involves a risk, whether the F doer realises it or not; and the risk being such having regard to all the circumstances, that the taking of that risk would be described as "reckless". The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually realised the likelihood. The extent of the damage which is likely to follow is another element, not the extent which the doer of the act, in his wisdom or folly, happens to foresee. If the risk is slight G and the damage which will follow if things go wrong is small, it may not be reckless, however unjustified the doing of the act may be. If the risk is great, and the probable damage great, recklessness may readily be a fair description, however much the doer may regard the action as justified and reasonable. Each case has to be viewed on its own particular facts and not by reference to any formula. The only test, in my view, is an objective one. Would a reason- H able man, knowing all the facts and circumstances which the doer of the act knew or ought to have known, describe the act as "reckless" in the ordinary meaning of that word in ordinary speech? As I have said, my understanding of the ordinary meaning of that word is a high degree of carelessness. I do not say "negligence", because "negligence" connotes a legal duty.

Here the particular question is whether there was or was not a legal duty. I If the defendants did not act recklessly they were under no legal duty to supply a barge which was seaworthy. Nevertheless, their conduct in supplying a barge which was unseaworthy might be careless; or it might be so careless, so much in disregard of possible damage as a consequence, as to qualify for the description "reckless".

I must now look at the grounds on which the plaintiffs assert that the defendants recklessly supplied an unseaworthy barge. That they did supply an unseaworthy barge is admitted. The plaintiffs submit that the defendants acted recklessly in that the only precaution which they took as regards the barge

Otter was to require their lighterman to inspect it when he took it over at Hay's Roads. That inspection was admittedly primarily for the purpose of ensuring that the defendants were not subject to claims for any pre-existing defect when they were taking the barge back at the end of the hire. It is what is known as an "in and out inspection". Such an inspection could not show whether there were such defects as loose rivets or cracks unless these were below the waterline in the barge when let. Therefore, this inspection provided no real protection against the possibility of unseaworthiness which would damage the plaintiffs' goods when the barge was laden. The hiring was subject to a clause —the letters' clause (16)—by which the defendants, as they were well aware, were clearly warned by Hay's that Hay's took no responsibility for the seaworthiness of the barge, and advised the defendants to inspect it carefully themselves for this purpose. The defendants knew nothing of the past history of the barge—her age, her past record of troubles or repairs; whether or not she had been recently overhauled, or whether, indeed, she was kept regularly and properly maintained. They did not ask for nor did they receive any particulars as to these matters. They really, so the plaintiffs submitted, relied only on the general reputation of Hay's, and from the defendants' own past dealings with Hay's, as the result of which they regarded Hay's as good and careful people. True, the records disclosed in the action showed no previous trouble with Hay's barges hired by the defendants. These records were shown to be, in at least one instance, incomplete as regards damage to cargo in barges hired by the defendants.

I leave out of account for the moment the conduct of Hay's. The defendants' answer to the plaintiffs' submissions, as I have summarised them, is shortly this. It would have been quite impracticable for the defendants to take each barge on daily hire out of the water for full examination at the commencement of its hire. It has never been done by any of the defendants' rivals in practice, or by anyone in the Port of London; there simply would not be the facilities to do it, nor the supply of barges at busy times in view of the delay involved. The defendants do not do it with their own barges. They were fully entitled to rely on the unchallenged good reputation of Hay's and on their own past experience. They were entitled to assume that Hay's maintained their barges properly and overhauled them completely as required, just as the defendants themselves did. True, they had not made inquiries as to the past history of the Otter or when she had been last put on blocks for full inspection. There was no obligation on them to do so, and they certainly were not reckless in not doing so. Moreover, if they had done so, they would have found that the Otter had very recently completed a full inspection and full overhaul costing over £1,000. Therefore, even if there was something wrong in their failure to make inquiries, that failure in no way contributed to the plaintiffs' loss, because they would have been satisfied by the truthful answer to their inquiries. This system of dealing with hired barges was, so say the defendants, unexceptional, and no suggestion has been put to the defendants' witnesses how, as a practical matter, it could be improved. The plaintiffs could not legitimately complain of the fact that a hired barge was supplied to carry their goods, since the London Lighterage Clause gave the defendants liberty so to do.

If the submission of counsel for the defendants as to the meaning of "recklessly" were right, there would plainly be no case of recklessness. The defendants did not deliberately take a risk which they, or anyone who could be regarded as their servant, regarded as in any way unjustified. I have rejected that submission, but, on the view which I take of the meaning of recklessness—which I do not think differs materially from the submission of the plaintiffs—I reach the same result as if I had accepted the submission of counsel for the defendants. I see no proper ground for holding that the defendants acted recklessly in supplying this barge, unseaworthy though she was. In my judgment, the

(16) See p. 398, letter F, ante.

A defendants have discharged the onus on them of disproving anything which could properly be called recklessness within my understanding of the meaning of that word. Indeed, I find it difficult to see how there was anything which could properly be called carelessness in their conduct. Their lighterman was free from any blame in not discovering the defect earlier. I see nothing of which complaint can legitimately be made in either the fact that the defendants hired B this barge from Hay's, or in their system, having regard to the general good reputation of Hay's and the defendants' own past experience of them. If they had had reason, from past experience or otherwise, to doubt the standard of Hay's barges, the position might have been very different.

There was a further facet of this case with which I need not deal at length. It was submitted on behalf of the plaintiffs—though I think it is fair to say that C it was not strongly pressed—that the defendants should be held to be vicariously reckless if Hay's were reckless, and that the onus was on the defendants to show that Hay's had not been reckless in supplying the Otter in her unseaworthy condition. There was a good deal of evidence, including expert evidence, as to the unseaworthiness of the Otter, and how and why it came about that she was in such a condition after a full overhaul on the blocks. I do not propose to D go into this matter at length because in my judgment even if it were to be shown, or not disproved, that there was something which could be called recklessness on the part of Hay's in their maintenance and supplying of this barge, it would not affect the defendants' defence under the London Lighterage Clause on the facts of this case. However, it is right that I should say that, in my view, the conduct of Hay's could not properly be called reckless. The defect in the E barge cannot, I think, be attributed to mere bad luck, as one of the witnesses for Hay's was disposed to think. [HIS LORDSHIP went on to say that there was a failure by Hay's to exercise due care, but this fell short of recklessness.]

I note that in *The Janice* (17), in the Mayor's and City of London Court, JUDGE BLOCK held that a hirer of barges, such as the defendants, could not be held to have acted recklessly vis-à-vis the owners of the goods carried in the F hired barge merely because the barge that is hired had plates which were so thin that the barge was unseaworthy. I agree with that view.

[HIS LORDSHIP made some observations on the use made of the London Lighterage Clause by the majority of barge-owners in the port of London, comparing the situation with that which led to the international agreement of the Hague Rules preventing the use of clauses limiting liability for unseaworthi- G ness except in cases where due diligence had been exercised to make the vessel seaworthy. HIS LORDSHIP concluded:] For the reasons which I have given, the defendants succeed in establishing their exemption from liability under the London Lighterage Clause, which is a term of this contract, and therefore the plaintiffs' claim fails.

Judgment for the defendants.

Solicitors: *Ince & Co.* (for the plaintiffs); *Clyde & Co.* (for the defendants).

[*Reported by* KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

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(17) [1957] 2 Lloyd's Rep. 48.

R. *v.* TILLEY. R. *v.* TILLEY.

[COURT OF CRIMINAL APPEAL (Ashworth, Salmon and Winn, JJ.), July 27, 1961.]

Criminal Law—Evidence—Handwriting—Necessity for expert evidence to assist jury—Criminal Procedure Act, 1865 (28 & 29 *Vict. c.* 18), *s.* 8.

The appellants were charged with the larceny of a motor car. They produced a receipt (exhibit 1), purporting to be that of the sale of the car to them for £4, signed by a Mr. Warren who, they said, had sold it to them. This receipt was produced at their trial and both appellants were asked to write on a piece of paper the self-same words as appeared on the receipt (exhibits 4 and 5). It was the prosecution's case that the appellants had armed themselves with the receipt before stealing the car, though the receipt might have been written by someone other than either of the appellants. No handwriting expert was called to compare exhibits 4 and 5 with exhibit 1 and the matter was not pursued by the prosecution. Apparently, however, arrangements were made to have exhibits 4 and 5 photographed during the adjournment after closing speeches, and for magnifying glasses to be made available for the jury when the case was summed up on the next day. In the summing-up considerable comment was made on exhibits 4 and 5 and the jury were invited to consider the exhibits with care so as to make up their minds whether exhibit 1 was a document fabricated by one of the appellants. On appeal against conviction,

Held: to leave a question of handwriting to be decided by a jury unassisted by expert evidence was a dangerous course that should not be followed; in the circumstances of the present case the comments may have weighed heavily with the jury and the convictions would be quashed.

Observations of SALTER, J., in *R.* v. *Rickard* ((1918), 13 Cr. App. Rep. at p. 143) applied; ruling of CROOM-JOHNSON, J., in *R.* v. *Day* ([1940] 1 All E.R. at p. 403) approved.

Appeals allowed.

[As to evidence of handwriting, see 10 HALSBURY'S LAWS (3rd Edn.) 872, para. 1691, note (p) and Supplement; and 15 HALSBURY'S LAWS (3rd Edn.) 324, para. 591; and for cases on the subject, see 14 DIGEST (Repl.) 298, *2782*; 22 DIGEST (Repl.) 194, *1811*, 195, *1825*, 196, *1831*, *1832*.

For the Criminal Procedure Act, 1865, s. 8, see 9 HALSBURY'S STATUTES (2nd Edn.) 589.]

Cases referred to:

R. v. *Crouch*, (1850), 4 Cox, C.C. 163; 22 Digest (Repl.) 188, *1724*.

R. v. *Day*, [1940] 1 All E.R. 402; 162 L.T. 407; 104 J.P. 181; 27 Cr. App. Rep. 168; 14 Digest (Repl.) 298, *2782*.

R. v. *Harvey*, (1869), 11 Cox, C.C. 546; 22 Digest (Repl.) 195, *1829*.

R. v. *Rickard*, (1918), 88 L.J.K.B. 720; 119 L.T. 192; 82 J.P. 256; 13 Cr. App. Rep. 140; 22 Digest (Repl.) 196, *1831*.

Appeals.

The appellants, George Richard Tilley and Leonard Thomas Tilley, were convicted on Jan. 20, 1961, at West Kent Quarter Sessions before the deputy chairman and a jury of the larceny of a motor car at some date unknown between Sept. 27, 1960, and Sept. 30, 1960, contrary to s. 2 of the Larceny Act, 1916. The deputy chairman had withdrawn from the jury an alternative count against both appellants of receiving the motor car knowing it to have been stolen contrary to s. 33 (1) of the Larceny Act, 1916. George Tilley was sentenced to three years' corrective training and Leonard Tilley to eighteen months' imprisonment. They both applied for leave to appeal against their convictions, and on June 30, 1961, the court (ASHWORTH, PAULL and ELWES, JJ.), gave leave to appeal generally. During the hearing of the appeal Mr. Gurrin, a handwriting expert,

A gave evidence on the documents concerned with leave of the court. The facts appear in the judgment of the court.

R. M. G. Simpson for the appellants.
G. H. Rooke for the Crown.

ASHWORTH, J., delivered the following judgment of the court: The B charge arose out of an incident which occurred late in September, 1960. It seems that an American serving officer or man left a Morris car by the side of the road. Not long afterwards, according to these two appellants, they were in that part of the world, and they came on a man named Warren who was standing by the car, and he sold it to them for £4, the value according to the owner being £7. These two men, according to them, took the precaution of obtaining from C Warren a receipt, and that receipt is exhibit 1. On Sept. 29, 1960, the day after the date which the receipt bears, these two men were found in broad daylight in the morning about two miles away from the main road up a lane engaged in breaking up this motor car with oxy-acetylene apparatus. They were asked what they were doing by two police officers, and they said that the car was in fact their property and they had bought it that morning for £4, and they produced D the receipt to corroborate their statements. The police officers did not observe that the date on the receipt did not tally with the statement that the car had been bought that morning and handed the receipt back to the men. They were in due course charged with larceny and stood their trial.

The trial seems to have proceeded with commendable speed, and in the course of the afternoon both the appellants were giving evidence, and in the course of E cross-examination each of them was asked to write out on a fresh piece of paper the self-same wording as appears on exhibit 1, and so there came into existence exhibits 4 and 5 signed by Leonard and George respectively. Nothing turns on exhibit 5, which was plainly written in a different hand from that which wrote exhibit 1, but it was thought by some that exhibits 1 and 4 showed signs of similarity. Counsel for the Crown perfectly properly did not pursue the matter, F having obtained exhibit 4 from Leonard. He took a look at it and there did not appear to him, as he has informed us, to be any striking similarities, and so he left it. In passing, it may be said that the Crown case was that while exhibit 1 might have been written by someone other than the accused, it was a document with which they had armed themselves prior to the theft of the car so that they could afford at once an explanation of their possession of it.

G At the conclusion of the evidence for the defence, speeches were made, and then the court adjourned, and it is a fair inference that at the adjournment arrangements were made to have the two new exhibits photographed and magnifying glasses made available for the jury, and the deputy chairman summed up the following day. In the course of his summing-up, the matter not having been mentioned again after the production of exhibits 4 and 5, he invited the jury to H consider these exhibits in relation to exhibit 1, the document produced to the police, and in a number of pages of the transcript there appear comments made by the deputy chairman as to the similarities of various letters appearing in each document, and there is no doubt that he did invite the jury—leaving it entirely to them to reach any decision which they thought right—to consider with care these documents so that they might make up their minds whether I exhibit 1 was a genuine receipt received from the vendor of the car, Warren, or was a fabricated document which Leonard Tilley brought into existence, forearming himself before inquiry. This was the first time this matter had really been canvassed, and criticism is now made by counsel on behalf of the two appellants that it was not right or fair that the defence should suddenly be met with this kind of address to the jury on a topic which had never been ventilated throughout the trial. Moreover, it was said that the topic was one on which the Crown had not relied and in regard to it if the defendants had had an opportunity they might have been in a position to call expert evidence. Those criticisms

were, we think, of considerable force. But the matter goes even further. The question arises whether in any case it was proper for the learned deputy chairman to indulge in comments himself about these documents and then hand them to the jury for their consideration and decision without any evidence having been called to assist them on that issue.

The matter has come before the court in more than one previous case. One to which our attention was called was *R.* v. *Harvey* (1). The matter was also raised, in *R.* v. *Rickard* (2). In that case SALTER, J., giving the judgment of this court said this (3), after referring to s. 8 of Lord Denman's Act (4):

> "That case [i.e., *R.* v. *Crouch* (5)] does not decide what degree of preparation is necessary to constitute an expert, but it does decide that a person is not entitled to give such evidence if his only knowledge on the subject is that acquired in the course of the case. That was the position of the police officer, and the position of Busby is less satisfactory. Therefore no expert evidence at all was given in the case. This court does not decide that expert evidence in such cases is necessary, and the observations of BLACKBURN, J., in *R.* v. *Harvey* (1) do not so decide, but it is clear from the nature of things that to leave a question of handwriting to a jury without assistance is a somewhat dangerous course."

In the present case there was no evidence, not even questions directed to alleged similarities, and the matter only arose in the course of the summing-up. This court indorses and re-affirms the statement of principle to be found in the judgment of SALTER, J., on behalf of this court in *R.* v. *Rickard* (6). A jury should not be left unassisted to decide questions of disputed handwriting on their own.

It is also to be noted that although *R.* v. *Day* (7) raised in the main an utterly different issue, the question of handwriting did occur, and the learned judge, CROOM-JOHNSON, J., ruled that "the jury could not be asked to [compare handwriting] without some assistance by way of expert evidence", and that ruling was once again in conformity with the decision in *R.* v. *Rickard* (2).

In the view of this court it is right to say that the course pursued by the learned deputy chairman was not in accordance with the principles previously laid down, and should not be followed in any other case. On the other hand, this court has had to consider with some care whether the effect of what was done was so serious as to render it incumbent on this court to allow the appeal and release these two appellants. The reason why that matter has caused some misgiving is that undoubtedly there was some strong evidence against these two men, and the jury did not believe them but, having regard to the importance which the learned deputy chairman evidently attached to the question of handwriting and the possibility that the receipt, exhibit 1, was fabricated, this court feels that his comments may have weighed heavily with the jury and, in the circumstances, it would not be right to apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. Accordingly, these two appeals must be allowed and the convictions quashed.

Appeals allowed. Convictions quashed.

Solicitors: *Linsley-Thomas & Co.* (for the appellants); *N. K. Cooper*, Maidstone (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(1) (1869), 11 Cox, C.C. 546. (2) (1918), 13 Cr. App. Rep. 140.
(3) (1918), 13 Cr. App. Rep. at p. 143.
(4) I.e., the Criminal Procedure Act, 1865, s. 8 of which reads: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute".
(5) (1850), 4 Cox, C.C. 163. (6) (1918), 13 Cr. App. Rep. at pp. 142, 143.
(7) [1940] 1 All E.R. 402 at p. 403; 27 Cr. App. Rep. 168 at p. 170.

A

FINKLE v. STRZELCZYK AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), July 21, 24, 1961.]

Rent Restriction—Possession—Sub-letting of whole of premises without consent of landlord—No evidence of there being such sub-letting at commencement of proceedings—Jurisdiction to make order for possession—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *Sch.* 1, *para.* (*d*).

B

The defendant was the statutory tenant of premises consisting of four rooms. Each room was equipped as a flatlet with a cooker and, on the evidence, it was clear that the defendant carried on the business of letting the rooms as separate dwellings as and when he could. The evidence did not establish, however, occupation of the whole of the premises by sub-tenants at one time for more than a period between some date in August, 1960, and Sept. 3, 1960. On appeal from an order for possession made at the instance of the landlord,

C

D

Held: (i) the court had power to give judgment for recovery of possession of premises within the Rent Restrictions Acts, on the ground of the sub-letting without consent of the whole premises (viz., under para. (d) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933), although the whole of the premises were not proved to have been sub-let when the action was begun and although the period when, on the evidence, it was established that the whole of the premises were sub-let was only of limited duration.

E

(ii) in the circumstances it was reasonable to make an order for possession in the present case.

Oak Property Co., Ltd. v. *Chapman* ([1947] 2 All E.R. 1) considered and dictum of SIR RAYMOND EVERSHED, M.R., in *Hyde* v. *Pimley* ([1952] 2 All E.R. at p. 104) explained.

F

Appeal dismissed.

[As to the recovery of possession for sub-letting without consent, see 23 HALSBURY'S LAWS (3rd Edn.) 821, para. 1601; and for cases on the subject, see 31 DIGEST (Repl.) 702, *7916-7919* and 3rd DIGEST Supp.

For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (d), see 13 HALSBURY'S STATUTES (2nd Edn.) 1060.]

G

Cases referred to:

Hyde v. *Pimley*, [1952] 2 All E.R. 102; [1952] 2 Q.B. 506; 3rd Digest Supp.

Oak Property Co., Ltd. v. *Chapman*, [1947] 2 All E.R. 1; [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364; 31 Digest (Repl.) 711, *7979*.

H

Appeal.

This was an appeal by Josef Strzelczyk, the first defendant, against an order made by His Honour JUDGE MAIS in Marylebone County Court and given on Feb. 6, 1961, adjudging that the plaintiff, Alexander Finkle, recover against the defendants possession of three rooms on the second floor and one room of the third floor of 92, West End Lane, London, N.W.6. The premises had been let to the first defendant and on the determination of the contractual tenancy by notice to quit in 1954 he had remained in possession as a statutory tenant. The defendant used the premises to carry on the business of letting rooms equipped as separate dwellings, each room being equipped as a flatlet with a cooker. The plaintiff had apparently not objected to the sub-letting of some of the rooms, but had not consented to the sub-letting of all of them. It was averred by the plaintiff in his statement of claim that in 1956 an order for possession of the premises had been made (its operation being conditionally suspended) on the ground of nuisance by the first defendant. The plaintiff alleged that the

I

first defendant had left the premises and no longer resided there and that he had sub-let the whole of the premises, by sub-letting one of the four rooms to a Miss Turkisch (the second defendant) another to Mr. Kutubu (the third defendant), another to Mr. Kanick-Martins (the fourth defendant) and the other to Mr. Ojosipe (the fifth defendant), as furnished sub-tenancies. By his defence the first defendant denied that he had sub-let the whole of the premises, although from time to time he lawfully sub-let some rooms furnished, and alleged that the second defendant was his sub-tenant until 1956 when she left and that she returned in 1959 since when she had resided on the premises as a licensee of the first defendant and had paid no rent. The second defendant was the first defendant's mistress, and he slept with her from time to time on the premises. The county court judge held on the facts that the second defendant was a sub-tenant of the first defendant and that the whole of the premises was sub-let without the consent of the plaintiff for a period in 1960, from August to October, and, considering it reasonable so to do, he made an order for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (d) (1). The first defendant appealed, inter alia, on the ground that the judge misdirected himself as to the meaning and effect of para. (d) and in particular as to the words " without the consent of the landlord ". The other defendants did not appeal.

L. A. Blundell, Q.C., and *G. Dobry* for the appellant, the first defendant.
Aron Owen for the respondent, the plaintiff.

LORD EVERSHED, M.R., having described the decision of the county court judge as just and the points raised by the first defendant as technical, held that the judge was entitled to find that the relationship between the first and second defendants was that of tenant and sub-tenant and that, though the period during which all the rooms were occupied by sub-tenants at one time was not, as the judge had found, from August to October, 1960, but only from some date in August to Sept. 3, yet, in the circumstances of the case, it was reasonable to make an order for possession of the premises, continued: There remains, however, a last point. It was said by counsel for the first defendant that, although the language (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (d) seems, on the face of it, clear enough, none the less in order that the court can eject a statutory tenant, it must be shown that the sub-letting envisaged in the paragraph continues at the date when the proceedings commence. I read again the paragraph as far as relevant, because it quite obviously says no such thing:

> " If . . . (d) the tenant without the consent of the landlord has at any time after [a date in 1923] sub-let . . . the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let . . . "

It is plain that the language used means that, if the tenant has done that thing at any time after the date specified, then, assuming reasonableness, the court is empowered to make an order; but it is said that decisions of this court, binding on us, compel a different conclusion. We were first referred to *Hyde* v. *Pimley* (2). In that case the dispute was determined by the circumstance that the landlord had indubitably assented to a sub-letting which might otherwise have been objectionable or made the basis of a proceeding under para. (d),

(1) The relevant terms of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (d) are: " A court shall . . . have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if— . . . (d) the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let; . . ."

(2) [1952] 2 All E.R. 102; [1952] 2 Q.B. 506.

A and on that ground was disentitled to claim possession. The relevant passage in the headnote is (3):

> "Accordingly where a tenant sub-let the whole of a dwelling-house in breach of his tenancy agreement not to sub-let without the consent of the landlord, but the landlord continued to receive rent from the tenant after becoming aware of the sub-letting and subsequently terminated the tenancy B by notice to quit:—*Held*, that the landlord's conduct amounted to a consent to the sub-letting, that para. (d) was accordingly excluded . . ."

In other words, it was said that he could not rely on the fact that there had been a sub-letting at one period without consent, when it was clearly proved that he had later consented to the sub-letting, had accepted the tenant as a C statutory tenant notwithstanding, and had, over an appreciable time, taken rent from him. It seems to me that that conclusion, if I may say so, is obviously sensible as well as just; and in my judgment (4) I referred to certain language of LORD NORMAND (Lord President) in an earlier case (5), namely:

> "I am clear that the words 'without the consent of the landlord' in para. (d) of Sch. 1 to the Act of 1933 mean without actual consent given D by the landlord either expressly or by implication . . ."

Shortly before that reference, I am recorded, in reading the judgment of the court, as saying this (4):

> ". . . this court held in *Oak Property Co., Ltd.* v. *Chapman* (6) that, although before the issue of the proceedings there had been a sub-letting within the E strict language of para. (d), the landlord could not invoke the paragraph if at the date of the summons the tenant had, in fact, regained possession of part of the premises—a conclusion which seems to indicate that the paragraph is not to be interpreted by a strict adherence to the tenses and times referred to."

In the *Oak Property* case (6), the point was quite a different one. Put very F briefly, the matter stood thus. The tenant had sub-let part of the premises to a Mrs. Jacobson as a furnished letting, though in circumstances, be it noted, which made it quite clear that the tenant was not intending by any means to abandon the right to return thereto. Then, during Mrs. Jacobson's occupation, the tenant sub-let the remaining room to the second defendant in the action as an unfurnished letting. Again it may be pointed out that it was a temporary matter, G for the convenience of the second defendant, pending her then intended marriage. When the letting to Mrs. Jacobson, the first sub-letting, took place, it was done without the consent of the landlord, but at a later stage, consent was given to that sub-letting, and also to the sub-letting to the second defendant, for the landlord had, with full knowledge of the sub-letting, accepted rent from the tenant, the first defendant. Moreover, not long afterwards Mrs. Jacobson had H departed and the tenant had himself resumed actual occupation of that part of the premises which had been sub-let to her. Nevertheless, the sub-letting to the second defendant started, albeit weekly only, before the consent to Mrs. Jacobson's sub-letting had been given and before the tenant's resumption of personal possession. The landlord brought proceedings for possession against both the statutory tenant and the second defendant, and the question was I whether the second defendant could rely on s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and could say that she was a person to whom there had been a lawful sub-letting.

The question was then put in this form. Since, when the sub-letting to the second defendant took place, Mrs. Jacobson was still there, no right could be

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(3) [1952] 2 Q.B. 506. (4) [1952] 2 All E.R. at p. 104; [1952] 2 Q.B. at p. 511.
(5) *Dalrymple's Trustees* v. *Brown*, 1945 S.C. at p. 193.
(6) [1947] 2 All E.R. 1; [1947] K.B. 886.

conferred on the second defendant which would bring her within s. 15 (3), for that which had been done, namely, the grant of the sub-tenancy to her, had amounted at the time when it first took place to a sub-letting of part, the whole of the rest being already sub-let. That argument was rejected, and the court came to the conclusion that, since Mrs. Jacobson had gone and the tenant had resumed possession of the premises, then the tenancy to the second defendant could be looked at afresh as from that date. It would seem to me, therefore, that the problem with which we are now concerned did not arise at all. The statutory tenant, the first defendant in the action, somewhat surprisingly consented to judgment, and never contested the right of the landlord to possession, which, if counsel for the first defendant's argument is right, I gather that the statutory tenant clearly could have done. In those circumstances, the argument must have been of this nature: that a sub-tenant, who otherwise might be within s. 15 of the Act of 1920 and entitled to invoke its protection, is prevented from doing so, if the sub-letting is "unlawful" in the sense that, when it first began, the circumstances were such that the landlord could have invoked para. (d) of Sch. 1 to the Act of 1933 (whether or not he would have got an order is another matter); and in those circumstances the sub-tenant could not be said to have any such interest in the dwelling-house which would support an invocation of s. 15 of the Act of 1920. That argument was rejected. The rejection of the argument does not imply, and nothing in SOMERVELL, L.J.'s judgment supports the view, as far as I can see, that this para. (d) of Sch. 1 to the Act of 1933 can be invoked only if the circumstances mentioned in it exist at the date when the proceedings for possession are initiated. It is important to bear in mind that what para. (d) does is simply to say that the court, if the events therein mentioned happen, is given jurisdiction which it may exercise if it thinks, in other respects, that it is reasonable so to do. The doing of that which para. (d) defines is not itself an illegality. It does not automatically put an end to any right of the statutory tenant. Therefore, as I think, *Oak Property Co., Ltd.* v. *Chapman* (7) is no authority for the present proposition when regard is had to the facts. My trouble has been what the citation of the case in the passage which I have read seems to state. I think that what is there referred to is the fact that the paragraph could not be relied on as a bar to a claim for protection by a sub-tenant in the circumstances there stated; but I do not think that the statement ought to be treated as having been intended to go further.

In those circumstances I am unable to accept the view that we should construe para. (d) contrary to what I conceive to be its plain language. At best, these statements are dicta, and I therefore reject this ground of counsel for the first defendant's argument. In the circumstances, the judge was amply justified in the conclusion which he reached, and I would dismiss the appeal.

HARMAN, L.J.: I agree. The first defendant is a man who for years past has succeeded in wresting the provisions of the Rent and Mortgage Interest Restrictions Acts to his own advantage. He has in fact carried on, in the rooms of which he is a protected tenant, a highly profitable business of a boarding-house, and has defied his landlord to eject him. In my judgment, there was plenty of evidence that this was a regular course of business, and the course of the business was to let all the rooms whenever they could be let. Where there is evidence of a general course of sub-letting, it does not seem to me to matter that every room is not proved to be let on every day. Even if at the date of the plaint no rooms were sub-let, an order might still be made in circumstances such as those proved here.

In my judgment, nothing in *Oak Property Co., Ltd.* v. *Chapman* (7) involved construing para. (d) of Sch. 1 to the Act of 1933 so as to allow it to operate only if the circumstances exist at the time when the plaint is issued. So to

(7) [1947] 2 All E.R. 1; [1947] K.B. 886.

A construe it would fly in the face of the language used; and the observation in *Hyde* v. *Pimley* (8), to which my Lord has referred, does not constrain us to do anything of the sort. [HIS LORDSHIP then considered the evidence as to the relationship between the first and second defendants and stated that there was ample evidence to support the finding that their relationship was that of tenant and sub-tenant, and concluded:] I would dismiss the appeal.

B

DONOVAN, L.J.: I agree and have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *S. L. Karpinski* (for the first defendant); *Israel, Joslin & Co.* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

C

PERFORMANCE CARS, LTD. *v.* ABRAHAM.

D [COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), July 26, 27, 28, 1961.]

Damages—Measure of damages—Separate tortfeasors—Successive torts—Each tort, if occurring alone, would render necessary the same work of repair—Judgment for damages, including cost of repair, recorded against first tortfeasor but unsatisfied—Whether second tortfeasor's liability in damages included the cost of that work.

E

The plaintiffs were the owners of a motor car which was damaged by a collision with a motor car driven by the defendant, who admitted liability. The damage to the plaintiffs' car was such as would necessitate respraying the whole of the lower part of the body of such a car. About two weeks earlier the plaintiffs' car had been involved in another collision which had also made respraying of the lower part of the car body necessary. The plaintiffs obtained judgment in default against the driver responsible for the first collision but that judgment was not satisfied, and at the date of the second collision the car had not been resprayed. The question for the court was whether the plaintiffs were entitled to recover as damages from the defendant the cost of respraying the lower part of their car.

F

G **Held:** the plaintiffs were not entitled to recover the cost of respraying from the defendant, because that damage did not flow from his wrongful act.

Appeal allowed.

[**Editorial Note.** The decision in the present case where the two independent acts of negligence were separated by a substantial period of time and may be said, perhaps, not to have caused the same damage, may be compared with the dicta of MORRIS, L.J., in *Drinkwater* v. *Kimber* ([1952] 1 All E.R. at p. 705, letter G, and p. 706, letter C), which show that where the defendant's negligence and the plaintiff's negligence concurrently cause damage to a third person the whole of that damage can be regarded as flowing from the defendant's negligence; in that case, however, the plaintiff was not liable in tort to the third person since he was her husband. Compare also the illustration of separate wrongful successive acts causing injury put by DEVLIN, L.J., in *Dingle* v. *Associated Newspapers, Ltd.* ([1961] 1 All E.R. at p. 916, letter C).

H

I

As to the measure of damages in tort, see 11 HALSBURY'S LAWS (3rd Edn.) 251, 252, para. 423; and for cases on the subject, see 17 DIGEST (Repl.) 101, 102, *155-173.*

As to the exclusion of collateral matters in mitigation of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 293, para. 481.

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(8) [1952] 2 All E.R. at p. 104; [1952] 2 Q.B. at p. 511.

As to a second action for damages lying on a separate cause of action although the facts giving rise to the causes of action are similar, see 11 HALSBURY'S LAWS (3rd Edn.) 228, para. 395.] A

Cases referred to:

Carslogie, The, Carslogie Steamship Co., Ltd. v. *Royal Norwegian Government (Represented by the Norwegian Shipping & Trade Mission)*, [1952] 1 All E.R. 20; [1952] A.C. 292; 3rd Digest Supp. B

Haversham Grange, The, [1905] P. 307; 74 L.J.P. 115; 93 L.T. 733; 10 Asp. M.L.C. 156; 29 Digest 246, *1982*.

Marine Insurance Co. v. *China Transpacific S.S. Co. (The Vancouver)*, (1886), 11 App. Cas. 573; 56 L.J.Q.B. 100; 55 L.T. 491; 6 Asp. M.L.C. 68; 29 Digest 245, *1980*.

Shearman v. *Folland*, [1950] 1 All E.R. 976; [1950] 2 K.B. 43; 36 Digest (Repl.) 205, *1072*. C

Appeal.

This was an appeal from the judgment of His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS, at Brentford County Court on Feb. 16, 1961, giving judgment for the plaintiffs for £110 15s. and costs. That sum included £75, being the cost of respraying the lower part of the plaintiffs' motor car which had been damaged in a collision with the defendant's car. The defendant appealed only as to the award of that sum on the ground that respraying had been rendered necessary by a previous collision. D

J. D. W. Hayman for the appellant, the defendant.

D. P. F. Wheatley for the respondents, the plaintiffs. E

Cur. adv. vult.

July 28. The following judgments were delivered.

LORD EVERSHED, M.R.: This appeal has raised an interesting and novel point. On Feb. 25, 1960, the defendant when driving his own motor car collided with the Rolls-Royce motor car of the plaintiffs' being driven by one of the plaintiffs' directors. The collision was not serious and the defendant, the appellant in this court, has accepted full responsibility for the accident. The defendant's car struck the offside front wing and the bumper of the plaintiffs' Rolls-Royce and there is no dispute as to the damage strictly attributable to this injury in so far as it required that the dent in the wing should be hammered out and the bumper straightened and re-chromed. The plaintiffs' Rolls-Royce is of a kind known as " Silver Cloud ". The top of the motor car and the bonnet is painted black, but the lower part of the motor car, including the wings, were of a pale colour appropriate, I assume, to the description " Silver Cloud ". It has been conceded by the defendant that where damage is done, say to the wing, of a kind which occurred in the present case, it is necessary to respray the whole of the lower part of the body, since if only the damaged wing were resprayed the colour would be in obvious contrast to that of the rest of the lower part of the motor car. The claim for this item amounts to £75. F G H

Now it so happened that a fortnight earlier the plaintiffs' same motor car had been struck by another motor vehicle, the fault again being solely that of the other vehicle. This accident was also slight, but on this occasion the damage consisted of a bump in the back of the lower part of the Rolls-Royce motor car. The plaintiffs sued the owner of this other vehicle and recovered judgment by default for a sum of damages slightly larger than the claim against the present defendant, but the sum so recovered included the same amount of £75 in respect of respraying the whole of the lower part of the car, and again it is not in doubt, and for the same reason which has already been stated, that such a claim was properly made as part of the damage caused by this first collision. Unfortunately the plaintiffs have recovered nothing under their first judgment and it appears from what we have been told that it is extremely unlikely that they will do so. I

A The vital fact is that when the defendant hit the plaintiffs' motor car the work of restoration to the latter as the result of the first accident had not yet been done. In these circumstances it has been said by the defendant that he is not liable for the £75 claimed against him, being the cost of respraying the whole of the lower part of the body of the Rolls-Royce.

What is said may be quite simply thus expressed. At the date of the defen-
B dant's collision the Rolls-Royce's condition was such that it had then in any case to be resprayed so that the need for so doing did not arise from the defendant's wrongful act. On the other side it is said that here you have two separate tortfeasors and each must be liable for the consequences of his tortious act naturally and properly flowing from the respective wrongs. It is conceded by the plaintiffs that they could not recover the cost of respraying from both
C wrongdoers, the earlier motorist and the defendant, and they offer accordingly to assign to the defendant the benefit of the earlier judgment, at least so far as it relates to this part of the claim.

The point appears, as I have said, novel and interesting but, with all respect to the county court judge, I have come to the conclusion that the defendant's view is right and that he is entitled to succeed. In *Shearman* v. *Folland* (1)
D it was pointed out by ASQUITH, L.J. (2), delivering the judgment of the court, quoting from MAYNE ON DAMAGES (11th Edn.), p. 151, that "matter completely collateral, and merely res inter alios acta, cannot be used in mitigation of damages". So in that case it was held that the defendant could not deduct from the nursing home expenses incurred by the plaintiff the cost which the plaintiff might otherwise have expended in hotel bills, though I note that the
E defendant was entitled to make a deduction representing a sum per week for food. Were it otherwise, as ASQUITH, L.J., observed, a defendant might be allowed to say that his wrong had in fact conferred a financial benefit on a person of extravagant tastes who by his sojourn in a nursing home had saved himself what he might otherwise have paid at a palatial hotel. On similar grounds it is clear that a wrongdoer such as the defendant cannot make a
F deduction because the plaintiffs may happen to be covered by a policy of insurance against financial loss which they may in fact suffer. So it was said by counsel for the plaintiffs that their rights against the earlier car owner are something completely collateral. As ASQUITH, L.J., pointed out in the case cited, the maxim which he quoted is easier to formulate than to apply. What, for the purposes of cases such as the present, ought to be regarded as "matter
G completely collateral, and merely res inter alios acta"? It will be observed that I have, in making my reference, emphasised the two adverbs. The fact in the present case is that the defendant struck a motor car already damaged, the damage including the necessity in any case of respraying the whole of the lower part of the body. The case is to my mind rendered less easy because the respraying is something special to the character of this particular and rather
H luxurious motor car. The principle, as it seems to me, is the same as that applicable to the example stated by DONOVAN, L.J., in the course of the argument. Suppose a man wrongfully damages my motor car by splintering part of the windscreen so that, as the inevitable result, I must have a new windscreen, the cost of which is damage properly flowing from the wrongful act which I have suffered. Then, suppose before my windscreen has in fact been replaced,
I if you will, while I am driving my motor car to the place where the new windscreen is to be fitted, another wrongdoer strikes my car and splinters another part of my windscreen. If the plaintiffs are right, it must follow that I can claim, if I have not already actually recovered from the first wrongdoer, the cost of replacing the windscreen from the second. The same result would follow, as it seems to me, if the first damage to my windscreen had been my own fault or

(1) [1950] 1 All E.R. 976; [1950] 2 K.B. 43.
(2) [1950] 1 All E.R. at p. 978; [1950] 2 K.B. at p. 45.

if, in the present case, the plaintiffs had by their own fault damaged the back of their Rolls-Royce motor car. A

I do not multiply examples but I have in the end felt compelled to the conclusion that the necessity for respraying was not the result of the defendant's wrongdoing because that necessity already existed. The Rolls-Royce, when the defendant struck it, was in a condition which already required that it should be resprayed in any event. In my judgment counsel for the defendant was B able to derive some assistance from the two cases which he cited, namely, *The Haversham Grange* (3) in this court and *The Carslogie, Carslogie Steamship Co., Ltd.* v. *Royal Norwegian Government* (4) in the House of Lords. Both cases were concerned with damage suffered by ships. In the first case the second wrongdoing vessel objected to paying the dry dock charges incurred by the owners of the injured vessel on the ground that that vessel was already damaged C and dry dock charges at least as great as those with which the second wrongdoing vessel was being charged already had to be incurred by reason of the collision with the first vessel. This court, however, rejected that argument (which had found favour with SIR GORELL BARNES, P.) and held, following *Marine Insurance Co.* v. *China Transpacific S.S. Co.* (*The Vancouver*) (5), that such charges ought to be apportioned, though they did absolve the second D wrongdoing vessel from any claim for demurrage since the vessel would in any event have been out of commission for the period in respect of which the claim was made as the result of the first collision. In the second case the House of Lords considered *The Haversham Grange* (3) and certainly both VISCOUNT JOWITT and LORD NORMAND held that no valid distinction could be drawn between the demurrage and the dock dues claimed and that the Court of Appeal's E decision with regard to the latter could not be supported. Thus in *The Carslogie* (6) VISCOUNT JOWITT is reported to have said:

> "My Lords, I think that there can be no logical distinction between the claim for damages for delay and for dock dues, and, believing as I do that the decision as to damages for delay was correct, it follows, in my view, that the latter decision in respect of dock dues cannot be supported." F

It is true that both these cases were Admiralty cases but it does not seem to me that any difference of principle can arise as a consequence of that.

In my judgment in the present case the defendant should be taken to have injured a motor car that was already injured in certain respects, that is, in respect of the need for respraying; and the result is that to the extent of that need or G injury the damage claimed did not flow from the defendant's wrongdoing. It may no doubt be unfortunate for the plaintiffs that the collisions took place in the order in which they did. Had the first collision been that brought about by the defendant and had they recovered the £75 now in question from him, they could not clearly have recovered the same sum again from the other wrongdoer. It is, however, in my view irrelevant (if unfortunate for the plaintiffs) H that the judgment obtained against the other wrongdoer has turned out to be worthless. For the reasons which I have stated I would allow the appeal.

HARMAN, L.J.: The only issue before us in the present case was the quantum of damage arising from the collision between the defendant's Triumph motor car and the plaintiff's Rolls-Royce, negligence on the part of the defendant being admitted in this court. The particulars of damage are stated in the I particulars of claim and the only one relevant here is: "Cost of repainting lower part of Rolls-Royce, £75". It was admitted that taken by itself this would have been a proper charge because, owing to the nature of the paint used, merely to spray the damaged portion of the wing would not have produced

(3) [1905] P. 307; 10 Asp. M.L.C. 156.
(4) [1952] 1 All E.R. 20; [1952] A.C. 292.
(5) (1886), 11 App. Cas. 573; 6 Asp. M.L.C. 68.
(6) [1952] 1 All E.R. at p. 25; [1952] A.C. at p. 303.

A the uniform colour of the lower portion of the body which characterised the Rolls-Royce car. More plebeian owners do not share this privilege and must be content with a mere "bodge". But it transpired in the course of the hearing that a few days previously the Rolls-Royce car had suffered damage to the rear part of the paint that would have necessitated a similar operation. The plaintiffs had in fact a judgment against the other vehicle owner for that B sum which was unsatisfied. The defendant contended that he was not bound to submit to judgment for that sum over again. This argument did not rest on the unsatisfied judgment, but on the fact that the car with which the defendant collided was in a damaged condition and that the expense of respraying would have been necessary in any case. This is a curious point, but in my opinion it succeeds. It was argued for the plaintiffs that the already existing damage C was a "collateral" matter and ought not to be taken into account. Counsel relied on the decision of *Shearman* v. *Folland* (7) where it was held that in assessing damages for injuries to the plaintiff caused by the defendant's motor car, the defendant could not deduct hotel charges which the plaintiff would probably have incurred during the time when she was in a nursing home if the accident had not happened, hotel charges and nursing home fees not being in pari materia D and a collateral matter. ASQUITH, L.J. (8), reading the judgment of the Court of Appeal, cited MAYNE ON DAMAGES (11th Edn.), p. 151: "Matter completely collateral, and merely res inter alios acta, cannot be used in mitigation of damages". The way in which the plaintiff lived was for her to choose and the defendant could not take advantage of the fact that she was in the habit of living in an expensive hotel. The court did, however, allow a modest sum, E namely, the cost of the food which she was bound to have eaten. In the instant case the circumstances are quite different. The damage to the plaintiffs' car had actually happened and what the defendant collided with was a car already damaged and reduced in value to that extent. Counsel for the plaintiffs admitted that his argument would have been the same if his client had, on leaving his garage that morning, damaged his car himself by running it into a wall. F This seems to me to show the fallacy of the argument. I would allow the appeal.

DONOVAN, L.J.: I am of the same opinion. The question, as I see it, is this: What extra burden in the matter of respraying was put on the plaintiff company by the second collision? To my mind the answer must be: None, for the earlier collision had already imposed the burden of respraying on them. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellant, the defendant); *P. H. Berry & Co.*, Brentford (for the respondents, the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(7) [1950] 1 All E.R. 976; [1950] 2 K.B. 43.
(8) [1950] 1 All E.R. at p. 978; [1950] 2 K.B. at p. 45.

WIGLEY *v.* BRITISH VINEGARS, LTD.

A

[COURT OF APPEAL (Ormerod, Upjohn and Davies, L.JJ.), June 20, 21, 22, 23, July 28, 1961.]

Factory—Safe place of employment—Secure foot-hold—Secure "hand-hold"—Window cleaner on ladder needing to use both hands at once to hold and clean window—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 26 (2).

B

Statutory Duty—Breach—Causation—Breach of duty not contributing to injury—Plaintiff failing to show that safety apparatus, if provided, would have been used.

The occupiers of a factory employed an independent contractor to clean the factory windows, and provided him with a good and solid ladder to enable him to do so. In cleaning a window in a position from which he was liable to fall more than ten feet, the contractor, while standing on the ladder, which was properly positioned as regards its angle, had to use one hand to hold the upper part of the window shut and at the same time to use the other hand to clean the lower part of the window. While cleaning this window he fell and was killed. His widow brought an action for damages alleging breach of the occupiers' statutory duty, under the Factories Act, 1937, s. 26 (2), to provide at the place where the contractor was working "unless the place . . . affords secure foot-hold and, where necessary, secure hand-hold, means . . . so far as is reasonably practicable, by fencing or otherwise for ensuring his safety". The deceased had had a safety belt, but the bars or hooks to which to attach it were not provided at this window On the evidence, however, the Court of Appeal found that in all probability the deceased would not have used the safety belt if hooks or bars had been provided.

C

D

E

Held: the occupiers were not in breach of statutory duty under s. 26 (2) of the Factories Act, 1937, and the ladder afforded a secure foot-hold and hand-hold within that enactment because—

(i) the deceased's place of work was the ladder and the foot-hold that it provided, it being a good and solid ladder properly positioned, was not rendered an insecure foot-hold by the circumstance that he needed to use both hands on the window; the ladder satisfied the true test under s. 26 (2) in that it afforded a secure foot-hold to an experienced window cleaner acting in a way that such a man might reasonably be expected to act in circumstances that might reasonably be expected to occur (see p. 423, letters E to H, post).

F

G

Test formulated by DU PARCQ, J., in *Walker* v. *Bletchley Flettons, Ltd.* ([1937] 1 All E.R. at p. 175) applied.

(ii) "hand-hold" in s. 26 (2) meant something which a man could hold or grab from time to time as and when he wished to do so, and the upright of the ladder had provided a secure hand-hold (see p. 424, letter C, post).

H

Per CURIAM: even if there had been a breach of statutory duty under s. 26 (2), the plaintiff would not be entitled to recover damages, because she had failed to prove that the breach caused or materially contributed to the deceased's injury as, on the evidence, if the defendants had provided at the windows hooks or bars to which the deceased could have attached his safety belt, the deceased would not have used them (see p. 427, letter F, post).

I

Bonnington Castings, Ltd. v. *Wardlaw* ([1956] 1 All E.R. 615) applied.

Dictum of LORD GODDARD, C.J., in *Roberts* v. *Dorman Long & Co., Ltd.* ([1953] 2 All E.R. at p. 432), stated to have been overruled; *McWilliams* v. *Sir William Arrol & Co., Ltd.* ([1961] S.L.T. 265) followed.

Appeal allowed.

[As to a factory occupier's duty to any person liable to fall from his place of work, see 17 HALSBURY'S LAWS (3rd Edn.) 87, para. 143, text and note (f).

A For the Factories Act, 1937, s. 26 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 1018.]

Cases referred to:

Bates v. *Parker*, [1953] 1 All E.R. 768; [1953] 2 Q.B. 231; [1953] 2 W.L.R. 642; 3rd Digest Supp.

Bonnington Castings, Ltd. v. *Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613; B [1956] 2 W.L.R. 707; 3rd Digest Supp.

Drummond v. *British Building Cleaners, Ltd.*, [1954] 3 All E.R. 507; [1954] 1 W.L.R. 1434; 3rd Digest Supp.

Lavender v. *Diamints, Ltd.*, [1949] 1 All E.R. 532; [1949] 1 K.B. 585; [1949] L.J.R. 970; 24 Digest (Repl.) 1041, *140*.

McWilliams v. *Sir William Arrol & Co., Ltd.*, [1961] S.L.T. 265.

C *Manwaring* v. *Billington*, [1952] 2 All E.R. 747; 24 Digest (Repl.) 1077, *335*.

Nolan v. *Dental Mfg. Co., Ltd.*, [1958] 2 All E.R. 449; [1958] 1 W.L.R. 936; 3rd Digest Supp.

Qualcast (Wolverhampton), Ltd. v. *Haynes*, [1959] 2 All E.R. 38; [1959] A.C. 743; [1959] 2 W.L.R. 510; *revsg.* C.A., sub nom. *Haynes* v. *Qualcast (Wolverhampton), Ltd.*, [1958] 1 All E.R. 441; [1958] 1 W.L.R. 225; D 3rd Digest Supp.

Roberts v. *Dorman Long & Co., Ltd.*, [1953] 2 All E.R. 428; [1953] 1 W.L.R. 942; 24 Digest (Repl.) 1077, *338*.

Trott v. *W. E. Smith*, [1957] 3 All E.R. 500; [1957] 1 W.L.R. 1154; 3rd Digest Supp.

Vyner v. *Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 E L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 24 Digest (Repl.) 1093, *428*.

Walker v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, *212*.

Appeal.

The defendants, the occupiers of a factory, appealed from the judgment of F ATKINSON, J., dated Oct. 26, 1960, awarding the plaintiff, the widow and executrix of a window cleaner who fell to his death while cleaning, as an independent contractor, one of the factory windows, £4,794 4s. 6d. damages for breach of their duty to the deceased under the Factories Act, 1937, s. 26 (2). The facts are stated in the judgment.

P. M. O'Connor, Q.C., and *J. F. A. Archer* for the defendants.

G *G. R. Swanwick, Q.C.*, and *W. W. Stabb* for the plaintiff.

Cur. adv. vult.

July 28. **DAVIES, L.J.,** read the judgment of the court at the request of ORMEROD, L.J.: This is an appeal by the defendants from a judgment of ATKINSON, J., dated Oct. 26, 1960. The learned judge awarded to the plaintiff a total sum of £4,794 4s. 6d. damages under the Fatal Accidents Acts, 1846 to 1908, H and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband, which occurred when he was working as a window cleaner at the defendants' premises at Tower Bridge Road, London, on Apr. 29, 1958. No question arises in this appeal as to the amount of damages. Moreover, the plaintiff's claim at common law was withdrawn at the trial for reasons which we shall state hereafter. The sole question for us is whether the learned judge was right I in deciding, as he did, that the plaintiff had established that the defendants had been guilty of a breach of their duty under s. 26 (2) of the Factories Act, 1937, and that her husband's death was a result of such breach.

The deceased man was in business on his own account as a window cleaner, under the style of the Ever Ready Window Cleaning Services. He was forty-one years of age and an experienced window cleaner. For some twelve months prior to his fatal accident he had had a contract with the defendants to clean once a month the windows of their premises. These premises were admittedly

a factory within the meaning of the Factories Act, 1937. From October, 1957, the deceased had been assisted in his business by his son, who at that date was sixteen years old. The part of the defendants' factory in which the deceased was working was called the fermentation house. Its relevant features are to be seen in the photographs and plan which are in evidence. It was a room which contained a large vat. To accommodate this, the original first and second floors of the building had been entirely removed. The site of the window at which the deceased was working, cleaning it from inside, can be seen at the top of photographs 1 to 3; a closer view is to be had in photograph 4. It was about thirty feet from the ground. But there was an important difference between the state of affairs as shown in the photographs and that which existed at the time of the accident. In the photographs it will be seen that the upper halves of the two top windows are now occupied by louvres. At the date of the accident they were glazed, each with six-pane windows similar to the other windows seen in the photographs. The left-hand one of those two windows was fixed and immovable. But the right-hand one pivoted on lugs, the top portion swinging inwards and the bottom portion outwards. The window was three feet six inches high and three feet wide. The lugs on which it rested were one foot six inches from the top. The bottom portion was, therefore, heavier than the top portion, so that the window, left to itself, would close by its own weight.

The special peculiarity of this window was that it was not fitted with any sort of catch or fastener by which it could be fixed in the closed position. It necessarily followed that, while to clean the top portion from the inside would present no particular difficulty since the pressure on the glass would keep it shut, in order to clean the bottom portion it would be necessary for the man in some way to press or hold the top portion in order to prevent the bottom portion from swinging under pressure. If the window was opened beyond the horizontal position, it would or could come away entirely from the lugs on which it swung. This window had, according to the evidence, been cleaned by the deceased or by his son some twelve or thirteen times, inside and outside, before the day of the accident. He was, therefore, well aware of its peculiarities. The outside was cleaned from the outside of the premises; and this case is not concerned with that operation. The ladder on which he was working was, as it happened, supplied by the defendants, but no sort of complaint is made as to the condition of the ladder. It was admittedly a good and sound ladder a triple extension one—in every respect. In the accident it did not tip or fall in any way. Precisely how the deceased came to fall is a matter of inference or even conjecture. No one saw the accident. Shortly after 4 p.m. the deceased was found lying on the ground a little to the left of the foot of the ladder. The window had come out and was lying, broken, a little to the right of the ladder. The deceased's wash-leather was found draped over the top rung of the ladder. His scrim or polishing cloth was not found. It would appear from the evidence that the top of the ladder was substantially in the same position as that shown in photograph No. 4.

The finding of the learned judge as to how the accident happened is as follows:

> "Thus, the evidence here is that a man who, on the evidence, was a fit and healthy man, not subject to attacks of giddiness, a man who it was not, and really could not be, suggested was suffering at the time from any self-created incapacity such as too much to drink, and a man as to whom it cannot really be suggested, and is not suggested, was playing the fool or doing anything stupid, has simply fallen. The inference that I draw—and, I think, that I am bound to draw—is that on this occasion this experienced and competent man, doing his job in the normal way, somehow slipped or lost his balance; and the reasonable inference is that that happened at the moment when the risk would be greatest—that is to say when, with both hands occupied, the left hand to hold the upper part of the window in

A position and the right hand to do the cleaning, and when still in that position, with no hand-hold at all, he fell, or lost his balance and fell."

That inference of fact was not challenged in this court on behalf of the appellant, though it is fair to point out that the judge's finding as to the use of the right hand and left hand respectively was a matter of speculation rather than of B evidence. It was strenuously contended, however, by counsel on behalf of the defendants that the deceased, in order to fall at all, must have been leaning well over the side of the ladder. It is to be observed, however, that there is no allegation to that effect in the particulars of negligence contained in the defence. What is there pleaded is that "he failed to maintain his balance and so carried out his work that he fell". But in his judgment the learned judge C clearly placed considerable weight on an answer given in cross-examination by Mr. Harrington, the expert witness called by the defendants, to the effect that if the deceased was leaning well over to his right and using both hands he was not in a secure position. Indeed, it is very difficult to see how the deceased came to fall at all unless he was leaning beyond what, during the argument, was called "the area of safety".

D On this finding the judge held that the defendants were in breach of their duty under s. 26 (2) of the Factories Act, 1937, and that that breach was the cause of the deceased man's death.

As we have said, the claim at common law was withdrawn at the trial. This withdrawal was based on the well known principle illustrated by such cases as *Bates* v. *Parker* (1), that where a householder employs an independent contractor E to do the work, be it of cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises on which he has to work. He is left to himself to decide how and in what manner he will perform his task.

It was necessary, therefore, for the plaintiff in order to succeed to have recourse to the Factories Act, 1937, s. 26 (2). That subsection provides as F follows:

> "Where any person is to work at a place from which he will be liable to fall a distance more than ten feet, then, unless the place is one which affords secure foot-hold and, where necessary, secure hand-hold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise for ensuring his safety."

G The reference to ten feet has been altered since the date of the accident to six feet six inches (Factories Act, 1959, s. 5).

It was decided in *Lavender* v. *Diamints, Ltd.* (2), a case under s. 26 (1) of the Factories Act, 1937, that "any person" in s. 26 includes an independent contractor and that consequently the duty owed under the section by the occupier of a factory is owed no less to an independent contractor than to his H own employees. Counsel for the defendants has conceded throughout in this case that that authority is as binding as to s. 26 (2) as to s. 26 (1), and that therefore, as the law stands, the defendants in this case owed to the deceased the duty laid down by s. 26 (2); but he indicated that, if necessary, he would argue in the House of Lords that *Lavender* v. *Diamints, Ltd.* (2) was wrongly decided.

I These problems, therefore, confronted the learned judge and have confronted us. First, it being conceded that the deceased was to work at a place from which he was liable to fall a distance more than ten feet and that the defendants provided no means (other than the ladder) for ensuring his safety, were they excused from their obligations to provide such means by the fact that the place was one which afforded secure foot-hold and if necessary secure hand-hold?

(1) [1953] 1 All E.R. 768; [1953] 2 Q.B. 231.
(2) [1949] 1 All E.R. 532; [1949] 1 K.B. 585.

Second, was it reasonably practicable to provide such means? Third, if the answer to the first question is "No" and the answer to the second "Yes", so that the defendants were in breach, did such breach cause the death of the deceased?

The first question is a difficult one and we confess that our views on it have fluctuated considerably during the argument. The learned judge approached it in this way. After quoting a passage from the judgment of JENKINS, L.J., in *Trott* v. *W. E. Smith* (3), he said this:

> "Seeking to apply that to this case, it seems to me that a foot-hold is not secure if there is a possibility of a man falling from it while 'acting in a way a human being may be reasonably expected to act, in circumstances which may reasonably be expected to occur.' I think it is quite plain on the authorities that a 'secure foot-hold' in this sort of context cannot mean 'absolutely safe', but means something more than reasonably secure. In my judgment, one has to bear in mind first of all the sort of man who is going to work in that particular place. Obviously, something may be safe for a steel erector or an experienced window cleaner that would not be safe for somebody whose work ordinarily lay at ground level. But then, one must also consider the work that has in fact to be done from that particular place and what sort of movement or action will be required of the man when he is in that place to do the work that he has to do; and, thirdly, one must take into account that, however experienced a man is, however careful he may be, human beings are people who are liable to a slip or loss of balance or even to some momentary lack of attention in regard to their own safety.
>
> "Trying to approach the matter in that way, looking at photograph No. 1 and trying to form a picture in my mind of a man working four or five rungs down a ladder, with his left hand stretched across his body to hold the upper part of this movable window and cleaning the bottom of that window with his right hand, in that sort of picture, and bearing in mind that the position did not in fact prove to be secure for this competent and experienced man, and bearing in mind the evidence of Mr. Harrington, the expert witness called by the defendants, who, having expressed the view that this deceased did have a secure foot-hold, conceded in cross-examination by counsel for the plaintiff, that that depended on the attitude in which the man was working, and that if he was using both hands and leaning over to the right he was not, in his judgment, in a secure position, I have come to the conclusion that in this case—on the particular facts of this particular case—the deceased man did not have a secure foot-hold.
>
> "That really makes it unnecessary to consider hand-hold, because foot-hold and hand-hold are not alternatives in this section. The requirement is for secure foot-hold, and, where necessary, secure hand-hold. I do not really have to consider whether a secure hand-hold was necessary because there was a hand-hold available, I suppose, in the upper part of the left-hand upright of the ladder, at any rate for his left hand. Of course, while doing the work, as I have already said, both his hands would be occupied."

The argument in this court in support of the judge's finding was not, as we understood it, that in no circumstances could this ladder, even at thirty feet up, afford a secure foot-hold and secure hand-hold. On the contrary, it was, we think, conceded by counsel for the plaintiff that in many places it would be perfectly satisfactory, for example, at the left-hand window of the two at which the deceased was working. What was said was that it was the conjunction of the ladder with this particular window, which had the peculiarities which

(3) [1957] 3 All E.R. at pp. 504, 505.

A have been described, that converted that which might otherwise—at any rate for an experienced window cleaner—have afforded a secure foot-hold and a secure hand-hold into something that did not, owing to the contortion, if that be not too strong a word, which the judge found it was necessary for the deceased to adopt at this place. This contention would obviously have one odd result, namely, that the ladder when positioned in one or indeed in many places might B fully comply with the requirement of s. 26 (2), but when placed elsewhere by the independent contractor using it might cease so to do. It is to be observed that there were other windows of this type on the defendants' premises and that the plaintiff's son, who had himself cleaned this window on occasions, while describing the procedure necessary for cleaning it, did not, as we understand his evidence, suggest that the task was a particularly difficult or dangerous C one.

The plaintiff's expert witness, Mr. Cox, an architect, went up this ladder to make measurements at this window and for that purpose used both hands on his measuring rod without any difficulty at all. So did Mr. Harrington, also an architect, the defendants' expert witness. His views as to the security afforded by this ladder are to be found in the evidence:

D

> "Q.—Do you subscribe to the view that a person standing on the rung of a ladder is in a position where it can be said that he has a secure foot-hold? A.—Yes. Q.—Do you? A.—Yes. Q.—That with that alone, with his hands occupied in doing the work of cleaning the window, you would regard the rung of the ladder alone as providing a secure foot-hold? A.—Oh yes; it is a secure foot-hold. Q.—And would you regard it as being desirable that there should be a hand-hold in addition? A.—The hand-hold provided, of course, is the stile of the ladder itself."

E

We have come to the conclusion that the proper approach to this problem is to say that the deceased's place of work was the ladder and that it is wrong to say that a good and solid ladder, properly positioned so far as concerns its F angle, does not afford a secure foot-hold even when the nature of the particular window requires the window cleaner to clean with one hand and support the window with the other. Obviously an experienced window cleaner working on such a ladder would be able to rest his weight against it with his knees or perhaps even his thighs. The situation might have been entirely different, of course, if the ladder had been insecurely placed. But here it was not.

G It is, in our judgment, right in this case to adopt with a slight amendment the criterion of security which was adopted by the judge, based on the well-known passage from the judgment of DU PARCQ, J., in *Walker* v. *Bletchley Flettons, Ltd.* (4). We should for ourselves, in applying that passage, frame the test in this way: "Did this ladder afford secure foot-hold to an experienced window cleaner acting in a way that such a man might reasonably be expected H to act in circumstances which might reasonably be expected to occur?" And in our judgment the answer to that question is that it did.

We are not impressed by the argument that the very fact that the deceased fell indicates that his foot-hold was not secure. Anyone can, and no doubt many people do, fall from or at a place as to which no one would suggest that it did not afford a secure foot-hold. The fact of the fall is equally consistent— I particularly when no one really knows precisely how he came to fall—with his having abandoned the security afforded by the ladder.

It must be made plain that we are not here dealing with any question of contributory negligence. We have already stated what the allegation in the defence is in that respect, namely, that "he failed to maintain his balance and so carried out his work that he fell". There is no allegation that the deceased was negligent in placing the ladder where he did place it. The view at which

(4) [1937] 1 All E.R. at p. 175.

we have eventually arrived is, as we have said, that the ladder did afford a secure foot-hold and that if any insecurity occurred in the event, and we are not sure that it did, this was due to the fact that the deceased, either in the way that he placed the ladder or in the way that he used it, abandoned the security that it afforded. A

So far as concerns secure hand-hold, we are also of the opinion—as was the learned judge—that the ladder afforded a secure hand-hold, namely, the upright of the ladder. It is true that if the deceased was working with both hands he would have no hand free with which to hold the side of the ladder, but we cannot think that the section enjoins that at every work place within its ambit there shall be available something which a man can hold throughout the whole of the time when he is working. It is to be supposed that in a great many, if not in the majority, of cases men work with both hands simultaneously; and we agree with counsel for the defendants' submission that "hand-hold" in the subsection means something which the man can hold on to or grab from time to time as and when he wishes so to do. In the result, therefore, we have come to the conclusion that the ladder did in all the circumstances afford a secure foot-hold and a secure hand-hold and that, therefore, the defendants were under no obligation to provide other means for ensuring the safety of the deceased. B C D

Strictly, this conclusion makes it unnecessary to consider the other points that were argued before us. But as they were fully argued and as it is possible that this case may go further, it is, we think, right that they should be dealt with.

The first point we can dispose of shortly. It was argued for the defendants that, even if a breach of s. 26 (2) had been made out, the sole cause of that breach was the act of the deceased himself in placing the ladder in an unsafe and unsatisfactory position, and that, therefore, by analogy with such cases as *Manwaring* v. *Billington* (5), the plaintiff was not entitled to succeed. This point is not really open to them on the pleadings; but in any event the argument, in our judgment, involves a slight confusion of thought. The breach of duty was not the failure properly to position the ladder. The breach alleged was the failure by the defendants to provide other means to ensure safety. With that obligation the deceased was in no way concerned. We can see no resemblance between this case and cases where a man deliberately and in breach of instructions neglects to use safety means which are provided or removes guards installed for his protection. E F G

The next point is more important. It was divided into two by counsel for the defendants, but really it merely involves a consideration from two different aspects of the same set of facts. It arises in this way. If the ladder or the deceased's place of work did not afford secure foot-hold and hand-hold, then the defendants were under a duty to provide means as far as was reasonably practicable, by fencing or otherwise, to ensure his safety. They provided none. The only suggestion that was made on behalf of the plaintiff was that the defendants could and should have provided hooks or bars at the window, to which the deceased could have attached a safety belt, and in that event his safety would have been ensured. It would obviously have been perfectly possible and practicable for the defendants to have fixed such hooks or bars; but the contention of the defendants is that on the evidence it is clear that no window cleaner working *on a ladder* would ever wear a safety belt or attach it to a hook or bar. So, it is argued: (i) since means of ensuring the window cleaner's safety would necessitate not merely the provision of hooks or bars but also the wearing and attachment thereto by the window cleaner of a safety belt, it was not reasonably practicable to provide such means; and (ii) that if there was a breach of duty by the defendants in failing to provide hooks or bars, as H I

(5) [1952] 2 All E.R. 747.

A the deceased would not have used them even if they had been provided, the plaintiff has failed to show that the defendants' breach of duty was a cause of the accident. It was pointed out on behalf of the respondent plaintiff and conceded by the appellant defendants that neither of these points found any place in the notice of appeal; but in view of the fact that the causation point was undoubtedly argued in the court below and decided by the judge, this B court thought it right to give leave to the appellants to raise it here.

The finding of the learned judge about this is as follows:

> "The particular means which counsel for the plaintiff contends should have been provided in this case is some form of hook or staple or other means for attaching a safety belt to. Even if that was necessary, that would not get the plaintiff home here, having regard to the decision in *Bonnington* C *Castings, Ltd.* v. *Wardlaw* (6), unless I was satisfied on the balance of probability that if such a hook had been provided the deceased man would have used it. To clear that matter out of the way at once, I accept the evidence given by the son, that he and his father had such safety belts, that they used to take them around with them in their work, that they had such safety belts with them on this occasion, and that from time to time the D father did in fact use such belts. The son fairly gave evidence, without objection, that his father had advised him to use such belts whenever there was anything to hook them on to. I suppose that really what the deceased father had said to the son would not be evidence, and I pay no attention to that particular item of evidence; but I believe that this man did have a belt available and that he was in the habit of using it when he thought it E was necessary, when—and it would perhaps be only very seldom in present conditions—there was anything to which the belt could be attached. So, my finding is that, if there had been such a hook provided here, the probability is that the deceased man would have taken a safety belt up with him, would have used that hook and would have been saved from the fall which caused his death."

F There is no doubt that there was evidence (that of the deceased's son) that the deceased had a safety belt, that he was accustomed to take it around with him in his van, that he had such a belt with him on the day of his accident and that he did from time to time wear it. But it was strenuously argued by the defendants, first, that on the evidence there was grave doubt whether the deceased G when at work ever attached his belt to anything which would serve as a firm anchorage, and, second, that on the whole of the evidence, including that of the son, it was clear that the deceased never did wear and never would have worn a belt when working on a ladder, and that, therefore, the judge's finding that if a hook had been provided the deceased would probably have worn his belt and attached it to the hook was not justified.

H On this point, therefore, it is necessary to summarise the evidence. [HIS LORDSHIP did so, and concluded thereon:] On the whole of the evidence on this part of the case, we have come to the conclusion that the learned judge's finding was wrong. We are satisfied that, in all probability, even if hooks or bars had been provided, the deceased would not have made use of them, that is to say, he would not have worn his belt or attached it to any such hook or bar.

I It was argued on behalf of the plaintiff that it ought not to lie in the mouth of the defendants to say: "Let it be admitted that we failed in our duty to provide means of safety; nevertheless the deceased would never have used them even if we had provided them". This argument was based on the decision of this court in *Roberts* v. *Dorman Long & Co., Ltd.* (7). In that case LORD GODDARD, C.J., said (8):

(6) [1956] 1 All E.R. 615; [1956] A.C. 613. (7) [1953] 2 All E.R. 428.
(8) [1953] 2 All E.R. at p. 432.

"... if a person is under a duty to provide safety belts or other appliances and fails to do so, he cannot be heard to say: 'Well, if I had done so, they would not have been worn'." A

HODSON, L.J., expressed a similar view (9). The defendants pointed out that that case concerned reg. 97 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), under which in appropriate circumstances persons employed are to be provided with certain safety measures which they may elect to use; but we cannot think that that is really a point of distinction from the present case. B

A much more formidable argument, to our way of thinking, was based on the decision of the House of Lords in *Bonnington Castings, Ltd.* v. *Wardlaw* (10). It will be recalled that that case overruled the decision of this court in *Vyner* v. *Waldenberg Bros., Ltd.* (11). In the course of his speech, LORD REID said (12): C

"It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury." D E

LORD TUCKER said (13):

"No distinction can be drawn between actions for common law negligence and actions for breach of statutory duty in this respect. In both, the plaintiff or pursuer must prove (a) breach of duty and (b) that such breach caused the injury complained of." F

It was argued that *Bonnington Castings, Ltd.* v. *Wardlaw* (10) must be taken to have overruled or at any rate qualified *Roberts* v. *Dorman Long & Co., Ltd.* (14). The question was discussed but not decided in this court in *Haynes* v. *Qualcast (Wolverhampton), Ltd.* (15) (see per LORD EVERSHED, M.R., and per PARKER, L.J. (16)). G

In *Haynes'* case in the House of Lords, LORD DENNING said (17), with reference to the view expressed by this court in *Roberts* v. *Dorman Long & Co., Ltd.* (18):

"... this is an over-statement. The judge *may* infer the omission to be a cause, but he is not bound to do so. If, at the end of the day, he thinks that, whether the duty was omitted or fulfilled, the result would have been the same, he is at liberty to say so." H

The question was fully discussed by the Inner House of the Court of Session in the recent case of *McWilliams* v. *Sir William Arrol & Co., Ltd.* (19). That case, though it concerned not a window cleaner but a steel erector, was brought under s. 26 (2) of the Factories Act, 1937, with which we are here concerned. I

(9) [1953] 2 All E.R. at p. 437. (10) [1956] 1 All E.R. 615; [1956] A.C. 613.
(11) [1945] 2 All E.R. 547; [1946] K.B. 50.
(12) [1956] 1 All E.R. at p. 618; [1956] A.C. at p. 620.
(13) [1956] 1 All E.R. at p. 621; [1956] A.C. at p. 624.
(14) [1953] 2 All E.R. 428. (15) [1958] 1 All E.R. 441.
(16) [1958] 1 All E.R. at pp. 445, 446, 447.
(17) [1959] 2 All E.R. at p. 46; [1959] A.C. at p. 762.
(18) [1953] 2 All E.R. at p. 432. (19) [1961] S.L.T. 265.

A The court there unanimously affirmed a decision of LORD GUEST to the effect that even though it had been established that by failing to supply safety belts the employers had committed a breach of their duty under the subsection, nevertheless, since it had been proved that the men would never in practice wear them, the plaintiff (the widow of the deceased workman) was not entitled to succeed. The authorities were fully considered including *Drummond* v. B *British Building Cleaners, Ltd.* (20), and *Nolan* v. *Dental Mfg. Co., Ltd.* (21), as well as those mentioned above. And although the judges were careful to point out that they were dealing with the law of Scotland and not that of England, it is plain that they considered that the view expressed by this court in *Roberts* v. *Dorman Long & Co., Ltd.* (22) is no longer law. Indeed, the Lord President expressly said so (23). He said:

C "The dictum [that is say in *Roberts'* case (22)] cannot in my view be reconciled with the decision of the House of Lords in *Bonnington Castings, Ltd.* v. *Wardlaw* (24)."

And LORD GUTHRIE said (25):

"Since the liability of the defenders in damages to the pursuer depends D on whether or not the injury complained of was caused by their failure in duty, it must be a defence to an action of reparation that the accident would have taken place even if the duty had been fulfilled, since that destroys the necessary link between the damnum and the negligence on which liability depends."

In our view, there is no difference between Scots and English law on this matter. E The proper test to apply is that stated in the speeches of LORD REID and LORD TUCKER, set out above in *Bonnington Castings, Ltd.* v. *Wardlaw* (26) and, in effect, re-emphasised by LORD EVERSHED, M.R., in *Haynes* v. *Qualcast* (*Wolverhampton*), *Ltd.* (27), where he said:

". . . it seems to me undoubtedly still law that the question of causation F is one of fact, to be considered in the light of all the circumstances and the probabilities."

Applying that test, we are of the opinion that the plaintiff has failed to prove that if the defendants had provided hooks or bars to which a safety belt could have been attached the deceased would have made use of it or them. It follows, therefore, that on this point also the defendants would have been, in our judg- G ment, entitled to succeed.

It is not, in our view, necessary to express any opinion on the question whether in the circumstances it could be said that it was not reasonably practicable to provide means for ensuring the safety of the deceased. We doubt whether on the notice of appeal this point was really open to the appellants, and, in any event, it is not effectively different from the causation point.

H This appeal must be allowed and there must be judgment for the defendants.

Appeal allowed. Judgment for the defendants. Leave to appeal to the House of Lords granted.

Solicitors: *Hewitt, Woollacott & Chown* (for the defendants); *Stephenson, Harwood & Tatham* (for the plaintiff).

I [*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(20) [1954] 3 All E.R. 507.
(21) [1958] 2 All E.R. 449.
(22) [1953] 2 All E.R. at p. 432.
(23) [1961] S.L.T. at p. 270.
(24) [1956] 1 All E.R. 615; [1956] A.C. 613.
(25) [1961] S.L.T. at p. 272.
(26) [1956] 1 All E.R. at pp. 618, 621; [1956] A.C. at pp. 620, 624.
(27) [1958] 1 All E.R. at p. 446.

Re THE AGREEMENT BETWEEN THE NEWSPAPER PROPRIETORS' ASSOCIATION, LTD. AND THE NATIONAL FEDERATION OF RETAIL NEWSAGENTS, BOOKSELLERS AND STATIONERS.

A

[RESTRICTIVE PRACTICES COURT (Diplock, J., Sir Stanford Cooper, Mr. W. L. Heywood and Mr. W. G. Campbell), June 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, July 27, 1961.]

B

Restrictive Trade Practices—Reference—Newspaper supplies—London daily newspapers—Newsagents' permits—Agreement not to supply newspapers to wholesale newsagents except on terms that newspapers supplied only to retail newsagents holding permits—Permits issued by association of newspaper proprietors—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 21 (1) (*b*).

C

The proprietors of national daily newspapers, whose principal publishing offices were in London (hereinafter called "the London daily newspapers"), were members of the Newspaper Proprietors' Association, Ltd. (hereinafter called "the Association"), and some thirty thousand newsagents were members of the National Federation of Retail Newsagents, Booksellers and Stationers (a registered trade union, hereinafter called "the Federation"). The policy of the Federation since its formation in 1919 had been to limit entry into the retail newsagency trade, and in June, 1944, an arrangement (known as the "Re-entrants and New Applications" Agreement, or "RENA") was reached which represented a compromise in a conflict between the organised interests of the three parties concerned in the distribution of London daily newspapers, namely, the newspaper proprietors, and wholesalers and the retailers. In substance, the members of the Association agreed not to supply any of the London daily newspapers to wholesale newsagents in England or Wales except on terms that the newspapers should (a) not be supplied to persons desirous of starting retail newsagencies at any shop, stand or other place at which newspapers were not sold in June, 1944, unless such persons held permits issued by the Association, and (b) should be supplied to persons holding such permits. Thus the Association was enabled to control, at their sole discretion, entry into the retail newsagency trade and the new points at which papers could be sold so far as London daily newspapers were concerned. The distribution system for London daily newspapers, most of which were also printed simultaneously in Manchester, was largely dictated by the conflicting requirements (i) that the newspaper must go to press as late as possible so as to be up to date in its news, and (ii) that it must be in the hands of the reader before working hours began the following morning. About seventy per cent. of the total supply of morning newspapers were delivered to the readers' residences, this delivery traditionally and most economically being carried out by schoolchildren whose hours of work in general were restricted by local bye-laws to the period from 7.0 a.m. or 7.15 a.m. to 8 a.m. This meant that the retail newsagent must have completed his sorting of newspapers for delivery by 7.0 a.m. and that the wholesaler must complete his delivery to the retail newsagent in time for the latter to have finished his sorting by 7.0 a.m. The court found that the typical retail newsagent's business was a small business of which the sale of London daily newspapers did not, so far as turnover was concerned, constitute a predominant part; almost invariably it was combined with the sales of periodicals and local newspapers, and generally with that of Sunday newspapers and evening newspapers; nearly always it was also combined with some other business such as the sale of tobacco, confectionery, stationery or fancy goods, or some

D E F G H I

A combination of these trades. The court found that the broad picture which emerged from the evidence was that the general run of retail newsagents were small traders, earning a modest livelihood often with the assistance of their wives, employing little full-time labour and working long and, in particular, early hours; the work called for no special skill and the newspapers and periodicals side of it required no substantial capital expenditure. Due to the B RENA agreement, the general pattern today of distribution of retail newsagencies was that they were more numerous in proportion to the total population in the older urban areas where the population might be falling than they were in the areas in which housing or re-development had taken place since the war. The turnover and income of newsagents in the older districts were, on the average, probably lower than those in the more recently C developed areas. Permits for the establishment of new selling points were issued on the recommendation either of the London New Applications Committee (consisting of the deputy circulation managers of each of the London daily newspapers) for proposed selling points south of the Trent, or of the Manchester New Applications Committee (consisting of the northern circulation managers of those newspapers together with a co-opted D representative of "The Guardian") for proposed selling points north of the Trent. Each applicant was required to give an undertaking that he would, inter alia, provide an efficient delivery service and an adequate display of newspaper posters, and that he would not transfer his supplies to any other selling point. The court found that, if all the applications made in each year were granted, the number of new entries into the retail newsagency trade E might be greater than it at present was by something of the order of one per cent. of the existing number of retail newsagents. The court further found that, in general, the public needs in the distribution of London daily newspapers had been reasonably well satisfied, irrespective of whether the RENA scheme, or its predecessors, had operated to restrict the number of selling outlets or not. On a reference of the RENA agreement to the F Restrictive Practices Court by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, the Association and the Federation sought to support the agreement under s. 21 (1) (b) of that Act†, contending that, if the agreement was abolished, it would be followed either (i) by unrestricted entry into the retail newsagency trade of anyone desirous of selling London daily news- G papers and by free competition between retail newsagents, or (ii) by restrictions on entry into the retail newsagency trade more stringent and less advantageous to the public as purchasers of London daily newspapers

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* Section 20, so far as relevant, provides: "(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare H whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

"(2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar; . . .

"(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court I may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

† Section 21 (1), so far as relevant, provides: "For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say— . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . ."

than those currently imposed under the RENA agreement. In either case, so the respondents contended, the public as purchasers would be deprived of advantages that they now enjoyed. The first contention involved the following assumptions: (a) that the total volume of sales of newspapers and periodicals throughout the country would remain constant, notwithstanding any increase in selling points; (b) that the total number of retail newsagents would increase by 33⅓ per cent.; (c) that the sales of newspapers and periodicals by each existing newsagent would be reduced to the same ratio of his former sales as the total number of existing newsagents bore to the final number of new and existing newsagents, that is seventy-five per cent.; and (d) that all sales of other goods effected before 8.30 a.m. would be reduced in the like ratio since they were made to customers who would not be attracted to the newsagent's shop if he did not sell newspapers and periodicals.

Held: the restrictions were deemed by s. 21 (1) of the Act of 1956 to be, and were declared to be, contrary to the public interest, the Association and the Federation having failed to satisfy the court of the circumstances stated in s. 21 (1) (b) for the following reasons—

(i) as regards contention (i), viz., assuming that no restrictions other than those due to ordinary economic forces operated after the RENA agreement were abolished—

(a) there were no grounds for supposing that an increase in selling points would not lead to some increase in casual sales.

(b) on the evidence, there was no foundation for the assumption that the total number of newsagents would increase by 33⅓ per cent., and factors which would operate under free competition would militate against the creation of new selling points except in areas where there was a shortage of existing newsagents or where their inefficiency or inconvenient location indicated a substantial public demand for London daily newspapers for the newcomer to satisfy.

(c) if new entrants succeeded in taking away a proportion of their competitors' trade, that would be because they provided a more efficient service and, while sale of tobacco and other goods were no doubt assisted by being combined with the sale of London daily newspapers, the assumption that it rose and fell in direct proportion to the sale of newspapers was unsupported by evidence (see, for the conclusion reached, p. 441, letter F, post).

(ii) as regards contention (ii), the court was not satisfied that there was any real likelihood that, if the RENA restrictions were removed, they would be replaced by other more stringent restrictions on entry into the retail newsagency trade in respect of London daily newspapers, for it was obvious that, if the RENA agreement was not such as to satisfy the test of s. 21 (1) (b) of the Act of 1956, neither would any other scheme controlling entry into the retail newsagency trade satisfy that test, whether the scheme were conducted by the Federation or by any other combination of existing members of the trade, unless there had been a relevant change of circumstances (see, for the conclusion reached, p. 443, letter D, post).

Restrictive Trade Practices—Injunction—Restrictions declared contrary to public interest—Party enjoined—Whether trade federation should be included in order restraining the enforcing of the restrictions or making new agreement with like restrictions—Whether Federation, a registered trade union whose members were retail newsagents, was "carrying on business"—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 20 (3).

After the hearing of the case, summarised in the foregoing headnote, but before judgment was delivered, the Federation notified the Registrar of its intention to set up a "Scheme for the establishment of a list of selling points of the national daily newspapers recognised by the Federation". That

A scheme involved setting up a procedure for recognised points of sale similar to that set up under the RENA agreement but, in a covering letter sent by the Federation to district secretaries inviting them to compile the list, it was expressly stated that the letter was not to be taken as containing any recommendation, express or implied, as to any action to be taken or not taken by any member, except as might be necessary in the preparation of B the list. The Federation did not offer any undertaking but contended that an injunction could not be granted against it as it did not carry on business.

Held: the preparation of the list of selling points by the Federation was intended to be a preparatory step to seeking to enforce restrictions on the entry of persons into the retail newsagency trade, and the Federation, as well as its members, would be enjoined against, among other acts, making C any other agreement to which Part 1 of the Act of 1956 applied to the like effect as the RENA agreement (see p. 445, letter E, post).

Per CURIAM: the words "who carry on business in the United Kingdom" in s. 20 (3) of the Restrictive Trade Practices Act, 1956, should not be restricted to persons who carry on business within the United Kingdom in the production or supply of goods or in the application to goods of any D process of manufacture (see p. 444, letter E, post).

Dictum of the court in *Re Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement* (*No. 2*) ([1961] 2 All E.R. at p. 9) not followed.

[For the Restrictive Trade Practices Act, 1956, s. 20 and s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 952, 954.]

E

Cases referred to:

Black Bolt and Nut Assocn. of Great Britain's Agreement (*No. 2*), *Re*, ante, p. 316; [1961] 1 W.L.R. 1139.

Sorrell v. *Smith*, [1923] 2 Ch. 32; 129 L.T. 349; *revsd.* C.A., [1924] 1 Ch. 506; 93 L.J.Ch. 241; 131 L.T. 195; *affd.* H.L., [1925] All E.R. Rep. 1; [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 43 Digest 113, *1183.*

F *Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement* (*No. 2*), *Re*, [1961] 2 All E.R. 8; L.R. 2 R.P. 231; [1961] 1 W.L.R. 613.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar G of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement between the Newspaper Proprietors' Association, Ltd. and the National Federation of Retail Newsagents, Booksellers and Stationers contained in a memorandum of agreement dated Aug. 9, 1957, as varied. The facts and restrictions are set out in the judgment of the court.

Arthur Bagnall, Q.C., and *E. W. Griffith* for the Newspaper Proprietors' Associ- H ation, Ltd.

G. T. Aldous, Q.C., *D. W. Falconer* and *W. Aldous* for the National Federation of Retail Newsagents, Booksellers and Stationers.

B. J. M. MacKenna, Q.C., *J. F. Donaldson, Q.C.*, and *C. S. Staughton* for the Registrar.

Cur. adv. vult.

I

July 27. **DIPLOCK, J.**, read the following judgment of the court: The respondents to this reference are the proprietors of national daily newspapers (namely, "The Times", the "Daily Telegraph", the "Daily Express", the "Daily Herald", the "Daily Mail", the "Daily Mirror", the "Daily Sketch", the "Morning Advertiser", the "Financial Times", the "Greyhound Express and Coursing News", and the "Sporting Life"), who are members of, and represented by, the Newspaper Proprietors' Association, Ltd. (hereinafter called "the Association"), and some thirty thousand newsagents who are members of

the National Federation of Retail Newsagents, Booksellers and Stationers, a registered trade union (hereinafter called "the Federation"), who are represented by the Federation. The newspapers in question have a nation-wide circulation. The principal publishing office of each is in London, and we shall, for convenience, refer to them collectively as "the London daily newspapers".

The restrictions with which this reference is concerned are those comprised in an arrangement between the Association and the Federation, which had been in operation since June, 1944, and was reduced into writing for the purpose of registration under the Restrictive Trade Practices Act, 1956. In substance, it is an agreement under which the members of the Association agree not to supply any of the London daily newspapers to wholesale newsagents in England or Wales except on the terms that the newspapers shall (a) not be supplied to persons desirous of starting retail newsagencies at any shop, stand or other place at which newspapers were not sold in June, 1944, unless such persons hold permits issued by the Association, and (b) shall be supplied to persons holding such permits. The restrictions thus enable the Association to control, at their sole discretion, entry into the retail newsagency trade and the new points at which papers can be sold so far as London daily newspapers are concerned.

This arrangement represents the current compromise in a conflict between the organised interests of the three parties concerned in the distribution of London daily newspapers, namely, the newspaper proprietors, and wholesalers and the retailers. The policy of the Federation, ever since its formation in 1919, has been to limit entry into the retail newsagency trade. At the outset, it adopted a policy, known as the "Distance Limit Policy", of endeavouring to prevent the setting up of new sales outlets for newspapers within a fixed distance from an existing outlet operated by a member of the Federation. The principal method adopted for enforcing this policy was to organise a boycott by its members of any wholesaler who sought to supply newspapers to new entrants to the newsagents' trade whose proposed place of sale would conflict with the Federation's "Distance Limit Policy". The method of applying such a boycott is described in the judgment of RUSSELL, J., in *Sorrell* v. *Smith* (1). The newspaper proprietors, in order to combat the distance limit policy, which they considered restricted sales of their newspapers, in turn combined to threaten to withdraw supplies from any wholesaler who supplied newspapers to the retail newsagent who had threatened to withdraw his custom from another wholesaler subject to the boycott. The judgment of the House of Lords in *Sorrell* v. *Smith* (2) in 1925 established the legality of this counter-move on the part of the newspaper proprietors. As a result, the practice grew up of dealing with applications to wholesalers for supplies of newspapers to persons desirous of entering the retail newsagency trade, by joint consultation at a local level between representatives of the Federation and of the wholesalers' organisation affected, that is, either the London or the Provincial Wholesale Newspaper Distributors' Association. The Newspaper Proprietors' Association was not a party to these arrangements between the wholesalers' organisations and the retailers' Federation, but from time to time when, in individual cases, differences arose between wholesalers and retailers whether or not newspapers should be supplied to any persons desirous of entering the trade, the matter was referred to the Association for decision.

Between 1939 and 1944, owing to wartime conditions, these arrangements lapsed. Many newsagents joined the forces or engaged in other national work, many newsagents' premises were destroyed by bombing. As the war drew to an end, the problem of re-entry into the trade of newsagents who had been affected in one or other of these ways was very properly a matter of concern to all branches of the newspaper distribution industry, and the arrangements which are the

(1) [1923] 2 Ch. 32. (2) [1925] All E.R. Rep. 1; [1925] A.C. 700.

A subject of the present reference, known as the "Re-entrants and New Applications" agreement, or "RENA" for short, were instituted. In the years immediately after the war, applications for permits were to a large extent concerned with re-entry into the industry of newsagents displaced by the war, but, as time went on, these applications diminished, and today and for several years past, applications have been almost exclusively from persons wishing to B enter the trade for the first time, or from newsagents already in the trade, who wish to open new shops or stands at other points of sale.

The distribution system for London daily newspapers, most of which are also printed simultaneously in Manchester, is largely dictated by the conflicting requirements (i) that the newspaper must go to press as late as possible so as to be up to date in its news, and (ii) that it must be in the hands of the reader before C working hours begin the following morning. Newspapers start to come off the press shortly after 10 p.m. Supplies for the provinces are despatched by train from London or Manchester to destinations throughout the country. On several of these trains, employees of the provincial wholesalers start the work of sorting into bundles for their retail newsagent customers. Supplies for the Greater London area are collected by the London wholesalers in their own vans. Sorting D into bundles for the retail newsagent customers through the country is completed at the wholesalers' premises, and distribution by the wholesalers to retail newsagents then starts. About seventy per cent. of the total supply of morning newspapers are delivered to the readers' residences. This delivery is traditionally and most economically carried out by schoolchildren whose hours of work are controlled by local bye-laws. In general these are restricted to the period from E 7.0 or 7.15 a.m. to 8.0 a.m., which means that the retail newsagent must have completed his own sorting of newspapers for delivery to his customers by 7.0 a.m. The wholesaler, of whom there are two thousand in England and Wales, must, accordingly, complete his delivery to his retail newsagent customers in time for the latter to have finished their own individual sorting by 7.0 a.m. The wholesaler, with a large number of retail newsagents to supply often over a wide F area, has, therefore, to work to a very tight time schedule. He is remunerated by a discount (generally 10½ per cent. in the case of provincial and 14¼ per cent. in the case of London wholesalers) on the wholesale price (4s. 8d. per quire for 3d. papers) of the newspapers he purchases, and his current costs of distribution are those of collecting the newspapers, in London and Manchester from the newspaper offices and elsewhere in the provinces from the railway station, of G sorting them into bundles for his retail newsagent customers and of distributing the bundles to the individual newsagents by van, a task which must be accomplished within the very tight time schedule referred to above. This means that there is a limit to the number of dropping points, that is, premises or stands of retail newsagents which can be served by one van; the nearer the dropping points are to one another, the larger the number that can be served by one van. Other H things being equal, it would pay the wholesaler best to sell the largest number of newspapers to the smallest number of newsagents in the most compact geographical area nearest to his own premises. To take on a new customer does not necessarily increase his profits, particularly if the new customer's order is small and the dropping point distant from any of his existing dropping points.

Newspapers are sold wholesale by the quire of twenty-six copies. The price I to the retail newsagent of a quire of twenty-six threepenny newspapers is 4s. 8d., the price at which he sells them 6s. 6d. and his gross profit 1s. 10d. per quire. For broken quantities less than one quire he pays a slightly higher rate. He sells them either over the counter (counter sales) or delivered to his customers at their residence (delivery sales). These two types of sales, and the great majority of newsagents undertake both, require separate consideration.

Probably the great bulk of counter sales are to customers who leave their homes for work before the morning newspaper can be delivered to their homes. Most are made before 8.0 a.m.; practically none after 9.30 a.m. A newsagent

who wishes to obtain this trade must open his shop or stand between 6.0 a.m. and 7.0 a.m. Success in this type of trade, which is commonest in working-class and industrial districts, is greatly influenced by the site of the shop. It is probably true that persons hurrying to work prefer to go the shortest distance out of their way to buy a newspaper. Counter sales involve the newsagent in the minimum trouble and expense and, since most newsagents sell other goods such as periodicals, confectionery, stationery and tobacco, they have the added attraction that, by bringing customers into the shop, they increase the newagent's sale of his other wares. As, however, London daily newspapers are not supplied by the newspaper proprietors on sale or return, the newsagent runs the risk of being left with unsold copies—which, after about 9.30 a.m., are valueless.

Delivery sales have in general to be effected between the hours of 7.0 a.m. and 8 a.m., because of local bye-laws relating to hours of work of schoolchildren. It is only in exceptional cases, such as rural areas, that adult labour is employed. This restricts the number of residences which can be served by one delivery boy and, for practical purposes, imposes a limit on the distance from the newsagent's premises from which he can undertake deliveries, although this can be extended if the newsagent uses his van to carry newspapers to a number of different starting points for his delivery boys' rounds. The number of residences which can be served by one boy or girl varies with the character of the neighbourhood. The evidence suggests that, in urban areas, the figure ranges from thirty to as much as eighty, with an average probably in the neighbourhood of fifty where the local bye-laws permit of a full hour's work. Nearly all newsagents make a weekly delivery charge ranging from as little as 1d. to as much as 6d. per week, but usually 2d. or 3d. This charge, however, includes delivery of periodicals and sometimes of Sunday newspapers or evening newspapers or both. The weekly wage to the delivery boy varies widely and appears generally to be in the range of 10s. to 15s. per week. To this must be added the cost of provision of newspaper bags and, generally, bicycles and waterproof clothing. Circumstances differ so widely that it is impossible on the evidence to reach any more definite conclusion than that, in the majority of cases, the actual cost of employing and equipping deliverers is somewhat more than the actual delivery charge, although there are cases where it is somewhat less and others where the newsagent breaks even. The work involved in sorting newspapers for delivery rounds is considerably greater than in sorting for counter sales and, if looked at in isolation, delivery sales of London daily newspapers are less profitable to retail newsagents than counter sales, but the trade is certain and steady and brings with it the regular sale of periodicals and other newspapers which are delivered on the same rounds. The proportion of delivery sales of London daily newspapers to counter sales varies greatly with the character of the district in which the newsagent's premises are situate. Exceptionally, a newsagent makes no deliveries at all, and, in the cases of which evidence has been given in this reference, the proportion of delivery sales to total sales has ranged between thirty per cent. and ninety per cent., the higher percentage being found in middle-class residential districts. The best estimate that we can make on the evidence before us is that, over the country as a whole, something of the order of seventy per cent. of the total circulation of London daily newspapers are delivered to the residences of the readers.

With some forty thousand retail newsagents in the United Kingdom (of whom a quarter are not members of the Federation), it is not possible to do more than form a very broad picture of the economic situation of the typical retail newsagent. At the one extreme are the large chains of retail shops of such well-known concerns as W. H. Smith and Wymans, which are also wholesalers on a very large scale; at the other is the tiny one-man shop in a side-street in a poor area. But it can be said with some confidence that the typical newsagent's business is a small business of which the sale of London daily newspapers does not, so far as turnover is concerned, constitute a predominant part. It is combined almost invariably with the sales of periodicals and local newspapers, and generally with

A that of Sunday newspapers and evening newspapers. Nearly always it is also combined with some other business such as the sale of tobacco, confectionery, stationery or fancy goods, or some combination of these trades.

The evidence before us would suggest as a very broad generalisation that a typical retail newsagent's purchases of newspapers and periodicals combined would amount to some thirty-four per cent. of his total turnover. The rate of B gross profit on newspapers and periodicals is, however, larger than the rate of gross profit earned by sales of other goods such as tobacco, confectionery and stationery, so that the proportion of the total gross profit earned by the business which is attributable to sales of newspapers and periodicals is considerably in excess of thirty-four per cent., and was estimated as probably something in the region of fifty-one per cent. The proportion of the total combined purchases of C newspapers and periodicals which is attributable to London daily newspapers was estimated at about sixty per cent. Even allowing for costs of delivery less delivery charges, the percentage of net profit on sales of newspapers and periodicals is considerably greater than on other goods, but long and early hours of work and some overhead expenses are needed for this part of a newsagent's trade. His total weekly sales of all goods would be of the order of £250. The picture that D emerges, and it cannot be more than a very broad picture of a trade in which there are forty thousand members, is that the general run of retail newsagents are small traders, earning a modest livelihood often with the assistance of their wives, employing little full-time labour and working long (seventy to eighty hours per week) and, in particular, early hours. The work calls for no special skill, and the newspaper and periodical side of it requires no substantial capital E expenditure. Like all small shopkeeping businesses, it attracts the man who "wants to be his own boss", and the economic reward is not its sole, and may well not be its primary, attraction. It is, moreover, probably true that the majority of those who want to enter the retail newsagency trade, except in newly developing areas, are already engaged in the retail trade and selling goods like tobacco or confectionery or fancy goods which are traditionally combined with F that of retail newsagencies. To such persons it is an added attraction that the counter sale of newspapers and periodicals brings customers into the shop and thus increases sales of other goods. On the other hand, it has to be appreciated that the peak time for counter sales of London daily newspapers is from 6.30 to 8.30 a.m., and that to achieve a worth-while turnover from customers for these it is necessary to open the shop not later than 7 a.m.

G But whatever be the attractions or hardships of a retail newsagent's life there has been, during the currency of the RENA agreement, a steady flow of applicants for permits to establish new selling points. It is to be borne in mind that no permit is required for selling points which already existed in June, 1944. Permits appear to have been granted at an average rate of six hundred per annum in recent years, so that probably seventy-five per cent. to eighty per cent. of the H selling points in being today have never been the subject of consideration by the Association under the RENA agreement. In the period during which the RENA restrictions on new entries have been operating, there have been very great movements of population, chiefly away from the centre of towns and the old overcrowded working-class districts; but the newsagencies in those districts have not all moved out with the residents they formerly served; they are restricted in I doing so, even if they wish, by the RENA agreement. Consequently, the general pattern of distribution of retail newsagencies is that they are more numerous in proportion to the total population in the older urban areas where the population may be falling than they are in the areas in which housing or re-development has taken place since the war and in which the establishment of new newsagencies has been subject to the control of RENA and, in addition, to that of housing authorities, as landlords of shops on municipal estates, and of planning authorities. The turnovers and incomes of newsagents in the older districts are, on the average, probably lower than those in the more recently developed areas.

Permits for new entries, that is for the establishment of new selling points, are issued on the recommendation either of the London New Applications Committee (N.A.C.) for proposed selling-points south of the Trent, or the Manchester N.A.C. for proposed selling points north of the Trent. The London N.A.C. consists of the deputy circulation managers of each of the London daily newspapers; the Manchester N.A.C. consists of the northern circulation managers of those newspapers, together with a co-opted representative of "The Guardian" whose proprietor is not a member of the Association. Each of these committees meets once a fortnight. Every applicant for a permit is required to fill in a form, containing particulars of the proposed selling point, including its distance from the nearest existing selling points and the name of the wholesaler from whom he proposes to obtain supplies. It also contains undertakings that he will, inter alia, provide an efficient delivery service and an adequate display of newspaper posters, and that he will not transfer his supplies to any other selling point. Notice of each application is given to the Federation for their comments, and the application is referred for investigation by the local representatives of three of the London daily newspapers acting on a rota system. Each of the three representatives on the rota to which the application is assigned sends in a written report on a standard form, which includes his recommendation whether the permit should be granted or not. Their current instructions are to bear in mind in arriving at their recommendations, firstly, would the proposed new selling point improve the service to the public? Secondly, would it cause more newspapers in total to be sold? Thirdly, if granted, would it be unreasonably hard on the other interested parties? The reports of the local representatives, together with the comments of the Federation, are considered at the meeting of the N.A.C. concerned. We were told that the N.A.C. pays little attention to the comments of the Federation, and the evidence was that sixty per cent. of all applications and forty per cent. of the applications granted are opposed by the Federation. It does not follow, however, that the views of the existing newsagents in the area to which the application relates are without influence. We are left with the strong impression that, in the majority of cases, the committee's decision follows automatically the recommendations of the local representatives reporting on the application. If two recommend that the permit be granted, it is granted; if two recommend that it be refused, it is refused. No local representative of any newspaper has given evidence, and we are left to guess at how they in fact pursue their investigations. The conflict of fact between some of the reports on the same application suggests that there are occasions when the investigation is somewhat casual. In nearly all cases, the only persons reported as having been interviewed are the applicant himself and the nearest established newsagents who will be the applicant's competitors if the application is granted and who are presumably known to and may be on friendly terms with the local representative. Human nature, encouraged by the "Thirdly" of the local representative's instructions, would incline him to have some bias in favour of the existing newsagents whose trade would be affected by the opening of a new selling point in their area.

With applications coming in at the rate of 1,200 a year, it is inherent in any control of this kind that decisions will be somewhat slap-dash, and that injustices to individuals in the particular application of the general criteria will occur. If the necessity for control be once granted—and that is the question that we have to decide—it would not be right to suggest that the evidence leads us to any conclusion other than that the Association have attempted with much expenditure of time to apply the control with an even hand, although tempered at times in the past by prejudice against co-operative societies briskly fanned by the Federation which the Association have sought, without complete success, to overcome. Frequently an application is refused as premature on the grounds that the district to which it relates, although developing, has not developed sufficiently to justify granting a permit for an additional selling point. In such a case, the letter

A intimating the refusal of the permit suggests that the applicant should apply again in six months' time. When this is not done, and many rejected applications are from applicants in non-developing areas, the letter simply says that the application is refused and contains no suggestion that there is any right of appeal. But, if the applicant does in fact send in a reasoned protest at the refusal, this is in practice treated as an appeal, and the application is considered again by B the N.A.C. These practices make it difficult to extract from the figures which the Association have furnished of numbers of applications and refusals any very accurate picture of the extent to which the RENA agreement has in fact restricted new entries into the retail newsagency trade. The only figures supplied relate to the last five years and to the London N.A.C. alone, which apparently deals with about five-sixths of the total applications. For the London committee during the C last five years, the annual number of applications has averaged about one thousand, but these include an indeterminate number of re-applications, probably of the order of 150 a year. New applications would appear to run at an average rate of about 850 a year, of which about five hundred a year are granted and the remainder refused. If all were granted, the number of new entries into the retail newsagency trade might be greater than it is at present by something of the order D of between 350 and 450 a year, including those dealt with by the Manchester committee, or of the order of one per cent. of the existing number of retail newsagents. We mention these figures because what seemed to us to be exaggerated fears were expressed and no doubt genuinely held by some witnesses in the retail newsagency trade as to the extent to which competition would increase if the RENA restrictions were abolished.

E Although there are a number of respects in which the method of administration of the RENA scheme creates a sense of injustice, not always without reason, in the minds of unsuccessful applicants for permits, the evidence does not lead us to the conclusion that the public as a whole are not reasonably well served by the present methods of distribution of London daily newspapers. There appears to be throughout the country a reasonably efficient domiciliary delivery service at F what is in most cases a modest delivery charge, which enables most regular newspaper readers who so desire to receive their London daily newspapers delivered at their residences between 7.0 and 8.0 o'clock on each weekday morning, except in the remoter rural areas. So far as selling points for counter sales are concerned, there is no evidence which would justify a finding that any substantial number of those members of the public who wish to purchase their London daily newspapers G over the counter, either because of the early hour at which they start work or for other reasons, have been prevented from doing so by a shortage of selling points, although inevitably there are cases where the selling points might be more conveniently situated for individual members of this class of purchasers. But, so far as the public is concerned, this situation has existed for the last fifty years. There is no evidence that the delivery service was any worse before the Federation H was founded, or that today any better service is provided to the public in the areas which have been developing since 1944 in which the RENA scheme has effectively restricted the number of newsagents than in those older areas in which the population is constant or falling which were already thickly supplied with retail newsagencies in 1944, and in which the RENA scheme has probably had little effect on their numbers. In general, it would seem that the public needs I in the distribution of London daily newspapers have been reasonably well satisfied, irrespective of whether the RENA scheme, or its predecessors, has operated to restrict the number of selling outlets or not.

As has so frequently been stated in judgments of this court, the test which we have to apply in determining whether or not particular restrictions are contrary to the public interest is not whether the public has been reasonably well served under—or in spite of—the restrictions. Parliament has declared by s. 21 of the Restrictive Trade Practices Act, 1956, that all restrictions of the categories into which the RENA restrictions admittedly fall are to be deemed to be contrary

to the public interest unless the court is satisfied of one of the circumstances specified in para. (a) to para. (g) of sub-s. (1) of s. 21. The respondents in this case rely, and rely only, on circumstances which they contend bring the restrictions within para. (b)—namely:—that the removal of the restrictions would deny to the public as purchasers of London daily newspapers specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restrictions themselves or of any arrangements or operations resulting therefrom. The test which we have to apply in the first instance is, therefore, whether the respondents have satisfied us that, if the RENA restrictions were abolished, the public, as purchasers of London daily newspapers, would be denied some specific and substantial benefits or advantages. Unless we are so satisfied, the question of balancing such benefits or advantages against any detriments either to the public or to would-be entrants into the retail newsagency trade (under the latter part of s. 21 (1)) does not arise. Our attention must, therefore, in the first instance be focussed on the public as purchasers of London daily newspapers; and, in determining whether the RENA restrictions can pass the test, we have to form a view as to what is likely to happen in the future (a) if the RENA restrictions continue in operation, and (b) if the RENA restrictions are removed.

If the RENA restrictions continue in operation, the distribution of London daily newspapers is, we think, likely to go on in much the same way as it has done since 1944. If the RENA restrictions are removed, the respondents' forecast of what would then happen is based on two alternative, and at first sight contradictory, hypotheses. The first is that the abolition of the RENA scheme would be followed by unrestricted entry into the retail newsagency trade of anyone desirous of selling London daily newspapers and free competition between retail newsagents; the second is that, somehow or other, the RENA scheme would be replaced by restrictions on entry into the retail newsagency trade more stringent and less advantageous to the public as purchasers of London daily newspapers than those currently imposed under the RENA scheme. This apparent contradiction, although it has inevitably presented forensic difficulties to the respondents in the presentation of their case, is by no means fatal to their contentions. It is not illogical to argue, as they do, that one or other of two things must happen and that, if either of them does happen, the public, as purchasers of London daily newspapers, will be deprived of advantages which they now enjoy and would have continued to enjoy if the RENA scheme were not abolished. Indeed, the two hypotheses are not unconnected, for the Federation's argument is that the result of unrestricted entry into the retail newsagency trade would so seriously imperil the livelihood of its members at present engaged in the trade that they would be compelled themselves, either alone or in conjunction with the wholesalers' organisations, to initiate some other scheme for restricting new entrants, and the Association's argument is that, in such an event, the new scheme would be more restrictive and less advantageous to the public than the RENA scheme operated by the Association themselves.

We will, accordingly, consider first what the effect would be on the public as purchasers of London daily newspapers if, on the abolition of the RENA scheme, no restrictions, other than those due to ordinary economic forces operating under a competitive system, were imposed on entry into the retail newsagency trade. The Federation's contention is that, under such conditions, the business of the individual retail newsagent would, in general, become so unprofitable that he would be unable or unwilling because of the inadequacy of the reward to continue delivery services to the extent that he now undertakes them, and that large numbers of the public would be deprived of the advantage of having their London daily newspapers delivered timeously at their residences; and that the retail newsagent, being unable to afford the risk of unsold copies, would fail to keep an adequate stock of newspapers and, in particular, of the less popular " quality " newspapers for casual sales over the counter. We are quite unable to accept this

A gloomy prophecy as to the results of exposing the retail newsagency trade to competitive conditions comparable to those which subsist without either disaster to the public or to the traders themselves in other branches of the retail trade.

The prophecy was based on some calculations of the ultimate effect on the annual net profits of six actual cases of retail newsagents of a decrease of twenty-five per cent. in sales of all types of newspapers and periodicals and of all sales B of other goods effected before 8.30 a.m. These calculations involve the assumptions:—(i) that the total volume of sales of newspapers and periodicals throughout the country would remain constant, notwithstanding any increase in selling points; (ii) that the total number of retail newsagents would increase by 33⅓ per cent.; (iii) that the sales of newspapers and periodicals by each existing newsagent would be reduced to the same ratio of his former sales as the total number C of existing newsagents bore to the final number of new and existing newsagents, that is seventy-five per cent.; and (iv) that all sales of other goods effected before 8.30 a.m. would be reduced in like ratio since they were made to customers who would not be attracted to the newsagent's shop if he did not sell newspapers and periodicals.

Each of these assumptions is, in our view, fallacious. No doubt sales of news- D papers and periodicals go together, and it is reasonable to suppose that a person entering the retail newsagency trade in respect of London daily newspapers will desire to include among his wares other kinds of newspapers and periodicals; but we see no grounds for supposing that an increase in selling points would not lead to some increase in casual sales, although it may well be that, in the case of London daily newspapers of which about seventy per cent. or more are now E delivered to readers' residences, the increase would be small.

The assumption that the total number of retail newsagents would increase by 33⅓ per cent. has no foundation in the evidence before us. Its origin appears to have been an observation in a report by Mr. Scrivens, an accountant called by the Federation who is also a newsagent, that, if there were no economic factors operating under free competition to deter would-be entrants from embarking F on the retail newsagency trade, their numbers might increase by one-third or more. He drew attention, however, in his very helpful report, to various economic factors which would act as a deterrent to new entrants, and expressed his own view, both in his report and in his oral evidence, that the increase in numbers of newsagents would be likely to be substantially less than 33⅓ per cent. With this we agree. Any increase of the order of 33⅓ per cent. in the number of retail G newsagents under conditions of unrestricted competition seems to us to be quite outside the realms of probability. We have already pointed out that, if all the rejected applicants under the RENA scheme came into the trade, the annual rate of entry into the trade would be greater than at present by a number representing something of the order of one per cent. of the total number of existing retail newsagents. It may be that, under the present system, some would-be H applicants are deterred from applying by the very existence of the permit scheme or by the requirement of the Association that applicants must undertake to operate a delivery service, since the main attraction to certain classes of applicants is counter sales which they think will bring customers into their shops and so increase their sales of other goods. On the other hand, the existence of the RENA restrictions gives to the successful applicant in developing districts a I business with a monopoly value sufficiently attractive to enable landlords to obtain an enhanced rent for a shop to be let to a retail newsagent, and the disappearance of this monopoly value would reduce the attractiveness of the trade to new entrants.

No doubt there are many small shopkeepers selling confectionery, tobacco or fancy goods who think that they could enhance their income by adding newspapers and periodicals to the goods which they stock; but, to effect any worthwhile volume of counter sales of London daily newspapers, it would be necessary to open the shop not later than 7.0 o'clock in the morning, and probably earlier.

Furthermore, unlike pre-war days, London daily newspapers are not available to retail newsagents on sale or return, and the risk of unsold copies is a relevant factor. Two unsold copies out of seven turn a gross profit into a gross loss. Very few newsagents indeed do not operate a delivery service to supplement their counter sales, although newsagents whose selling points were established before the RENA scheme was inaugurated and who constitute probably seventy-five to eighty per cent. of the total number of points in existence today are under no compulsion to do so. As the delivery boy also delivers periodicals and local papers at the same time as the London daily newspapers, such a service increases the newsagent's sales of periodicals as well and, since deliveries are in response to firm orders, a delivery service ensures to the newsagent a steady trade free from the risk of loss on unsold copies. It would seem, indeed, that, except in the case of selling points in busy shopping centres, the provision of a delivery service by a retailer of London daily newspapers is necessary to make the newsagency pay. In a district which is already well served by newsagents' delivery services, it is a slow and difficult task to attract satisfied customers away from their existing retailer, and a would-be entrant to the trade in such a district would not be able to look forward to any rapid growth in this branch of his trade.

But, even if a would-be entrant were undeterred by these considerations, he would have to find a wholesaler willing to supply him. We have already drawn attention to the rigid time schedule to which the wholesaler has to work, and to the added expense in which he is involved if he increases the number of dropping points, particularly if these are at any distance from existing dropping points. Furthermore, as the total circulation of London daily newspapers increases slowly, a wholesaler would have to consider whether the expansion of dropping points is likely to add to, or merely to diversify, his total business. Operating on a gross profit margin of $10\frac{1}{2}$ per cent. in the provinces and $14\frac{1}{4}$ per cent. in London on the price of newspapers to retailers, that is about 6d. per quire of twenty-six copies in the provinces and about 8d. per quire in the London area, it would not pay a wholesaler to increase his turnover by additional deliveries of small quantities of London daily newspapers at scattered delivery points, save at an additional delivery charge which would have to be met out of the gross profit margin of the retailer. An additional and potent factor is the necessity for the wholesaler to retain the goodwill of his existing customers. A wholesaler is unlikely to offend and risk losing the custom of an established retailer unless he sees the prospect of larger sales to the newcomer, and this in itself will tend to deter wholesalers from being eager to supply new selling points in close proximity to existing customers. Where, as in most parts of the country, there are competing wholesalers, the wholesaler who had no existing customers near the newcomer's premises would not be influenced by the same deterrent, but he is more affected by the additional expense of adding to his round a more distant dropping point. All these factors, which would operate under free competition, militate against the creation of new selling points except in areas where there is a shortage of existing newsagents, or where their inefficiency or inconvenient location indicates a substantial public demand for London daily newspapers for the newcomer to satisfy.

Turning now to the third assumption, it should be hardly necessary to point out that a new competitor in a retail trade does not either immediately or eventually take away the same proportion of the trade of each of his competitors. If the new entrant succeeds at all, and he may not, he does so because he provides a more efficient service to his customers if that expression be taken to include, as it should in the retail trade, geographical convenience of the selling point. If, by providing a more efficient service, he attracts customers from his competitors, that is merely the normal process whereby under competitive conditions less efficient tradesmen are eventually driven out of the trade and replaced by the more efficient to the advantage of the public as purchasers. Finally, while no doubt sales of other goods, such as tobacco in particular, in the early morning is

A assisted by being combined with the sale of London daily newspapers, the assumption that up to as late as 8.30 a.m. it rises and falls in direct proportion to the sale of newspapers is a mere assumption unsupported by evidence.

We should not have thought it necessary to mention such elementary considerations, which are applicable in a greater or less degree to competition in all forms of retail trade, were it not for the fact that many of the retail newsagents B called as witnesses for the Federation genuinely feared that the abolition of the RENA scheme would be followed by a great influx of new entrants into the trade. Time and again reference was made to conditions thirty or forty years ago when, it was said, there was intensive competition from street newsvendors who bought and sold a few dozen newspapers to make " beer money ". The great social and economic changes which have occurred since the 1920s make this C comparison inapplicable. The abolition of the system of supplying newspapers on sale or return has in itself wholly changed the economics of the small casual trade, but even more important is the emergence of full employment and rising economic standards which have eliminated the attractions of this kind of casual trade. No doubt, if the RENA scheme were abolished and entry into the retail newsagency trade were limited only by the operation of the inevitable economic D forces of free competition, there would be some increase in the number of newsagents in some parts of the country, particularly in developing districts, and some existing newsagents would be subjected to the spur of greater competition than that which they now face, but we are quite unconvinced that, if the retail trade in London daily newspapers were left exposed to the ordinary economic forces of free competition, the delivery service which the public now enjoys would be in E any way jeopardised, nor does it seem to us that the availability of newspapers, whether popular or " quality ", for casual sales would be reduced. Neither of these things happened before the RENA restrictions or their predecessors were imposed; neither of these things has happened in the older districts where there is a falling population where the RENA restrictions have had little impact, where there are many newsagents with selling points close to one another estab- F lished before 1944 and where, as many witnesses have deposed, two or three different newsagents are delivering newspapers to houses in the same road.

We are not, therefore, satisfied that, if the RENA restrictions were removed and entry into the trade in respect of London daily newspapers were left to the operation of the economic forces of free competition, the public, as purchasers G of such newspapers, would be deprived of any specific or substantial benefit or advantage.

While the Federation's main concern is with the well-being and prosperity of its members as vendors of newspapers, the Association's primary concern is with maintaining or expanding the circulation of their newspapers. It is to the Association's interest that there should be an efficient, low-cost distribution sys- H tem providing a nation-wide delivery service and adequate selling points for counter sales. So far as distribution of their products is concerned, their interest is the same as that of the public as purchasers. Their support of the RENA restrictions is not really based on the contention that, if entry into the retail trade in London daily newspapers were left to the ordinary economic forces of free competition, circulation figures would be reduced, or that the distribution I system as respects either delivery services or counter sales would be any less efficient or that the public, as purchasers of newspapers, would be deprived of any benefits or advantages. Their fear is that, if the RENA restrictions were abolished, the Federation or its members, perhaps in association with wholesalers, would in some way or other impose their own restrictions on entry into the retail newsagents' trade, that such restrictions would be more rigorous than those at present imposed under the RENA scheme and that, with stricter limitation on the number of newsagents, delivery services would tend to become local monopolies, more costly and less efficient, and the number of selling points would

tend to become inadequate for the public needs, with a consequent fall in the circulations of their newspapers. A

The Federation witnesses, while expressing their conviction that members would take such action as was permissible under the law to preserve their livelihoods, were noticeably reticent as to what steps they contemplated taking to prevent persons desirous of entering the trade from doing so if the RENA restrictions were abolished. The value of their evidence as to their probable reactions was, however, largely vitiated by the unrealistic assumptions as to future conditions under free competition on which, no doubt for forensic purposes, the questions put to them were based. If you ask any tradesman if he would view with equanimity a reduction of his trade by twenty-five per cent., you are unlikely to receive the answer " Yes ". It is understandable that members of any trade association concerned in the manufacture or distribution of goods should regard it as being in their own interest to exclude potential competitors from coming into the trade; and it would be natural that, if the Federation were in a position to control entry into the retail newsagency trade, they would tend to allow fewer entrants than are at present allowed by the Association under the RENA scheme. The Federation's policy, initiated in an economic climate very different from that of today, has historically been based on limitation of entry; and forty per cent. of the permits currently granted under the RENA restrictions are unsuccessfully opposed by the Federation. Although this is not necessarily indicative of the extent to which entry would be limited under a system of control under which the Federation had some responsibility greater than a mere right to make representations, we accept that, if the Federation were today free to impose its own policy, that policy would be more restrictive than that applied by the Association under the RENA scheme. B C D E

But the Federation is a responsible body; its members are responsible and law-abiding citizens and the law, by which we do not doubt they will continue to abide, today includes the Restrictive Trade Practices Act, 1956. It is necessary, therefore, in considering the Association's way of presenting its case in favour of the existing restrictions, to consider the impact of the Act on the sort of control of entry into the retail newsagency trade which the members of the Association fear. Counsel for the Association has suggested that it might be possible for the Federation to devise restrictions which would fall outside the scope of Part 1 of the Act, citing as an example an agreement which, while ostensibly dealing with the hours of work of workmen and so falling within the exclusion provided in s. 7 (4) of the Act, would effectively prevent their employment in the distribution of London daily newspapers to traders who did not hold such permits or fulfil such other conditions as were specified in the agreement. Since this was only a hypothetical agreement, we are not called on to express any concluded opinion on it; it is sufficient to say that the likelihood of any such agreement's falling outside the scope of Part 1 of the Act seems to us so remote that we do not think that any practical importance should be attached to it. Furthermore, if an agreement in such a form were excluded from the provisions of Part 1 of the Act, it could be used to exclude from the provisions of the Act almost any restriction of any of the kinds specified in s. 6. Even if we thought it probable—which we do not—that the Act, on its true construction, does enable persons to evade its provisions in the way in which counsel has suggested, we should still have to look at the realities of the situation, and in such an event it is a not unreasonable assumption that Parliament would make the appropriate amendments to stop the gap so opened. We can, therefore, limit our consideration to agreements containing restrictions in substitution for the RENA restrictions to which Part 1 of the Restrictive Trade Practices Act, 1956, applies. F G H I

From what has been said earlier in this judgment, it must be obvious that, if the RENA restrictions themselves do not satisfy the requirements of s. 21 (1) of the Act so as to justify a declaration that they are not contrary to the public interest, any other scheme under which entry into the retail newsagency trade

A in respect of London daily newspapers or the supply of such newspapers to persons desirous of entering the trade was controlled by the Federation or any combination of existing members of the trade, whether acting alone or in conjunction with other persons engaged in the production or distribution of such newspapers, would also fail to satisfy the requirements of s. 21 (1), and would be contrary to the public interest, unless there had been a material change in B the relevant circumstances. We do not contemplate that either the Federation or any of its responsible members would desire to act in a manner which, under the provisions of the Act, had been declared to be contrary to the public interest. In these circumstances, no useful purpose would be served by considering hypothetical agreements, registrable under the Act, under which restrictions on entry into the retail newsagency trade in respect of London daily newspapers might C be imposed. We do, however, draw particular attention to the judgment which has just been delivered in *Re Black Bolt and Nut Assocn. of Great Britain's Agreement* (*No. 2*) (3) as to the scope of injunctions granted under s. 20 (3) of the Act.

We are, accordingly, not satisfied that there is any real likelihood that, if the RENA restrictions were removed, they would be replaced by other more stringent D restrictions on entry into the retail newsagency trade in respect of London daily newspapers. The alternative way of presenting the case contended for by the Association accordingly also fails.

As the respondents have failed to satisfy us of any of the circumstances specified in para. (a) to para. (g) of s. 21 (1) of the Act, it is unnecessary for us to consider under the balancing clause the detriments resulting from the operation of E the RENA scheme either to the public or to unsuccessful applicants for permits thereunder. There must be a declaration that all the restrictions which are the subject of this reference are contrary to the public interest and, accordingly, void.

[Counsel for the Registrar placed before the court a letter to the Registrar from the Federation dated July 13, 1961, notifying him of their intention to set up a scheme entitled "Scheme for the establishment of a list of selling points F of the national daily newspapers recognised by the Federation", the minutes of a meeting of the national executive of the Federation held on July 5, 1961, resolving that the list should be compiled in accordance with the scheme, a copy of the proposed scheme (4), and a letter from the general secretary of the Federation to all district secretaries, dated July 13, 1961, (4). Counsel for the Federation said that the documents were not registrable under the Act of 1956 and, G therefore, did not come within the jurisdiction of the court at that time. He further said that the Federation was not in a position to give undertakings on behalf of its members and contended that no injunction could be made against the Federation itself under s. 20 (3) of the Act, because it did not carry on business within s. 6 (1) of the Act; the agreement being between the members of the Federation, he agreed that an injunction could be made against them H under s. 20 (3).]

DIPLOCK, J.: So far as the individual members of the Federation are concerned, there will be an injunction in the usual form; that is to say, restraining the represented parties and each of them, members of the Federation,

I "from doing any of the following acts whether by themselves or their respective servants or agents, that is to say (a) giving effect to or enforcing or purporting to enforce the said agreement in respect of any of the said restrictions, (b) making any other agreement to which Part 1 of the said Act applies to the like effect as the said agreement in respect of the said restrictions or any of them."

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(3) Ante, p. 316.

(4) The relevant portions of these documents are set out at p. 444, letter G, to p. 445, letter D, post.

With regard to the Federation itself, we have considered the argument addressed to us on the question whether the court has jurisdiction to make an injunction against the Federation under sub-s. (3) of s. 20 of the Act. The basis of that argument is that there is no power to grant such an injunction because the Federation are not persons party to the agreement who carry on business in the United Kingdom. Our attention has been drawn to passages in the judgment in *Re Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement (No. 2)* (5). That was a case in which the restrictions were restrictions which arose under sub-s. (7) of s. 6 of the Act, and the Association was not itself a party to the agreement. In the present case, the Federation is itself a party to the agreement, and the question which arises is whether it is a person party to the agreement who carries on business in the United Kingdom within the meaning of sub-s. (3) of s. 20. In the *Confectioners'* case (6), the point which was being argued in relation to s. 21 (1) (b) and the desirability of restraining the Federation from making any other agreement to the like effect did not arise, and the opinion expressed by the court (7) was in somewhat tentative form. Having heard argument on the matter, we have come to the conclusion that the Federation is a party to the agreement who carries on business in the United Kingdom within the meaning of sub-s. (3) of s. 20. It is to be observed that the agreements referred to in s. 6 (1) are agreements

> "between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties . . ."

The section, therefore, contemplates agreements, such as this is, in which the parties may include not only parties who carry on businesses of the kind specifically described in s. 6 (1) but also other parties who carry on business of a different kind. It does not seem to us, therefore, on further reflection, that the words "who carry on business in the United Kingdom" in s. 20 (3) should be restricted to persons who carry on business within the United Kingdom in the production or supply of goods or in the application to goods of any process of manufacture; and, in our view, we have jurisdiction to make an order restraining the Federation itself, which is a registered trade union, in the terms of sub-s. (3) (a) and sub-s. (3) (b). This seems to us to be a case where it is desirable that such an injunction should be granted, and we propose to grant an injunction against the Federation in that form. We appreciate that this is expressing a view as to the construction of the Act which differs from the tentative view expressed by the court in the *Wholesale Confectioners' Alliance Agreement* (7). Whether the tentative view then expressed or the final view now expressed is right is a matter of law which can, if necessary, go to the Court of Appeal for decision.

There is one other matter which it is desirable to mention. On July 13, 1961, the Federation notified the Registrar of their intention to set up a "Scheme for the establishment of a list of selling points of the national daily newspapers recognised by the Federation". That scheme involves setting up a procedure for recognised points of sale similar to that which was set up under the RENA agreement, but, in the covering letter sent out to district secretaries inviting them to compile the list, it was expressly stated:

> "To avoid any possible misapprehension please note that this letter must NOT be taken as containing any recommendation, express or implied, as to any action to be taken or not taken by any member, except as may be necessary in the preparation of this list."

A copy of the scheme was sent to the Association and to two wholesalers' organisations, and it is, perhaps, desirable that I should read some of the paragraphs in that letter. The first one is:

(5) [1961] 2 All E.R. at p. 9; L.R. 2 R.P. at pp. 238, 239.
(6) [1961] 2 All E.R. 8; L.R. 2 R.P. 231.
(7) [1961] 2 All E.R. at p. 9; L.R. 2 R.P. at p. 239.

A "The Federation's list will be available to any person interested . . . May I assume that you will inform your own members of the contents of this letter."

Then the last three paragraphs I should read:

"We should perhaps add, although we are aware that this point is well appreciated, that when one is seeking to evolve a scheme to replace an B agreement which (we are assuming) will be declared void by the Restrictive Trade Practices Court, there must be a certain amount of risk that in one way or another someone may think of a way of attacking the validity of the new scheme which has not occurred to one. Further, if the RENA agreement is declared void, the Federation will be subjected to an injunction, but in our C opinion the form of injunction which it would be proper for the court to make would not affect the scheme we propose. In the circumstances, therefore, bearing in mind that it is vital to the Federation that the livelihood of its members should be safeguarded, we are of the opinion that it would be reasonable for the Federation to adopt the scheme we propose, provided, of course, that they decide that such would be advantageous to them"

D the scheme being described as one "to replace an agreement which (we are assuming) will be declared void by the Restrictive Trade Practices Court". It is obvious that the purpose of the list is not to frame it and hang it up in the offices of the Federation, and that this is intended to be a preparatory step to seeking to enforce restrictions on the entry of persons into the retail newsagency trade—a preliminary step. We desire to say this: The Federation and each of the E members of the Federation will be subject to an injunction by this court restraining them, among other things, from making any other agreement to which Part 1 of the Act applies to the like effect as the RENA agreement, and any breach of such an injunction is subject to severe penalties, including imprisonment, if the court takes the view that there is a deliberate attempt to flout the orders of the court. It is plain that this list, if it is to serve any purpose at all, is designed to F form part of a scheme for carrying on a course of conduct which this court has declared to be contrary to the public interest. If, in the course of carrying out further steps in the scheme, any person breaks the injunction which the court has granted, I desire to make it crystal clear that the court will take a very serious view of that conduct; and I also desire to make it crystal clear, since the object is plain, that the court will not regard as a mitigating circumstance the fact G that any such person has acted on the advice of lawyers, solicitors or counsel, and that, if the advice which they have received is wrong and they are in fact in breach of the injunction, the fact that they were wrongly advised that their attempt to evade the provisions of the Act was lawful will not be regarded as a mitigating circumstance or any reason for not applying the full penalties of the law on persons who commit contempt of court.

Orders accordingly.

Solicitors: *Lewis & Lewis and Gisborne & Co.* (for the Newspaper Proprietors' Association, Ltd.); *Shaen, Roscoe & Co.* (for the National Federation of Retail Newsagents, Booksellers and Stationers); *Treasury Solicitor* (for the Registrar).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re WOLVERHAMPTON BOROUGH COUNCIL'S ALDERMANIC ELECTION.

A

[QUEEN'S BENCH DIVISION (Glyn-Jones and Thesiger, JJ.), July 27, 28, 1961.]

Elections—Local government—Aldermen—Mayor also candidate for election as alderman—Vacation of mayoral chair by mayor and an alderman chosen to preside—Vote made by mayor—Mayor's vote counted, making equality of votes each for seven candidates including himself—Presiding alderman gave casting vote for candidates for whom mayor had voted and declared them duly elected—Whether mayor was entitled to be present and vote at meeting of council over which he did not preside—Whether the seven aldermen duly elected—Local Government Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 51), *Sch.* 3, *Part* 2, *para.* 3.

B

C

A council of a borough consisted of a mayor, fifteen aldermen and forty-five elected councillors. An annual meeting of the council was held for the purposes, inter alia, of electing a mayor and seven aldermen. An outgoing alderman was elected to be mayor and he immediately submitted a declaration of acceptance of office and took the chair and presided over the meeting. The next item on the agenda was the election of seven aldermen and the mayor announced that being a candidate for election as alderman he was precluded from presiding, whereupon Alderman M. was elected to preside and the mayor took a seat beside the other aldermen. The council then proceeded to elect seven aldermen from fourteen candidates divided into two sets of seven. Voting papers were signed by the forty-five councillors and the mayor and delivered to Alderman M. who ascertained and stated that twenty-three votes had been given to each of the fourteen candidates. The mayor signed and delivered a voting paper for the candidates (who included himself and six others) who, apart from the mayor's vote, had only twenty-two votes. On the footing that there was an equality of votes Alderman M. gave a casting vote (under s. 22 (5) of the Local Government Act, 1933) in favour of the candidates for whom the mayor had voted and declared them to be duly elected. If the mayor had not voted, the other set of seven candidates would have had a majority of votes.

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Held: if a mayor were present at a meeting of a borough council, he must preside, for para. 3 (1)* of Sch. 3 to the Local Government Act, 1933, which so provided, was mandatory (see p. 449, letter G, post), and, moreover, the statutory casting vote of the person presiding at the meeting only arose on the assumption that the mayor was not present at the meeting (see p. 451, letter F, post); therefore, the seven aldermen declared elected had not been duly elected and the other seven candidates should have been declared to have been elected.

G

Per GLYN-JONES, J.: a mayor's office is one and indivisible; at a meeting of councillors the mayor, seated in the mayoral chair, can exercise all his one and indivisible functions, but, if not in the mayoral chair, and thus not performing his function as mayor of presiding at the meeting, he has lost the right to exercise any other of his functions, so far as taking part at that meeting is concerned (see p. 449, letter I, to p. 450, letter A, post).

H

[As to the conduct of business at borough council meetings, see 24 HALSBURY'S LAWS (3rd Edn.) 462, para. 860; and for cases on the subject, see 33 DIGEST 60, 61, *358-372*.

I

For the Local Government Act, 1933, s. 22, s. 75, Sch. 3, Parts 2, 3 and 5, see 14 HALSBURY'S STATUTES (2nd Edn.) 371, 395, 520, 521, 523.]

Special Case.

This was a Special Case stated to be heard before the High Court pursuant

* For the Local Government Act, 1933, Sch. 3, Part 2, para. 3, see p. 448, letter F, post.

A to the order of GORMAN, J., and MCNAIR, J., dated June 30, 1961, made under s. 126 (1)* of the Representation of the People Act, 1949, in an election petition presented by the petitioners, Louis Reginald Guy and Anacletus Byrne-Quinn, and dated June 13, 1961, in relation to an election of aldermen for the county borough council of Wolverhampton held on May 29, 1961. The council consisted of the mayor, fifteen aldermen and forty-five elected councillors. B On May 29, 1961, an annual meeting of the council was held for the purposes, inter alia, of electing a mayor and seven aldermen. The first business was the election of a mayor. The respondent Charles Herbert Davies, an outgoing alderman, was elected to be mayor and he immediately made and submitted a declaration of acceptance of office and thereupon became mayor of the council. The next item on the agenda was the election of seven aldermen and the mayor C announced that being a candidate for election as one of the aldermen he was precluded from presiding, whereupon Alderman Frank Mansell was elected to preside, and presided for the purpose of the election and the mayor sat alongside the other aldermen. The council then proceeded to elect seven aldermen. Voting papers were signed and delivered to Alderman Frank Mansell. The persons who made and signed the voting papers were the forty-five elected councillors D of the borough and the mayor. Alderman Frank Mansell then ascertained the result of the voting and stated the number of votes given to each person, the number being twenty-three to each of the fourteen candidates. Paragraph 7 of the Special Case stated that the voting paper signed and delivered by the mayor contained votes in favour of these candidates (who were the respondents to the petition): Norman Frank Bagley, Charles Herbert Davies, Harry Bagley, Frank E Clapham, Mabel Dale, Herbert Preece, Sidney Richard Swain. Apart from the mayor's vote there were only twenty-two votes for these candidates. On the footing that there was an equality of valid votes for all the candidates, Alderman Frank Mansell gave a casting vote for the candidates who were the respondents and declared them duly elected. If the mayor had not voted or if his vote had not been seen or counted the under-mentioned candidates would have had the F majority of votes. Paragraph 9 of the Special Case stated that these candidates were Anacletus Byrne-Quinn, James Cahill, Louis Reginald Guy, William John Rawlins, Malcolm Pascall Birch, Harold Thomas Fullwood, John Clement Homer. On the completion of the election of aldermen the mayor resumed the chair and presided for the rest of the meeting.

It was contended by the petitioners that by virtue of his being a candidate G for election as alderman, Charles Herbert Davies was precluded from presiding at the election of aldermen. They contended that if the mayor could not and did not preside at a meeting he was not in law present and could not validly vote, and they relied on the Local Government Act, 1933, Sch. 3, Part 2, para. 3. The purported vote of the mayor in the first instance was therefore invalid and should not have been seen or counted. In the premises only twenty-two H votes were given in the first instance for each of the persons declared to be elected as against twenty-three votes given for each of the persons not declared to be elected. There was consequently a majority of valid votes given for candidates not declared to have been elected and they should have been declared duly elected. No case arose for the exercise of a casting vote by the person presiding at the meeting.

I It was contended by the respondents that the mayor was entitled to be present at the election and to vote, notwithstanding that he did not preside by reason of his being a candidate. They contended that the vote of the mayor in the first instance was valid and that there was consequently an equality of

* Section 126 (1) of the Representation of the People Act, 1949, provides: "If, on the application of any party to a petition made in the prescribed manner to the High Court, it appears to the High Court that the case raised by the petition can be conveniently stated as a special case, the High Court may direct it to be stated accordingly and the special case shall be heard before the High Court . . ."

valid votes in the first instance for each of the fourteen candidates and Alderman Frank Mansell, as the person presiding, was entitled to give a casting vote. The persons declared elected were duly elected. A

The questions for the opinion of the court were on the above statement of facts, (i) whether the persons, named in para. 7 were duly declared to be elected as aldermen or (ii) whether the persons named in para. 9 were the persons who had the greatest number of votes at the election and should have been declared by Alderman Frank Mansell to be elected aldermen. B

C. E. Scholefield, Q.C., and *D. G. H. Frank* for the petitioners.
R. I. Threlfall for the respondent Alderman Frank Mansell.
D. G. Widdicombe for the respondents N. F. Bagley and others.

GLYN-JONES, J., after referring to the nature of the proceedings and reviewing the facts appearing from the special case, continued: The petitioners contend that the mayor, by virtue of his being a candidate for election as alderman, was precluded from presiding at the election of aldermen of the borough. That contention is not challenged by the respondents, and I will say no more about it. Secondly, they contend that if the mayor cannot and does not preside at a meeting, he is not in law present thereat and cannot validly vote, and in support of that contention the petitioners referred to para. 3 of Part 2 of Sch. 3 to the Local Government Act, 1933. C D

By s. 75 of the Local Government Act, 1933, it is enacted that:

> "The provisions of Parts 1 to 5 of Sch. 3 to this Act shall have effect as respects the meetings and proceedings of local authorities and of committees thereof . . ." E

Schedule 3, Part 2, para. 3, which is the part relating to proceedings of borough councils, reads as follows:

> "(1) At a meeting of the council of a borough the mayor, if present, shall preside. (2) If the mayor is absent from a meeting of the council, the deputy mayor, if chosen for that purpose by the members of the council then present, shall preside. (3) If both the mayor and the deputy mayor are absent from a meeting of the council, or the deputy mayor being present is not chosen, such alderman, or in the absence of all the aldermen, such councillor, as the members of the council present shall choose, shall preside." F

At an election for aldermen the electors are the councillors and the mayor. Aldermen as such are not permitted to vote, but the fact that the mayor happens to be an alderman does not deprive him of his right to vote as mayor. As mayor he may cast a vote which as alderman he could not cast. Counsel for the petitioners having referred us most carefully to all the sections of the statute which have any bearing on this case, and having also cited one or two cases which I do not think that I need cite again for the purpose of my judgment based his submission on this point: that the mayor could only vote in the exercise of his mayoral office. If he was present at the meeting in his capacity as mayor he should have presided; if he could not preside there was no other capacity in which he was capable of being present at the meeting. Hence, when the mayor cast his vote it was the vote of a person who could not in law be present at or form part of the meeting. It was therefore an invalid vote and should have been rejected. G H I

Counsel who appears for Alderman Frank Mansell who presided, said that it was the duty of the court to protect the vote which Parliament had conferred on the mayor; that if Parliament had intended to disfranchise him if he himself happened to be a candidate for election to the office of alderman, Parliament would have done so in express language in s. 22 of the Local Government Act, 1933, the section which deals with the election of aldermen, and in sub-s. (2) contains the provision that aldermen shall not as such, vote at the election of aldermen, the words "as such" indicating that an alderman may have a right

A to vote in some capacity, and that he might have such right in his capacity as mayor if in addition to being an alderman he happens to be mayor. Of course that is quite right, there is nothing in s. 22 which says expressly that if a mayor is candidate for the office of alderman he shall not vote.

Then counsel for Alderman Frank Mansell said that it was a well-recognised rule of the common law that a man might not be judge in his own cause, and B therefore that the mayor was disqualified from presiding at the election. He said that Parliament must be taken to have known of that, therefore the provision that "the mayor, if present, shall preside" should be read as if the words were "subject to any common law rule which disqualifies the mayor from presiding, the mayor, if present, shall preside". Secondly he argued that the rules laid down by para. 3 of Part 2 of Sch. 3 were not mandatory, but were C merely directory, and that a failure to comply with them did not invalidate the proceedings at the meeting at which the breach took place. In support of that proposition he cited passages from MAXWELL ON INTERPRETATION OF STATUTES (9th Edn.) at p. 372, p. 373 and p. 379, and I mention now that counsel for the seven successful candidates also cited a passage on p. 379 and p. 380. Counsel for Alderman Frank Mansell submitted that there were only two possible results D in this case: first, the fact that the mayor was a candidate did not take away his vote, and if his vote was valid, the result of the election stands. Secondly, he said that if that were wrong, and if it were true that a mandatory provision had been disregarded and that the mayor was present at the meeting, some other person having been elected to preside, then it followed that the council was improperly constituted, that the person elected to the chair had no right to be there E and a fortiori had no right to give a casting vote, and that the result would be that the election was void, and there would have to be another election.

Counsel for the respondents, the seven successful candidates, submitted to us that the mayor's office was one whole and indivisible office with all the incidents which belonged to the mayor whether he was in the chair or out of it. He said that the effect of the argument of counsel for the petitioners was to F treat sub-para. (1) of para. 3 of Part 2 of Sch. 3 as if it formed part of the definition of the mayor. Counsel for the respondents said the word "present" meant not only physically present but also legally capable of acting. The mayor might be physically present but legally incapable of performing some only of his functions, in which event his right to perform his remaining functions was unimpaired. His submission was that if the mayor was present in the room, G it could not be said that he was not present at the meeting.

I think that this provision in para. 3 of Part 2 of Sch. 3 is mandatory, and that, if the mayor is present at the meeting, he must preside. I am not sure, however, that it is necessary to hold that that provision is mandatory, and I am inclined to think one reaches the same result whether the provision is mandatory or directory. The office of mayor has its own peculiar characteristics. The H mayor is elected to be the first citizen of the borough, and as first citizen of the borough he has certain mayoral functions to perform. I accept, and I agree with the proposition of counsel for the respondents that the mayor's office is one which is whole and indivisible, all the incidents of which belong to the mayor. I cannot accept his concluding words: "whether he is in or out of the chair". In my opinion it was Parliament's intention that at a meeting I of the council the mayor's place, and his only place, should be in the chair. Seated in the mayoral chair he can exercise all his one and indivisible functions. In my opinion it was the intention of Parliament, evidenced in the provisions laid down in this enactment, that there should be, as it were, no place in the council where the mayor can sit except the mayoral chair. When he is in the mayoral chair presiding at the meeting he is performing his functions as the mayor, and he has the mayor's right to vote. When he is not in the mayoral chair and thus cannot exercise his mayoral function of presiding over the meeting as the statute intends that he should, then since his functions are one and

indivisible he has lost his right to exercise any of them so far as taking part in this meeting is concerned. A

It seems to me to be quite clear that Parliament intended that one of those functions which make up the "one and indivisible office" should be the right and duty to preside at council meetings and it seems to me that at a meeting of the council the mayor forms part of the council and is entitled to be regarded as present and a member of the council only when he is sitting in the mayoral chair. B I express no opinion, I do not think it necessary, whether, if for some reason he is disqualified from exercising the mayoral functions, he does or does not retain a right in his capacity as alderman to take part in the proceedings of the council. That does not arise in this case, because an alderman has no power to vote and it would not matter whether or not the mayor had a right to take his seat as alderman and take part in the proceedings of the council as an alderman. C That would not have helped him in this case because as an alderman he would have had no vote.

In my view, then, the mayor, unless presiding, is not present at the meeting in his mayoral capacity and could not therefore vote as mayor. I have come to the conclusion that the vote which he cast was not a valid vote and should not have been accepted by the presiding alderman, and that being so, the D answers that I give to the first two questions propounded in the Case Stated are: to question (i) no; to question (ii) yes.

THESIGER, J.: I agree. It is provided by s. 22 (1) of the Local Government Act, 1933, that:

> "The ordinary election of aldermen shall be held in every third year at the annual meeting of the council, and shall take place immediately after the election of the mayor . . ." E

By s. 22 (2) it is provided: "An alderman shall not, as such, vote at the election of an alderman of the borough". By s. 22 (5) it is provided:

> "In the case of an equality of votes the person presiding at the meeting, whether or not entitled to vote in the first instance, shall have a casting vote." F

It is conceded that a candidate for an aldermanic vacancy is precluded from presiding at the meeting even in his capacity as mayor.

One of the respondents, Mr. Davies, who was an outgoing alderman and a candidate for re-election, could not therefore preside even though he had just been elected mayor. It appears that he therefore took a seat somewhere next to the other aldermen. G I pause to point out that the presence of a distinguished overseas judge on the bench would not mean that he was present as a member of the court, nor if a visiting mayor was present at a meeting of a county borough council would he be present as a member of the council. The respondent, Alderman Mansell, then took the chair. A little later Alderman Mansell counted the vote of Mr. Davies as if Mr. Davies, an outgoing alderman, was present and voting for his own re-election and for the election of six other candidates. H By so doing, Alderman Mansell arrived at an equality in the votes. Having, as he thought, arrived at that result, Alderman Mansell then cast a vote himself, which must have been on the grounds that he was presiding at the meeting, and that up to that point there was an equality in the voting. Alderman Mansell having done that, declared that Mr. Davies and the other candidates for whom Mr. Davies and he had voted had been elected; I in other words they were elected by counting the vote of Mr. Davies not as an outgoing alderman but as mayor, and by also counting a vote given by Alderman Mansell not as alderman but as presiding at the meeting.

The Local Government Act, 1933, Sch. 3, provides in Part 2, para. 1 (1):

> "The council of a borough shall [that word is to be noted] in every year hold an annual meeting and at least three other meetings, which shall be as near as may be at regular intervals, for the transaction of general business."

A By para. 3 it is provided that:

> "(1) At a meeting of the council of a borough the mayor, if present, shall preside. (2) If the mayor is absent from a meeting of the council, the deputy mayor, if chosen for that purpose by the members of the council then present, shall preside. (3) If both the mayor and the deputy mayor are absent from a meeting of the council, or the deputy mayor being present is not B chosen, such alderman, or in the absence of all the aldermen, such councillor, as the members of the council present shall choose, shall preside."

Alderman Mansell was therefore presiding because the mayor had arranged not to be present at the meeting of the council within the meaning of para. 3 (1), and had arranged to be absent from the meeting of the council within the meaning C of sub-para. (3). In those circumstances it seems to me clear that the only interpretation of the movement of Mr. Davies, the mayor, out of the chair to another place, and the movement of Alderman Mansell into the chair to preside, is that Mr. Davies had absented himself from the meeting of the council within the meaning of the Act, so that the mayor as such was not present. He was not, for example, present within the meaning of Sch. 3, Part 5, para. 1 (1), which D provides:

> "Subject to the provisions of any enactment (including any enactment in this Act) all acts of a local authority and all questions coming or arising before a local authority shall be done and decided by a majority of the members of the local authority present and voting thereon at a meeting of the local authority."

E Incidentally, para. 1 (2) provides once again as in s. 22 (5): "In the case of an equality of votes the person presiding at the meeting shall have a second or casting vote". I think that in those circumstances Alderman Mansell was wrong in regarding the mayor as present within the meaning of the Act and voting as mayor at a meeting of the council. Alderman Mansell's position and his opportunity if it was necessary to give a casting vote in an aldermanic election, al- F though he was an alderman himself, only arose on the assumption that the mayor as such had absented himself from the meeting of the council.

In my view, and I entirely agree with GLYN-JONES, J., Alderman Mansell could not turn round, as it were, and regard the mayor as such as present and voting at that meeting at that point. Consequently there was no necessity, and indeed no right, for Alderman Mansell to exercise the casting vote which his G position as the person presiding might have given, a position which he owed entirely to the notional absence of the mayor. There was a majority of those present and qualified to vote for the other set of candidates whom he erroneously declared to be not elected because he, I think wrongly, counted the vote of the mayor as such, and then added his vote, although he was an alderman, on the ground that he was presiding in the absence of the mayor.

H It is never very useful to use metaphors, but the matter perhaps can be understood if one bears in mind such proverbial metaphors as: "You cannot have your cake and eat it", "You cannot blow hot and cold", and even perhaps one may sometimes be "Hoist with one's own petard". I think that it is quite clear that the answer to question (i) must be as my Lord said, and so must the answer to question (ii).

I

GLYN-JONES, J.: I would like to add one word to my own judgment. There was a suggestion, I think, by one or other of the learned counsel for the respondents that in some way it would be a grievance, or the mayor would have a legitimate grievance if he was disfranchised, as it was said. I think it is right to point out that this difficulty has arisen because the mayor allowed his name to go forward as a candidate for both offices. He was not bound to do so; he could have chosen between the two and said that he would rather be mayor than alderman, or that he would rather be alderman than mayor. It was known

no doubt before ever the election of mayor took place what the voting was likely to be, and I think that the mayor had his opportunity to make his own choice which office he would hold. I do not think that he is entitled in those circumstances to say that he labours under any grievance if he is told by the court that the method which was adopted to secure his retention of both offices is one which the court cannot support.

Declaration accordingly.

Solicitors: *Alfred Bright & Sons*, agents for *Dunham, Brindley & Linn*, Wolverhampton (for the petitioners); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Wolverhampton (for the respondent Alderman Frank Mansell); *Lees & Co.*, agents for *Manby & Steward*, Wolverhampton (for the respondents N. F. Bagley and others).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

SPARROW *v.* FAIREY AVIATION CO., LTD.

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), July 13, 14, 27, 1961.]

Factory—Dangerous machinery—Duty to fence—Component on machine forming a fence preventing operator's body touching machinery—Hand tool coming into contact with machinery—Whether breach of duty to fence in that fencing not secure against hand tool—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

The plaintiff, an experienced lathe operator employed by the defendants, was machining metal discs of some four inches diameter to form sealings for petrol filler caps. The jaws of a chuck were within the boss of a disc, viz., a hole that the plaintiff had bored in a disc, and were holding the disc rotating in the lathe while he finished the disc by removing burring with a hand tool. There was only one-sixteenth inch clearance between the front of the jaws and the disc from which he was removing the burring. The tool caught against the jaws and the plaintiff's hand was thrown against the machinery or the disc (but did not come into contact with the jaws) and was injured. In an action for damages for breach of statutory duty under s. 14 (1) of the Factories Act, 1937,

Held (SELLERS, L.J., dissenting): under s. 14 (1) the duty that was owed to an employee was not unlimited but extended only to protecting him from injury caused by or through contact between him and the machine (see p. 458, letter H, and p. 459, letter G, post); accordingly the defendants owed no statutory duty to the plaintiff to prevent the tool that he was holding coming into contact with the jaws of the chuck (see p. 459, letter B, post), and the action failed.

Johnson v. *J. Stone & Co. (Charlton), Ltd.* ([1961] 1 All E.R. 869) and *Moran* v. *Tweedales & Smalley, Ltd.* (Dec. 1, 1960, unreported) overruled.

Nicholls v. *Austin (Leyton), Ltd.* ([1946] 2 All E.R. 92) and *Close* v. *Steel Co. of Wales, Ltd.* ([1961] 2 All E.R. 953) applied.

Decision of STREATFEILD, J. ([1961] 1 All E.R. 216) affirmed.

QUAERE: whether s. 14 (1) imposes a duty to fence dangerous machinery against contact with the employee's clothes (see p. 458, letter D, and cf. p. 456, letter G, post).

[As to the statutory duty to fence machinery securely, see 17 HALSBURY'S LAWS (3rd Edn.) 70-72, paras. 122, 123.

For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

Benn v. *Kamm & Co., Ltd.*, [1952] 1 All E.R. 833; [1952] 2 Q.B. 127; 24 Digest (Repl.) 1075, *324*.

A *Close* v. *Steel Co. of Wales, Ltd.*, [1961] 2 All E.R. 953; [1961] 3 W.L.R. 319.
Eaves v. *Morris Motors, Ltd.*, ante, p. 233.
Gorris v. *Scott*, (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 2 Asp. M.L.C. 282; 2 Digest (Repl.) 365, *459*.
Johnson v. *Stone (J.) & Co. (Charlton), Ltd.*, [1961] 1 All E.R. 869; [1961] 1 W.L.R. 849.
B *Miller* v. *Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 24 Digest (Repl.) 1091, *418*.
Moran v. *Tweedales & Smalley, Ltd.*, (Manchester Assizes, Dec. 1, 1960), unreported.
Nicholls v. *Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 24 Digest (Repl.) 1091, *419*.
C *Quinn* v. *Horsfall & Bickham, Ltd.*, [1956] 2 All E.R. 467; [1956] 1 W.L.R. 264, 652; 3rd Digest Supp.
Summers (John) & Sons, Ltd. v. *Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; [1955] 2 W.L.R. 825; 24 Digest (Repl.) 1055, *217*.
Walker v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, *212*.

D

Appeal.

The plaintiff workman appealed against the decision of STREATFEILD, J., on Nov. 11, 1960, reported [1961] 1 All E.R. 216, dismissing his action against the defendants, his employers, for damages for breach of their statutory duty under s. 14 (1) of the Factories Act, 1937. The facts are stated in the judgment of SELLERS, L.J.

E

P. R. Pain for the plaintiff.
Desmond Ackner, Q.C., for the defendants.

Cur. adv. vult.

July 27. The following judgments were read.

F **SELLERS, L.J.:** The appellant plaintiff worked for the defendants on a turret lathe and in course of his work on Sept. 27, 1956, he met with an accident in circumstances and with a result which he could only vaguely describe. At the time a metal disc $4\frac{3}{4}$ inches in diameter, with a central hole $2\frac{1}{2}$ inches in diameter, was being made into a petrol filler cap and was attached in the chuck of the lathe by three jaws gripping the inside of the hole and with their ends lying one-sixteenth inch from the outer surface of the component. Whilst the chuck, with the component part so held, was revolving at five hundred revolutions per minute, the plaintiff used a scraper against the front edge of the hole in order to remove a slight projection and smooth it out.

G

I quote from the judgment findings which we have not been asked to review:

H "The plaintiff himself does not know how the accident happened, but what he told me was that somehow the tool seemed to get caught. He thought it had caught against one of the jaws and before he knew where he was his left hand had been flung against something. He does not know what it was, whether it was flung against the component gripped in the jaws or whether it was flung against the face of the chuck. I think, and I am satisfied, that the probability of the accident is that it did occur because the point of the tool, as he was holding it, caught against the jaw inside the hole of the component and that, of course, threw the tool out of control, and it may well have been that the hand hit the component or the face of the chuck. The hand did not come into contact with the jaws themselves inside the hole, but I think the point of the tool did, and it was in that way that this accident happened."

I

The learned judge found that the jaws were a dangerous part of machinery when revolving at speed and his finding was accepted and unchallenged before

this court. He also found that the jaws (the dangerous part of the machinery) were fenced by the component part which the jaws were holding in position. A

The learned judge asked (1):

> ". . . if this was a dangerous part, was it so fenced as to prevent the body of the operator coming into contact with it?"

He answered the question in this way (1): B

> "In a sense, it was fenced by the component itself, that being the fence which in fact did prevent the body of the operator coming into contact with the dangerous part. The fence would appear to have fulfilled s. 14 of the Factories Act, 1937. What happened here may be a very fine distinction, but here a part, which was a dangerous part and which was fenced in such a way as to prevent the body of the operator or some part of his body coming into contact with it, in fact was not so fenced as to prevent a tool coming into contact with it. I am afraid that, with some reluctance, I must give effect to the submission of counsel for the defendants that that is the answer to it on the facts. If the injury was caused by the tool rather than some part of the plaintiff's body coming into contact with the dangerous part that is not enough. In those circumstances, as I have said with some reluctance, I feel bound to hold that the dangerous part was fenced sufficiently within the meaning of s. 14 of the Factories Act, 1937." C D

The question on appeal is, therefore, whether or not, on the facts found, the plaintiff proved a breach of s. 14 of the Factories Act, 1937, and injury to himself resulting therefrom.

It is not a case where part of the machinery itself flew out or broke and came away and injured him or where the material or component part which was being worked at the time caused the accident. The plaintiff was injured when he was doing his work at the machine in the manner in which he was required and expected to do it and, as the judge has found, without any negligence on his part. The learned judge has held that there was a dangerous part of the machinery which required fencing and which was securely fenced by the component part itself to prevent the plaintiff's fingers or hands or other parts of his body from coming into contact with the jaws but which was not securely fenced for the operation which the plaintiff was properly performing with a small tool or scraper. Workmen are often, I imagine, required to use tools of some kind, or perhaps to use an oil can, with moving machinery and it would be strange if the secure fencing which the section requires were not to be adequate to protect them in the task that they were normally called on to perform and having regard to the manner in which it was to be done. E F G

This is not, I think, a case where it could be said that the risk of such an accident was not reasonably foreseeable, applying the principles of *Walker* v. *Bletchley Flettons, Ltd.* (2) and *John Summers & Sons, Ltd.* v. *Frost* (3). Clearly the learned judge did not think so, for he thought that there might have been liability at common law if such a claim had been pursued. The revolving jaws were only one-sixteenth inch from the place where the tool had to be applied and it might well have been foreseen that the scraper might be struck, although apparently there was no history of such an accident. The probable consequences of it being struck are not so easy to envisage but that damage of some kind might result would seem likely. H I

The recent case in the House of Lords, *Close* v. *Steel Co. of Wales, Ltd.* (4) relied on by the defendants, does not seem to me to be against the plaintiff's contentions. There, part of the drill shattered and flew outwards from the machine. In *Nicholls* v. *Austin (Leyton), Ltd.* (5), which was fully considered

(1) [1961] 1 All E.R. at p. 219.
(2) [1937] 1 All E.R. 170.
(3) [1955] 1 All E.R. 870; [1955] A.C. 740.
(4) [1961] 2 All E.R. 953.
(5) [1946] 2 All E.R. 92; [1946] A.C. 493.

A by the House in *Close's* case (6) along with intervening decisions of this court, the workman had been injured by a piece of wood which was being processed and was ejected from a circular saw; that also, therefore, is a different case.

We were referred in argument to the words used by the noble Lords in *Nicholls'* case (7) and cited in *Close's* case (6) by LORD MORTON OF HENRYTON (8) as follows:

B "LORD MACMILLAN said (9): 'The obligation under s. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, and this obligation was in the present instance amply fulfilled.'

C "LORD SIMONDS said (10): 'I find nothing in this language to suggest that the section aims at protecting the worker from any indirect danger arising out of the functional operation of the machine. If there was any ambiguity, it would be set at rest by the proviso, which provides that: ". . . in so far as the safety of a dangerous part . . . cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided

D which automatically prevents the operator from coming into contact with that part." These last six words make it clear that the security at which the substantive part of the subsection aims is security from unintentional, or, I suppose, even intentional, contact with a dangerous part. The fence is intended to keep the worker out, not to keep the machine or its product in.'

E "LORD UTHWATT said (11): 'Section 14 (1) applies to "every dangerous part of any machinery other than prime movers and transmission machinery." That dangerous part is to be securely fenced unless it—i.e., the dangerous part—is in such a position or of such construction as to be safe. The proviso to the subsection is of assistance. Where a fixed guard is not practicable as respects a dangerous part, the provision of a device which prevents contact between the operator and that part is to satisfy the

F obligation contained in the leading provision of the subsection. The prevention of contact between the worker and the dangerous part is to be sufficient '."

I do not think that the noble Lords in their reasoning in *Nicholls'* case (7) had in mind the circumstances which exist here or were intending to express

G an opinion which would affect them. "The worker", as LORD UTHWATT uses the word, would have included, I should have thought, the worker doing his work in the manner in which he was equipped for doing it, including his clothing, whether special equipment or not, and any tool or material the process necessitated.

Eaves v. *Morris Motors, Ltd.* (12) also differs from the present case. There

H the thing which caused the accident was material being processed, namely a bolt or bolts secured in the machinery, which for the reasons given did not call for protection under s. 14. Here the dangerous parts, the jaws, did on the judge's finding require fencing under s. 14 but that which was found to be effective fencing against direct contact with parts of the body did not protect the workman from danger having regard to the manner in which he was required

I to work, namely, with a tool.

For the plaintiff it was urged that the finding that the component part provided an efficient fence to the extent that the judge held was erroneous and unjustified, but I do not think that the judge's finding in that respect should be disturbed.

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(6) [1961] 2 All E.R. 953. (7) [1946] 2 All E.R. 92; [1946] A.C. 493.
(8) [1961] 2 All E.R. at p. 963.
(9) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.
(10) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 504.
(11) [1946] 2 All E.R. at p. 99; [1946] A.C. at p. 506. (12) Ante, p. 233.

The first sentence of s. 14 (1) is clearly wide enough to include a workman working with a tool for it contemplates security to "every person employed or working on the premises" and it seems to envisage a person at work, which itself involves consideration of a method or manner of working. The proviso requires a device "which automatically prevents the operator from coming into contact with" a dangerous part. Again, I would say, the operator as he operates, including method and manner of working. There is nothing in the section read as a whole which would exclude protection for an operator plus the tool with which he was working, whereas the section read as a whole, as the cases have decided, does not require protection, except as expressly specified under s. 14 (3), from the material being processed in a machine.

Section 15 of the Factories Act, 1937, contemplates that a workman may in the course of his work lubricate or adjust a machine, both of which functions might and probably would require use of an oil can or a tool, and exemption from the obligations under s. 14 only arises if the requirements of s. 15 are fulfilled.

It might be argued that the woodworking regulations—and, I think, other regulations—require the use of a tool and therefore it would be inconsistent to construe s. 14 (1) so as to require a secure fence against the use of a tool. The Woodworking Machinery Regulations, 1922 (S.R. & O. 1922 No. 1196), made "for the use of woodworking machinery", provide (reg. 11) that

> "A suitable push-stick shall be kept available for use at the bench of every circular saw which is fed by hand, to enable the work to be carried on without unnecessary risk."

Clearly there would be no obligation under the statute to have a secure fence against a push-stick so used. It should, however, always be borne in mind that circumstances may create a common law obligation. But the argument, I think, goes when it is recognised that a regulation such as reg. 11 only supplants the obligation under s. 14 to the extent which the regulation defines: *Miller* v. *William Boothman & Sons, Ltd.* (13), *Benn* v. *Kamm & Co., Ltd.* (14), and *Quinn* v. *Horsfall & Bickham, Ltd.* (15).

I regard the issue as a difficult one, more particularly having regard to the limitations which have been put on the section. The restrictions have been, if I may so put it, on the machine side of the statutory fence. This event all arises on the workman's side and in the result I can see no reason for restricting the requirement of s. 14 to protecting the workman as a man and for not applying protection to him as a workman complete with the equipment for his task. If an unfenced dangerous part of revolving machinery—which ought to have been fenced—caught a workman engaged on it by his trousers only and threw him clear of the machinery so that he fell violently on the ground away from the machinery and received injury there would in my view be liability under s. 14 (1). It is well known that clothing catching in machinery is one of the commonest forms of accident and damages have frequently been awarded for the consequences of such an accident without, I feel sure, inquiry into whether the injuries which arose were occasioned by the dangerous part itself which trapped the clothing or by a blow on the floor or on some other part of the machine or adjacent structure. I do not see that this case is in principle any different.

In *Johnson* v. *J. Stone & Co. (Charlton), Ltd.* (16) HINCHCLIFFE, J., found for the plaintiff, who was injured when a casting which he was manoeuvring into position struck a fast-moving pulley which was inadequately fenced, fracturing the pulley's bearing and causing it to drop from its anchorage so that it struck the plaintiff's hand in its fall. I need not here review the decision of HINCHCLIFFE, J. It may be that the facts created liability at common law

(13) [1944] 1 All E.R. 333; [1944] K.B. 337.
(14) [1952] 1 All E.R. 833; [1952] 2 Q.B. 127.
(15) [1956] 2 All E.R. 467.
(16) [1961] 1 All E.R. 869.

A without invoking s. 14, but the learned judge expressed disapproval of what STREATFEILD, J., has held in the present case. This view of PAULL, J. (17), is cited (18):

> " 'Argument was placed before me that there is no liability under [s. 14 of the Factories Act, 1937] because it was not the plaintiff's hand which came against the machine, but the metal which he had to hold that did so. I am not very impressed with that argument. Once you have a dangerous machine and the man is compelled to put a piece of metal against it, I should have thought that the machine, under the Act, ought to have been protected against accidents due to the metal being forced against the hand. Be that as it may, there is, I think, negligence '."

B

C That is not quite the same as the present case and may permit of argument, as the metal which did the injury was the material being processed, but it would seem that both these learned judges would have approved the present appellant's claim.

The conclusion to which I have come was not pressed by learned counsel for the plaintiff and I do not find this a wholly satisfactory case on which to form the conclusion or to apply it, but, having regard to the way the case and the D appeal have been conducted, I do not think that the point can escape decision; it is of general importance in applying s. 14 of the Act.

With every respect to the learned judge, and to my brethren, who think otherwise, I would hold that on the findings made a breach of s. 14 (1) was established and that thereby the plaintiff met his injuries and that the appeal should succeed.

E

DEVLIN, L.J.: The plaintiff in this case was injured because of an accident with a turret lathe. There are three places in or in connexion with the lathe that have to be identified and considered. There is the component which was being processed in the lathe, the jaws which were holding it in the chuck and the face of the chuck. All these were at the time of the accident revolving F at five hundred revolutions a minute. The tool with which the plaintiff was working, a scraper, came into contact with the jaws and caused his hand to be flung against either the component or the face of the chuck and his hand was injured. The plaintiff contended that the jaws were a dangerous part of the machine which ought to have been fenced or guarded. His hand, however, did not come into contact with them but with either the face of the chuck or the com- G ponent. If the jaws were dangerous, it was because they were in rapid motion; since the component and the face of the chuck were in the same rapid motion and since they were capable of causing injury, as in fact they did, it is difficult to see why, if the jaws were dangerous, the face of the chuck and the component were not dangerous also. If it had been contended and proved that not merely the jaws but also the face of the chuck ought to have been fenced or guarded, the nice point which we have to consider in this case might not have arisen. H However, we must deal with the matter on the evidence before us and on the findings which the judge below was invited to make. We must disregard the fact that the face of the chuck may have been as dangerous as the jaws. We must treat the case as if the jerk which the plaintiff sustained had caused him to injure his hand on some object which had nothing to do with the machine and which I there was no obligation to guard, such as a sharp surface nearby.

On this footing, the case for the plaintiff is, first, that the jaws were a dangerous part of the machine (as the judge has in fact found); secondly, that under s. 14 (1) of the Factories Act, 1937, the jaws, as a dangerous part of the machine, should have been securely fenced; and, thirdly, that if they had been so fenced the scraper would not have come in contact with the jaws and so the injury to him would not have happened.

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(17) In *Moran* v. *Tweedales & Smalley, Ltd.*, (Manchester Assizes, Dec. 1, 1960), unreported.

(18) [1961] 1 All E.R. at p. 874.

Counsel's main argument for the defendants accepts the fact that the jaws were dangerous and admits that they were not, as they should have been, securely fenced; for this purpose he does not rely on the finding of the judge that the component itself constituted a fence or guard. On this argument he admits the breach of the section but disputes that the defendants are in breach of duty towards the plaintiff and submits that, if they are, the damage is too remote.

He bases his argument on a reading of the section that he claims has now been settled by the House of Lords as authoritative. I do not enter into the question whether the speeches of their Lordships on this point constitute binding or persuasive authority; if persuasive only, I am persuaded. On this reading the object of the section (following the words of the proviso) is limited to preventing " the operator " from coming into contact with the dangerous part of the machine. Does that extend to preventing a tool which the operator is holding from coming into contact with the dangerous part? In my judgment it does not. Some of their Lordships have described the obligation as being to prevent the body of the operator from coming into contact with the machine: see LORD MACMILLAN in *Nicholls* v. *Austin (Leyton), Ltd.* (19) and LORD MORRIS OF BORTH-Y-GEST in *Close* v. *Steel Co. of Wales, Ltd.* (20). I need not consider whether that means that it is only if the flesh of the operator is brought into contact with the machine that there is a breach of duty. We have heard argument about whether an operator's clothes may be said to be so much a part of him as to come within the purview of the section; that will have to be decided when it arises: but I am clear that a tool that he is holding is not a part of him. Nor is it reasonable to suppose that the Act of 1937 was intended to prevent contact between moving machinery, which when in movement is dangerous, and a tool. Contact between a body and moving machinery will in all probability always result in serious injury. Contact between a tool and such machinery is unlikely to result in serious injury provided the body is properly guarded; and it would be a strong thing without clear words to construe the statute as completely prohibiting all such contact. The section is to be read in the light of the common law principle that in any particular case in which the employer ought to anticipate danger, he will be liable unless he guards against it. I cannot hold that the word " operator " by itself clearly includes the tools the man is working with; and I am not therefore willing to conclude that in guarding against this sort of contact the statute goes further than the common law.

This conclusion leads, I think, inevitably to the further conclusion that the defendants are not liable. Their defence may perhaps be put on the ground that, since they could have complied with their obligation by erecting a guard of a sort which would have prevented the plaintiff from himself coming into contact with the jaws while permitting a tool he was using to be brought into contact with them, their omission to guard was not the cause of the injury which the plaintiff in fact sustained. But I prefer to put it on the ground that under the section the employer does not owe an unlimited duty to the employee to protect him from all injury caused by the working of the machine but only from injury caused by or through contact between him and the machine. The leading case in this branch of the law is *Gorris* v. *Scott* (21). It is conveniently summarised in SALMOND ON TORTS (12th Edn.), p. 471, in the chapter which deals with the breach of statutory duties. It is there stated:

> " An action for damages will not lie at the suit of an injured person . . . if the damage suffered by him is not of the kind intended to be guarded against. In *Gorris* v. *Scott* (21) the plaintiff sued the defendant, a ship-owner, for the loss of sheep which had been swept overboard in consequence

(19) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.
(20) [1961] 2 All E.R. at p. 966.
(21) (1874), L.R. 9 Exch. 125; 2 Asp. M.L.C. 282.

A of the failure of the defendant to supply certain pens and other structures on the deck of his ship for the accommodation of sheep, as required by Act of Parliament. It was held, however, that the defendant was not liable, because the purpose of the statute in question was to make provision against the spread of contagious disease among animals, and not to prevent such accidents as the plaintiff complained of."

B On the ground, therefore, that the defendants owe no duty under s. 14 (1) to the plaintiff to prevent the tool which he is holding from coming into contact with the machine, I hold that the action fails and that the appeal should be dismissed. I appreciate that it is a doubtful point and that I am differing not only from SELLERS, L.J., but also from the reasoning of HINCHCLIFFE, J., in *Johnson* v. *J. Stone & Co. (Charlton), Ltd.* (22), and that of PAULL, J., in C *Moran* v. *Tweedales & Smalley, Ltd.* (23), which HINCHCLIFFE, J., quotes (24). Nevertheless, I prefer the conclusion of STREATFEILD, J., in this case and would dismiss this appeal accordingly.

DANCKWERTS, L.J., summarised the facts and continued: It was contended on behalf of the plaintiff that there was a breach by the defendants of D s. 14 (1) of the Factories Act, 1937, which requires " every dangerous part of any machinery " to be securely fenced,

> " unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

E The learned judge held that the jaws of the chuck were a dangerous part of the machine but he thought that the component operated as a fence in respect of the jaws of the chuck so that the terms of the section were satisfied. I agree with his conclusion, though I would express the position a little differently. The terms of the section plainly indicate that the circumstances in which the part is being used are to be taken into consideration in applying the terms of the F section. The circumstances were that the position of the component prevented the jaws of the chuck from being dangerous to the person working on that part. If that is a correct conclusion of fact, then I think that in the circumstances the jaws of the chuck were not a dangerous part of any machinery, or alternatively, were in such a position as to be as safe to any person employed or working on the premises as they would be if securely fenced.

G The accident is assumed to have occurred through not any part of the workman, but a scraper tool used by him, coming into contact with the jaws of the chuck. If the jaws of the chuck, in the position in which they were, were incapable of being brought into contact with any part of the body of the workman, does the intervention of some tool cause a breach of the section to be committed? In my opinion, it does not. It seems to me that this conclusion is supported by the authorities to which DEVLIN, L.J., has referred, and I agree with his H conclusion.

In my view the learned judge reached the correct result, and the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *W. H. Thompson* (for the plaintiff); *Hextall, Erskine & Co.* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(22) [1961] 1 All E.R. 869. (23) Manchester Assizes, Dec. 1, 1960, unreported.
(24) [1961] 1 All E.R. at p. 874. This reasoning is also printed ante p. 457, letter A in the judgment of SELLERS, L.J.

A

NOTE.

R. *v.* DIXON.

[GLAMORGANSHIRE ASSIZES (Jones, J., and a jury), December 5, 1960.]

Criminal Law—Insanity—Evidence of insanity tendered by prosecution—No defence of diminished responsibility—Defence should be raised by accused and witnesses called on his behalf. B

[As to the defence of insanity, see 10 HALSBURY'S LAWS (3rd Edn.) 287, 288, paras. 530, 531, and p. 437, para. 810.]

Case referred to:

R. v. *Bastian*, [1958] 1 All E.R. 568; 42 Cr. App. Rep. 75; [1958] 1 W.L.R. 413; 3rd Digest Supp. C

Trial on indictment.

The accused was charged with the murder of his wife; he pleaded not guilty. In the course of his opening speech, counsel for the prosecution stated that he proposed to call evidence of the accused's insanity.

JONES, J., intimated that he would not allow that in the first instance, and the matter was argued at the conclusion of counsel's opening speech and in the absence of the jury. D

H. E. Hooson, Q.C., and *I. Davies* for the Crown.

Elwyn Jones, Q.C., and *W. T. Williams* for the accused.

H. E. Hooson, Q.C.: It was proposed to call before the jury at the conclusion of the prosecution's evidence the evidence of three doctors, namely, two prison doctors and a psychiatrist because, in counsel's submission, the prosecution were entitled to submit that the accused was suffering from such a disease of the mind as to amount to insanity; see *R.* v. *Bastian* (1). E

JONES, J.: There have been some special cases in which it has been done, but this is not a special case. This is a perfectly ordinary case. I do not see why the ordinary course should not be followed, that is to say that the defence should raise this point and call evidence. Over and over again it has happened that persons who might be said to be witnesses for the Crown are called for the defence. This has been the practice for many years and apart from a suggestion in one particular case I do not think that anything has arisen to suggest that the practice should be departed from. F G

Elwyn Jones, Q.C.: The doctors consulted on behalf of the accused were not the equal of the Crown medical witnesses and their evidence, initially, was not in full accord with the Crown evidence. Those instructing him and he himself had come to the conclusion that it would be in the best interests of the accused for the position which would be propounded by the Crown's medical witness to be accepted. The defence of diminished responsibility was not put forward. H

JONES, J.: If the accused sets up a defence it is for him to call evidence in support of it. I shall not put the defence of insanity to the jury unless it is raised by the defence and evidence is called to support it.

Solicitors: *Director of Public Prosecutions* (for the Crown); *Leo Abse & Cohen*, Cardiff (for the accused). I

[*Reported by* D. M. HUGHES, ESQ., *Barrister-at-Law.*]

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(1) [1958] 1 All E.R. 568; 42 Cr. App. Rep. 75.

A

R. v. R. and I.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Scarman, J.), July 11, 1961.]

Injunction—Divorce—Divorced wife—Child of the dissolved marriage—Child at school in Scotland—Injunction restraining divorced wife from allowing letter sent to child's school to be handed to him—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 49), *s.* 45 (1).

B

In 1948 the husband was granted a decree absolute of divorce on the ground of the wife's adultery, and was granted the custody of the son, R. R. was now at school in Scotland. In 1961 the wife filed notice of application for access to R. but withdrew her application. At the same time she wrote a letter to R. explaining her reasons for withdrawing her application. She sent that letter, with a covering letter, to R.'s headmaster in Scotland asking him to pass the letter on; and the wife's solicitors informed the husband's solicitors of her action and enclosed a copy of the letter. The husband on ex parte application was granted an interim injunction, whereupon the wife requested the headmaster to hold her letter to R. The court found that the letter went beyond anything which could reasonably be written to R. at this stage.

C

D

Held: the court had jurisdiction to grant an injunction enjoining the wife not to allow the letter to be handed to R., since the application concerned custody of and access to the child R., and in the circumstances of the present case, including the fact that the headmaster of R.'s school in Scotland would observe the wife's instructions concerning the letter, the court would grant the injunction.

E

[As to injunctions for the protection of children involved in divorce proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 477, para. 1067, note (h), and 21 HALSBURY'S LAWS (3rd Edn.) 402, para. 841; and for cases on the subject, see 27 DIGEST (Repl.) 503, *4454* and 28 DIGEST (Repl.) 866, *948*, *949*.

F

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 482.]

Summons for injunction for hearing in open court.

In this case the husband sought an injunction to restrain the wife from allowing a letter written by her and dated July 4, 1961, to be handed to R., their son.

G

The parties were married in 1944 and in 1948 the husband obtained a decree absolute of divorce on the ground of the wife's adultery. The husband was granted the custody of the child, R., who was then about three years of age. R. was brought up by the husband and his second wife and at the time of the present proceedings was at school in Scotland. On Sept. 15, 1960, the wife filed notice of application for custody of R. On Oct. 7, 1960, no order was made on the wife's application save that she should have reasonable access. On June 30, 1961, the wife gave notice of application for access for a specific period in August, 1961, and generally thereafter. The wife then decided to withdraw this application and she wrote a letter dated July 4, 1961, to R., explaining why she was withdrawing her application. She sent that letter sealed with a covering letter to the headmaster of R.'s school in Scotland, asking the headmaster to pass the letter on to R. The wife's solicitors informed the husband's solicitors of the course which the wife was taking and provided them with a copy of the letter addressed to R. The husband thereupon applied ex parte for an injunction and on July 7, 1961, COLLINGWOOD, J., granted an interim injunction. The wife then requested the headmaster to hold the letter. The matter now came before SCARMAN, J.

H

I

S. Seuffert for the husband.

W. R. K. Merrylees for the wife.

SCARMAN, J., stated the facts and continued: I have now to decide whether in all the circumstances this is a case in which the letter dated July 4, 1961, should be prevented from getting into the hands of the boy. A

The court's jurisdiction to grant an injunction originates from s. 45 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. That subsection reads as follows:

> "The High Court may grant . . . an injunction . . . in all cases in which it appears to the court to be just or convenient so to do." B

As counsel for the wife rightly conceded, that jurisdiction is in terms a very wide one. It is, however, relevant to bear in mind that the subsection is dealing with the machinery at the disposal of the court and the court must have grounds on which to interfere, grounds recognised by the law of the land, before it can invoke that machinery. The only difficulty on the law is whether in the circumstances there are grounds entitling the court to invoke its process of injunction to prevent this letter being delivered to the boy. I should add that since the ex parte proceedings the wife has requested the headmaster to hold the letter. So far as I know, the letter has been held and has not been handed or otherwise communicated to the boy. C

In my judgment, the court has jurisdiction to intervene for the simple reason that this application arises out of the matters of custody of and access to this child of the family. It cannot be doubted that, should the court think fit, it can deny a parent access to its child, and it cannot be doubted in my judgment that in a suitable case, and in support of that denial of access, it can enjoin a parent from writing to her child. Here there is no difficulty in enforcing the court's order because of the steps very properly taken by the wife's solicitors; and, in my judgment, there is no difficulty in the matter of jurisdiction because the court is being asked to act in a matter which arises out of the problems of custody of, and access to, a child over whom the court has jurisdiction. D E

I take the view, therefore, that the court has jurisdiction to interfere if it thinks it just or convenient so to do. There is no difficulty about convenience through the action taken by the parties themselves. If the court does decide to interfere, the indications are that its interference will be effective even though, be it noted, the school is in Scotland and so is the headmaster. As to the justice of the matter, I have read the letter and I think it a most disturbing and unhappy letter to send to a boy of his age and antecedents. I have every sympathy with the wife in desiring to put her point of view forcefully to the boy and it is plain that the boy is probably already of an age, or certainly will soon be of an age, at which he can receive the strong meat of a parent's forcefully put point of view. This letter, however, goes beyond anything which could reasonably in the circumstances be addressed to this boy by his mother at this juncture. F G

I, therefore, think that this is a case in which the order of the court should go addressed to the mother and in the terms in which it is sought—namely, enjoining her from allowing her letter of July 4 to be handed to the boy. As I say, the boy and the headmaster are in Scotland but it is clear that the headmaster will do what he is told to do by the wife. The injunction therefore fastens on the conscience of the wife in England. H

Order accordingly.

Solicitors: *Walter, Burgis & Co.* (for the husband); *J. D. Langton & Passmore* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

A

R. v. PORRITT.

[COURT OF CRIMINAL APPEAL (Ashworth, Salmon and Winn, JJ.), July 25, 26, 1961.]

Criminal Law—Murder—Provocation—Summing-up—Issue to be left to jury although defence of provocation not raised and although accused did not testify that he was provoked—Homicide as culmination of evening of gang warfare—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 11), *s.* 3.

B

The appellant was indicted for capital murder contrary to s. 5 (1) (b) of the Homicide Act, 1957.* He undoubtedly had shot the deceased. On the evening of the crime the appellant was engaged in gang warfare between his family and another family. At the culmination of this stormy evening the appellant, according to his own evidence, saw his stepfather astride a window sill in a room in his home being held by two men, members of the rival gang, one of whom held a knife close to his stepfather's throat. The appellant said that he pulled a gun out of his pocket and endeavoured to shoot his stepfather's assailant, but the shot killed his stepfather instead. The appellant's defence was that the shooting was done in defence of a near relative then in imminent danger of being killed, and also that he fired in defence of his own home which was being attacked by armed raiders. At no time during the trial was any suggestion made by the defence or by the trial judge that a verdict of manslaughter could be returned on the evidence. The appellant did not say in evidence that he was provoked or had lost his self-control when he fired the shot. In summing-up the judge did not refer to manslaughter. On appeal against conviction the appellant contended that the jury should have been directed that it was open to them to find a verdict of manslaughter on the ground of provocation, under s. 3 of the Homicide Act, 1957.†

C

D

E

Held: (i) notwithstanding that a verdict of manslaughter was not sought by the defence at the trial, it was incumbent on the judge to leave to the jury the issue of provocation and loss of self-control, for in the circumstances of this case the jury might have thought that the appellant shot on provocation, being no longer master of his mind when he saw his stepfather in imminent peril, and, if that view were not displaced, the proper verdict would be manslaughter (see p. 469, letter F, post).

F

R. v. *Hopper* ([1915] 2 K.B. 431) followed.

Bullard v. *R.* ([1957] A.C. 635) considered‡.

G

(ii) in the circumstances a verdict of manslaughter would be substituted for the conviction of capital murder.

Appeal allowed in part.

[**Editorial Note.** This is the first reported case on s. 3 of the Homicide Act, 1957, and the test to be applied, apparently, is whether the provocation is sufficient to deprive a reasonable man of his self-control (see p. 469, letter C, post). *R.* v. *Cunningham* ([1958] 3 All E.R. 711), applying the observations of VISCOUNT SIMON in *Holmes* v. *Director of Public Prosecutions* ([1946] 2 All E.R. at pp. 127, 128) shows that the defence of provocation is only available on a charge of murder to reduce the crime to manslaughter.

H

As to the defence of provocation on a murder charge, see 10 HALSBURY'S LAWS (3rd Edn.) 710-713, paras. 1362 (especially notes (e) and (f)), 1363 and SUPPLEMENT; and for cases on the subject, see 15 DIGEST (Repl.) 938, *8980-8993*, 940, 941, *9011, 9019, 9021, 9022* and 3rd DIGEST Supp.

I

For the Homicide Act, 1957, s. 3, s. 5 (1) (b), see 37 HALSBURY'S STATUTES (2nd Edn.) 175, 177.]

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* Section 5 (1), so far as material, reads " Subject to sub-s. (2) of this section, the following murders shall be capital murders, that is to say . . . (b) any murder by shooting . . ."

† Section 3 is set out at p. 468, letter G, post.

‡ The relevant passages from the judgment in this case are printed at p. 470, post.

Cases referred to: A

Bullard v. *R.*, p. 470, post; [1957] A.C. 635; 121 J.P. 576; 42 Cr. App. Rep. 1; [1957] 3 W.L.R. 656; 3rd Digest Supp.

R. v. *Golder*, *R.* v. *Jones*, *R.* v. *Porritt*, [1960] 3 All E.R. 457; 124 J.P. 505; 45 Cr. App. Rep. 5; [1960] 1 W.L.R. 1169; 3rd Digest Supp.

R. v. *Hopper*, [1915] 2 K.B. 431; 84 L.J.K.B. 1371; 113 L.T. 381; 79 J.P. 335; 11 Cr. App. Rep. 136; 15 Digest (Repl.) 941, *9019*. B

R. v. *Prater*, [1960] 1 All E.R. 298; [1960] 2 Q.B. 464; 124 J.P. 176; 44 Cr. App. Rep. 83; [1960] 2 W.L.R. 343; 3rd Digest Supp.

Appeal.

This was an appeal by George Anthony Porritt against his conviction on July 4, 1961, at the Central Criminal Court before GLYN-JONES, J., and a jury of the capital murder by shooting, contrary to s. 5 (1) (b) of the Homicide Act, 1957, of his stepfather, Albert Leonard Porritt. He was sentenced to death. The facts are set out in the judgment of the court. The cases enumerated below were cited in argument in addition to those in the judgment.* C

Victor Durand, Q.C., and *R. D. L. Du Cann* for the appellant.

J. M. G. Griffith-Jones and *S. A. Morton* for the Crown. D

ASHWORTH, J., delivered the following judgment of the court: This appellant, George Anthony Porritt, was convicted on July 4 this year at the Central Criminal Court of capital murder, the victim whom he undoubtedly shot was Albert Leonard Porritt, his stepfather, and the appellant was sentenced to death.

The evening in question had begun with trouble between two families, the Copley's on the one side and their friends, and the present appellant and his wife, who had met at a club some fifteen or twenty miles out of London. The women fell out and fought each other, and on the way home there was something which no one suggests was an accident, but somehow or other two cars came into collision, and that provoked further trouble. According to the evidence, the appellant went home and went round to the Copley house where further trouble ensued as a result of which the windscreen of the appellant's car was smashed. He was persuaded or otherwise induced to go back to the Copley's to look for the other car which had been left immobile below Swanley, and so the appellant went back, having, according to him, first picked up his father who chose for the occasion to take with him a revolver and something like twenty rounds of ammunition. E F G

When the appellant reached Swanley he recognised the two cars of the Copley party, reversed his own car, drove past the two Copley cars, was greeted with a volley of stones, and then drew up and someone in the appellant's car fired two shots out of a revolver. According to the appellant it was his stepfather who fired these shots and thereafter, said the appellant, he removed the revolver from his stepfather's possession together with the ammunition and went home. Meanwhile, an attack had been made on the appellant's home in the course of which the front door glass had been smashed in. According to the appellant, as he reached home he became aware that the Copley party was in the neighbourhood, so he left his car some streets away and arrived home by devious ways over back garden walls and went into the house. The party assembled in the appellant's house consisted of himself and his stepfather and mother, and, I think, another woman, two children and his stepbrother. At some time either shortly thereafter or a little longer thereafter there was undoubtedly an organised attack on the appellant's house. How many men were involved in it may not be altogether clear, but there were at least four, and those in the house became aware that this attack H I

* *Mancini* v. *Director of Public Prosecutions*, [1941] 3 All E.R. 272; *Kwaku Mensah* v. *R.*, [1946] A.C. 83; *Holmes* v. *Director of Public Prosecutions*, [1946] 2 All E.R. 124; *A.-G. for Ceylon* v. *Perera*, [1953] A.C. 200.

A was being launched because according to the appellant there was "shouting and hollering" outside and the sound of crashing glass probably caused by the flinging of the lid of a dustbin through the window, and the victim, the appellant's stepfather, went into the front room to investigate what was going on. Having reached the front room, although the evidence is by no means clear, it seems that he became involved in a struggle with one or more members of the Copley B gang and, because he was having difficulty, he called for assistance. According to the appellant, the father said to him: "George, George, they are tooled up. Get the gun". The appellant had already heard the smashing of glass. He had already heard what he described as a lot of "hollering and shouting". He had already heard someone shout out: "Give him the knife", and accordingly he took the gun and went into the front room. His version of what happened, C which did not tally in the least with the Crown evidence, was that on arrival in the front room he saw his stepfather astride the window sill held by two men, one of whom held a knife close to the stepfather's throat. This much may be said in favour of the appellant's version that when the victim was examined after his death it was found that there was undoubtedly a cut wound somewhere on his face or neck, it was found that his shirt had been ripped, and there were also found D in the garden or on the window sill two knives. The appellant was asked what he did, and he said: "I pulled the gun from my pocket. I pointed it at the man who had the knife on my father's neck and he had his arm round his neck and my father was right forward like that", and he said he fired the gun. The assailant was the appellant and the victim fell on the floor and died.

Thereafter there was an ugly scene in the front garden in which the appellant E undoubtedly fired the same revolver, having reloaded it, and shot two others who had formed part of the Copley party. Eventually the gun was thrown away.

The appellant at first told a number of lies to the police, but when it came to his trial the defence which he put forward and put forward throughout the trial was that the shooting of the gun which resulted in the killing of his stepfather was shooting in defence of a near relative then in imminent danger of being killed. F Parallel with that was the defence that he had fired in defence of his own property, his own home, which was then being attacked by armed raiders.

At the trial it was conceded on behalf of the Crown that if the jury took the view that the firing was done in the honest belief that it was necessary for the protection of his stepfather, then the proper verdict was one of not guilty, and a similar concession was made in regard to the possibility of an honest belief that G it was reasonably necessary to protect the house by shooting. The defence had stressed the fact throughout the case that that was the appellant's frame of mind and contended that, accordingly, he should be acquitted.

It is worth emphasising, in view of the decision to which this court has come, that at no time in the course of the trial at the Central Criminal Court was there any suggestion that a verdict of manslaughter was open on the evidence. Such H a verdict was not sought by the defence nor was it suggested by the Crown or by the learned judge. So far as the defence is concerned it is perhaps right to say this, that concentrating, as counsel for the appellant was, on securing if possible an out-and-out acquittal, he was understandably reluctant to introduce further issues which might result in the appellant being found not guilty of capital murder but none the less guilty of manslaughter and so liable to a term of imprisonment. I None the less, the possibility of a verdict of manslaughter in circumstances such as I have endeavoured shortly to describe was something one would have expected would be in the minds of those engaged in the case.

In the course of his summing-up the learned judge did not refer once to the word "manslaughter", and it is only when the appeal is brought before this court that it is submitted on behalf of the appellant that the jury should have been directed on this evidence that it was open to them to find a verdict of manslaughter on the ground of provocation. It is only fair to the learned judge, whose conduct of the trial has been the subject of a warm tribute by counsel on both sides, to

point out that he was never invited to leave this issue to the jury. It was never mentioned before him and, in particular, no mention of it was made to the learned judge who, having seen a number of law books behind counsel, inquired whether any submission was to be made. There was complete silence so far as the learned judge was concerned, and he proceeded to direct the jury on the only issues actually raised before him.

Before dealing with this question of provocation, it is perhaps convenient to dispose shortly of two other matters raised in support of this appeal. The first of them relates to a witness named Clarke. He had arrived at the appellant's house in company with the Copleys; indeed, he had been fetched by one of the women on the Copley side and had been induced to get out of bed and join the raiding party. Undoubtedly Clarke had not told the truth at the magistrates' court. Undoubtedly he had lied to the police. When he came to the trial at the Central Criminal Court, by way of contrast with one or two of the other witnesses, members of the Copley party who were called to give evidence, the man Clarke proceeded to describe in very considerable detail what, according to him, occurred at the appellant's house that night. His version (1) with which I need not deal in detail, was utterly different from that put forward by the appellant.

The complaint that is made is that in these circumstances Clarke should have been regarded if not as an accomplice as someone so close to an accomplice that the learned judge was called on to direct the jury by warning them of the danger of relying on his evidence unless it were corroborated. Reliance was placed on two cases, *R.* v. *Golder*, *R.* v. *Jones*, *R.* v. *Porritt* (2) and *R.* v. *Prater* (3). In particular in *R.* v. *Prater* (3) reliance was placed on the passage in which it was said (4):

> "For the purposes of this present appeal, this court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve."

It is to be noted that in that case it was a co-defendant who was seeking to shed some of his own responsibility by attributing blame to a co-defendant. Nothing of the sort is applicable here.

When one comes to see what the learned judge said about the matter, it will be found that he dealt with Clarke's evidence with particular care and separately on its own. He concentrated in what turned out to be five or six pages of transcript on Clarke's evidence, which was undoubtedly of very great importance. In the course of dealing with it he repeated the comments made by counsel for the appellant,

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(1) Clarke said in evidence-in-chief that when he and the Copley gang arrived at the appellant's house Leslie Copley and the deceased had a struggle in the front garden of the house, both fell to the ground and thereafter the deceased went back through the front window calling to the appellant to get the guns and shoot to kill. That when the deceased was in the middle of the room he, Clarke, heard a shot and the appellant jumped through the broken window and fired three shots at him, the last shot hitting him in the arm and causing him to fall to the ground. At this time, the witness said, the appellant was jumping about on both feet like an antelope. Then the witness heard the appellant's wife shout "George, George, you've killed your father". He stated that when one Spencer, who was another member of the Copley gang, was bending over the witness who was still on the ground, the appellant again came jumping through the window like a madman and fired three or four shots at Spencer as he ran away. Thereafter, the witness said, the appellant spoke to him holding the gun in his hand saying "I have killed my father; can I lose the gun?" The witness was then helped into the house by the appellant and saw the deceased lying in the front room with his back against the piano. Later, whilst waiting for the ambulance he said he had a conversation with the appellant. (2) [1960] 3 All E.R. 457; 45 Cr. App. Rep. 5.

(3) [1960] 1 All E.R. 298; [1960] 2 Q.B. 464.

(4) [1960] 1 All E.R. at p. 299; [1960] 2 Q.B. at p. 466.

A "that the witness admitted not only that he had failed to say in the magistrates' court what he had said here, but also that some of the things he had said in the magistrates' court were wholly inconsistent with what he said here and that if what he said here was true what he said in the magistrates' court must have been a lie."

B Then he went on:

"Now, you will bear in mind that cross-examination and all those criticisms of Mr. Clarke's evidence, but you will also bear in mind the possibility that Mr. Clarke is a man who for some reason has made up his mind since the magistrates' court to tell you the truth, or at least most of the truth; and it is a matter for you, but if you think you have heard in C that evidence the authentic voice of truth, at any rate in what he said from the moment when Porritt was jumping through the window and was shot, why then, you are entitled, you know, to give effect to it if that is your honest belief."

Right at the end of that passage he emphasised again the point to which I have alluded. On p. 251 he said:

D "Then he was very much cross-examined, and rightly cross-examined, by Mr. Durand, and he admitted to Mr. Durand, as I say, that what he had said at the magistrates' court was not the whole truth and he said that he told lies there because he was a little frightened of George Porritt really, he did not want to say any more against him than he had to, and, what is more, he was not feeling very well at the magistrates' court. I am not going E to go through the whole of that cross-examination; it is an effective cross-examination, and it is entirely for you to say if you find, as I have said, the voice of truth in that man so far as he described what happened after the scuffle between Len Porritt and Copley."

In the view of this court, any jury which had heard the cross-examination of F this man Clarke and realised that he had told lies on one occasion and another and who then heard that passage and the whole of those five pages, must have realised that it was incumbent on them to examine his evidence with great care. This court sees no ground for criticising the learned judge's summing-up on that point.

It was then said that right at the end of the summing-up the learned judge G used expressions which were misleading or might mislead the jury in regard to the defence. The passage in question is this:

"But if you are satisfied beyond reasonable doubt that on that night there was a kind of gang warfare going on between this man on the one hand and the Copley party on the other, if you find the production of the pistol and the firing of those shots was no more, really, than a hostile act com- H mitted by him in the course of the gang warfare, then you cannot possibly find the shooting was justifiable, and your verdict would be one of guilty of murder and capital murder at that."

It may be that taken by itself that sentence would be open to criticism because it might still be a case of self-defence albeit that it was a hostile act in the course of gang warfare; but when one recalls the fact that only a moment before the I learned judge had with complete accuracy and fairness summarised the defence and told the jury that if they were in any doubt on this issue of self-defence they were to acquit, then the sentence which is now criticised takes on a different colour. The matter is placed beyond controversy by the concluding words of the summing-up given at the request of counsel for the appellant, when the learned judge said:

"If I have not made it clear I will repeat again the burden is on the prosecution to satisfy you, and if you are in any doubt whether this man's

story is true, why then, the prosecution have not proved it is not true. Does that cover the point?" A

Counsel replied " Yes ". On that ground also the appeal will fail.

It is now necessary to turn to the ground on which, in the opinion of this court, the appeal succeeds. As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is B incumbent on the judge trying the case, if the evidence justifies it, to leave that issue to the jury. The leading case so far as chronology is concerned is *R.* v. *Hopper* (5) in this court, but the same principle has been emphasised in a number of other cases and, for convenience, one can read what I think is the last of them, *Bullard* v. *R.* (6). In that case LORD TUCKER, giving judgment, said C (7):

" It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper D direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

While that case is being cited it is perhaps convenient to refer to a further passage (8):

" In the present case the fact that the jury rejected the defence of self- E defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say that it would have been impossible." F

The issue is whether there was on the evidence any material which made it incumbent on the learned judge to leave that issue.

The relevant statutory provision is s. 3 of the Homicide Act, 1957, which provides:

" Where on a charge of murder there is evidence on which the jury can G find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

H

It is to be noted that in *Bullard* v. *R.* (6) reference was made to the fact that the issue must be left whether or not the accused man said he was provoked, and in one of the reported cases, which are all referred to in *Bullard* v. *R.* (9) and others, it was pointed out that notwithstanding the fact that the accused at his trial had in terms stated that he was not angry, none the less the jury

(5) [1915] 2 K.B. 431; 11 Cr. App. Rep. 136. I

(6) Post p. 470; [1957] A.C. 635; 42 Cr. App. Rep. 1.

(7) Post at p. 470, letter F; [1957] A.C. at p. 642; 42 Cr. App. Rep. at p. 5.

(8) Post at p. 471, letter C; [1957] A.C. at p. 643; 42 Cr. App. Rep. at p. 8.

(9) [1957] A.C. 635; 42 Cr. App. Rep. 1: in this case the following authorities were referred to: *R.* v. *Hopper*, [1915] 2 K.B. 431; *Woolmington* v. *Director of Public Prosecutions*, [1935] All E.R. Rep. 1; *Mancini* v. *Director of Public Prosecutions*, [1941] 3 All E.R. 272: *R.* v. *Roberts*, [1942] 1 All E.R. 187; *Holmes* v. *Director of Public Prosecutions*, [1946] 2 All E.R. 124; *Kwaku Mensah* v. *R.*, [1946] A.C. 83; *H.M. Advocate* v. *Doherty*, [1954] S.L.T. 169; *Chan Kau* v. *R.*, [1955] 1 All E.R. 266; *R.* v. *Lobell*, [1957] 1 All E.R. 734.

A should have been directed on the issue of manslaughter because it might be that they would not accept his view that he was not angry. In the present case there was not a word in the whole course of the appellant's evidence to suggest in terms that he was provoked. There was nothing to suggest that he had lost his self-control when he fired that shot. Indeed, as counsel for the Crown said, his evidence on the point tended the other way, to the effect that he took deliberate B aim at the man who, he said, was assaulting his stepfather, and fired. On the other hand, it may perhaps be mentioned that when that shooting was over, beyond all question the appellant jumped out of the window of that house and, to use the words of one of the witnesses, ran about like an antelope and behaved in a manner which on one view indicated very considerable loss of self-control. The jury in considering the matter, if it had been left, might—and it is unnecessary C to say more—have taken the view that the appellant at the moment when he fired the shot which killed his stepfather had already lost his self-control in the same way as the evidence appeared to indicate he had lost it afterwards.

The matter can be approached in two ways: First of all, if the appellant's description of the scene in the front room were accepted by the jury, it did not follow that they must necessarily acquit the appellant on the ground of self-defence D because the defence of self-defence not only involved the dangerous assault on the stepfather but also involved a frame of mind in the appellant that he honestly thought it was reasonably necessary to fire. It may be that the jury in convicting the appellant, as they did, were not satisfied on that limb, but both in the course of counsel for the Crown's address to the jury and on several E occasions in the summing-up the learned judge had referred to both those limbs of the defence which I have called self-defence. It is possible that the jury in considering the matter might have found that the description of the scene in that front room as told by the appellant was accurate. They might not have accepted that it was reasonably necessary to fire, but, if they had had to consider the matter they might have thought—one does not know—that the sight F of his stepfather in imminent peril came as such a shock to this man as the culmination of a stormy evening that he was no longer the master of his mind and shot on provocation. If they took that view or, better still, if that view were not displaced by the prosecution, then the proper verdict would be manslaughter.

That would be one approach, but the other is equally clear. After all, this was G the culmination of a very stormy evening and, while it is quite true that the events in the club in Kent had happened so long ago that they were given time to cool, none the less they were part of the story, and one can regard it as possible that a jury considering that story reaching its climax with the second attack on the appellant's house when he heard, using only his own evidence, "hollering and shouting", the breaking of glass outside and the voice crying: "Use the H knife", and his stepfather saying: "George, George, they are tooled up. Get the gun", that at that moment his self-control evaporated. As I ventured to say, one does not know, but, in the view of this court the matters to which reference has been made were material on which a jury could have come to the conclusion that this killing was killing after provocation and, accordingly, would justify a verdict of manslaughter.

I For those reasons, this court will allow this appeal in regard to conviction, and will substitute a verdict of manslaughter as was done in one of the cases to which the attention of the court was directed (10).

This court has carefully considered what is the appropriate sentence in this case. It was in every sense of the word a very terrible crime. The use of the gun, albeit under provocation, with the intention to kill and wound as the climax

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(10) I.e., *Kwaku Mensah* v. *R.*, [1946] A.C. 83.

of an evening of what has been called gang warfare is a matter which deserves and will now receive severe punishment. The sentence of the court is that this appellant be imprisoned for ten years. A

Appeal allowed in part. Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*] B

NOTE.

In *Bullard* v. *R.*, the appellant had been tried before the Supreme Court of Trinidad and Tobago and a jury and convicted, on Nov. 19, 1956, of the murder of one Eugene Layne, whom the appellant had killed by striking him with a hatchet. His appeal to the Court of Criminal Appeal of Trinidad and Tobago was dismissed on Jan. 4, 1957, and his appeal to Her Majesty in Council was heard on July 15, 16, 1957, before EARL JOWITT, LORD TUCKER and Mr. L. M. D. DE SILVA. At the trial counsel for the appellant had relied on defences of self-defence and provocation. In regard to provocation the trial judge directed the jury that it would not be open to them to return a verdict of manslaughter because C

> "it is from the evidence that you must get the provocation if there is any. And putting the most favourable construction on this evidence given here on oath by the accused he has not himself told you that what he did was a result of any provocation given him by Layne." D

A little later the judge said:

> "I am directing you that nowhere in his statement, his evidence given on oath, will you find that he committed this act because he was provoked by Layne's refusal or failure to pay him the money. His evidence here is that 'if Layne had not held my throat I would not have hit him with the hatchet'." E

The appellant submitted that the trial judge was wrong in withdrawing the defence of provocation from the jury. The reasons of the Judicial Committee were delivered by LORD TUCKER, and the material passages of his opinion were as follows:

It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked. See such cases as *R.* v. *Hopper* ([1915] 2 K.B. at p. 435), and *Kwaku Mensah* v. *R.* ([1946] A.C. at p. 93). F

In the present case it is not the non-payment of money by Layne that is relied on as affording provocation but the assault, as described in the appellant's evidence, on a man who on the prosecution evidence was already incensed by the non-payment and whose claim had been brushed aside by Layne with the statement that he was a madman. The non-payment alone could not, of course, have afforded any sufficient provocation. Their Lordships do not know exactly on what counsel for the appellant at his trial based his case of provocation. If it was based solely on the non-payment this may account for the language used by the judge. However this may be, the real ground as disclosed by the evidence is as indicated above, and it should have been left to the jury, whose duty it would have been to determine with what part of the hatchet the blow or blows were struck and whether the weapon used was or was not wholly disproportionate to the provocation received and whether the story of the appellant, even if unacceptable in its entirety or somewhat exaggerated, might not have afforded sufficient provocation to excuse—though not to justify—the blows struck by the appellant. The jury might for instance have rejected the view that the appellant's life was ever in real peril from strangulation, yet accepted the story that he had been seized by the throat and received numerous violent blows. All these matters were for the jury and it is not in their Lordships' opinion possible, taking the view of the evidence most favourable to the appellant, to say that the issue of manslaughter could properly be withdrawn from the jury. G H I

The Court of Criminal Appeal took the view that as the appellant's story had been rejected by the jury on the issue of self-defence there was no evidence on which the issue of provocation could be based, and in so deciding relied on the language used by VISCOUNT SIMON, L.C., in his speech in *Mancini* v. *Director of Public Prosecutions* ([1941] 3 All E.R. at pp. 277, 278) as follows:

> "Before, therefore, the summing-up of MACNAGHTEN, J., can be criticised on the ground that it did not deal adequately with the topic of provocation, we have to see what was the extent of the provocation as disclosed by the evidence which

A the jury had to consider, and for this purpose we have to exclude altogether the allegation made by the prisoner that he heard the voice of Fletcher threatening him with 'knifing', and that Distleman came at him with an open pen-knife in his hand. The judge had already instructed the jury fully on these matters and had directed the jury to acquit Mancini altogether if they felt that they could accept Mancini's story. The alternative case, therefore, as to which it is suggested that a defence of provocation was open, must be regarded on the basis that Mancini's story was rejected."

B This language must be considered in the context of the facts of that particular case, when it would seem true to say that once the story of the presence of a knife in Distleman's hands was rejected there was nothing left on which to base the defence of provocation, but their Lordships have no doubt that VISCOUNT SIMON, L.C., was not intending to lay down as a proposition of universal application that the same evidence which has been adduced in support of an unsuccessful defence of self-defence can never be relied on in whole or in part as affording provocation sufficient to reduce the crime C from murder to manslaughter. Conduct which cannot justify may well excuse.

In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say that it would have been impossible. As D was said by HUMPHREYS, J., in *R.* v. *Roberts* ((1942), 28 Cr. App. Rep. at p. 110):

> "As for the question whether it was open to them on the facts, counsel for the prosecution has argued with good reason that no reasonable jury could come to such a conclusion. The court may be disposed to take much the same view, but it cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them."

Every man on trial for murder has the right to have the issue of manslaughter left to E the jury if there is any evidence on which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.

Their Lordships are accordingly of opinion that the verdict of guilty of murder cannot stand in this case.

BRONESTER, LTD. *v.* PRIDDLE.

F [COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), July 18, 19, 1961.]

Master and Servant—Remuneration—Commission—"Advance commission"—Half commission paid in advance—Commission due only if delivery of goods made during employment—Whether half commission advanced during G *employment on orders of goods not delivered until after employment ended repayable.*

In 1958 the defendant entered the plaintiffs' employment as one of their sales representatives. By the terms of his written agreement with the plaintiffs he was entitled to a salary and a ten per cent. commission "on all deliveries made during [his] employment [upon] orders taken by [him]". H The agreement further provided that the plaintiffs might at their discretion "advance up to one-half of commission on forward orders" when such orders had been confirmed and accepted. Half commission was paid in advance accordingly. In 1959 the defendant was appointed sales manager and a new agreement was made. Under this agreement entitlement to commission was again limited to deliveries made during the defendant's employment. The I new agreement provided expressly, as also the former agreement had provided, for repayment by the defendant of a sum paid by way of commission on an order if, e.g., the order were cancelled; but there was no provision whatever in the new agreement regarding half commission in advance, and there had not been any provision in the former agreement concerning the repayment of advance commission at the termination of the employment. It was, however, orally agreed with the defendant at the time of the new agreement that he should continue to be paid half commission in advance after he had become sales manager in the same way as before.

The defendant's employment was subsequently terminated abruptly by agreement and the plaintiffs claimed repayment of the one-half commission paid to the defendant in respect of orders on which delivery was not made until after his employment ended. A

Held (PEARSON, L.J., dissenting): in the circumstances of this case the "advance" of commission was repayable to the plaintiffs because the defendant had no right to commission on orders for goods undelivered at the termination of his employment and the advance half commission, on the construction of the first agreement and as a matter of inference on the facts, was not a gift but something paid before becoming due which, if it did not ultimately become due, would have to be repaid. B

Rivoli Hats, Ltd. v. *Gooch* ([1953] 2 All E.R. 823) and *Clayton Newbury, Ltd.* v. *Findlay* ([1953] 2 All E.R. 826) considered. C

Appeal dismissed.

[As to repayment of commission, see 8 HALSBURY'S LAWS (3rd Edn.) 123, para. 215, note (r); and for cases on the subject, see 3rd DIGEST Supp.]

Cases referred to:

Clayton Newbury, Ltd. v. *Findlay*, [1953] 2 All E.R. 826; [1953] 1 W.L.R. 1194; 3rd Digest Supp. D

Reigate v. *Union Manufacturing Co.* (*Ramsbottom*), *Ltd.*, [1918-19] All E.R. Rep. 143; [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; Digest Supp.

Rivoli Hats, Ltd. v. *Gooch*, [1953] 2 All E.R. 823; [1953] 1 W.L.R. 1190; 3rd Digest Supp. E

Appeal.

This was an appeal by the defendant from a judgment of His Honour JUDGE WILLIS given at Shoreditch County Court on Jan. 23, 1961, giving judgment for the plaintiffs on their claim for £204 17s. 4d., and dismissing the defendant's counterclaim for £67 0s. 6d. F

The defendant was employed by the plaintiffs in May, 1958, as one of their sales representatives and became sales manager in 1959. His employment was terminated by agreement in July, 1960. The plaintiffs by their particulars of claim claimed £204 17s. 4d. as representing moneys paid by them to the defendant by way of loan of commission on contract and forward orders, the particulars given extending to June and July, 1960. The defendant denied that he was indebted and by his counterclaim claimed a sum of £67 0s. 6d. for salary, commission and out of pocket expenses for the same months. By further particulars the plaintiffs pleaded that the sums paid by them by way of loan of commission were paid as advance commission on forward orders in accordance with cl. 2 (c) of an agreement of May 19, 1958, and that the plaintiffs would contend that the advance commission constituted a loan to the defendant, and further or alternatively that it was an implied term of the defendant's employment that he would repay any over-payments at the termination of his employment, alternatively that the sums paid as advance commission were moneys had and received by the defendant to the use of the plaintiffs. The facts and relevant terms of agreement are stated in the judgment of HOLROYD PEARCE, L.J. G H

M. Browne for the appellant, the defendant. I

Aron Owen for the respondents, the plaintiffs.

HOLROYD PEARCE, L.J.: The claim and counterclaim stand or fall together, and there is no dispute about figures. The dispute is one between master and servant arising on the termination of the employment. The question is whether the servant is entitled to retain, after the end of his employment, amounts received by him in advance in respect of commission which, by virtue of the termination of his employment, can never become lawfully due.

A The defendant was a sales representative who was entitled to salary and commission on deliveries of goods during his employment. The commission was calculated and paid as to half of it when the orders which he obtained had been accepted, and as to half on delivery when the commission became lawfully due. On the cessation of his employment he had thus received half commission on many orders which had not yet been delivered. Must he now repay the half com-
B mission which he had received?

On May 19, 1958, the plaintiffs employed the defendant on the terms of a written agreement. The material part of the agreement is as follows:

> "(2) . . . salary and commission ex the company's regular price list will be paid on the following basis: (a) Next three months of successive employment at £7 per week. Commission of ten per cent. on all deliveries made
> C during your employment with us for orders taken by you and accepted by us for a minimum turnover of £45 per week . . . (c) We may at our discretion advance up to one-half of commission on forward orders when such orders have been confirmed and accepted . . . (h) Upon any order going for any reason into abeyance or in the case of non-payment then any commission
> D or bonus paid or credited to you in respect of that order shall become repayable."

The defendant relies on the fact that though commission becomes repayable if an order goes into abeyance, it is not specified that advances made at discretion shall be repayable on the servant leaving the employment, and therefore never being able to earn the commission. Clause 10 provides that on the servant
E ceasing for any reason to be employed, he will not for twelve months solicit orders, and it ends:

> "and you will hand over forthwith to us all our property held by you including order books, record cards, samples, price lists . . ."

Again the defendant relies on the fact that that clause, dealing as it does with
F the situation on the termination of the employment, says nothing about the repayment of the half commission advanced which will, owing to the cessation of employment, never become due.

On July 31, 1959, the defendant was promoted to be sales manager, and a second agreement was made of that date. That provides under cl. 3 as follows:

> "Remuneration will consist of the following: We shall pay you, subject
> G to satisfactory service and within these terms, commission as below at the rate of ten per cent. based on the nett invoice value, and, in addition [a certain salary,] Provided that (1) commissions shall be payable monthly and only upon deliveries made during your employment with the company upon orders taken by you from the area in which you are at the time employed subject to [a certain weekly minimum]."

H Nothing is stated with regard to advance commission in respect of orders that have not yet been delivered. The learned judge found that before the second agreement was entered into, the plaintiffs' agent made an arrangement with the defendant that the advances in respect of commission which he had been receiving under the first agreement should be continued during the course of the second agreement.

I Clause 5 of the second agreement makes clear that all commission is to become due only on deliveries during the servant's employment. Clause 8 deals with orders that go wrong, orders that for any reason are cancelled or go into abeyance, and provides that in that case:

> ". . . no commission or bonus shall be paid and any which has been paid in respect thereof shall become immediately repayable and such orders or delivery shall be at the time when such event happens or as soon as possible thereafter deducted from any calculation of commission or bonus and when

such commission or bonus has not been previously included be excluded from any such calculation thereafter."

The point made in respect of that clause is that though it provides for repayment of advance commission where orders are cancelled or go into abeyance, there is no provision for repayment if, owing to termination of employment, the full commission never becomes due. Again the second agreement by cl. 13 deals with the ending of employment, and provides that the servant will return to the employer immediately all the employers' property, and will not solicit orders directly or indirectly. Again it is said that that clause makes no provision for the repayment of any advance commission that has been made.

On July 6, 1960, the defendant wished to resign from his employment. On July 13, 1960, the defendant's employment was terminated by agreement. There was some little difference between the parties at the time of the termination of the employment. The defendant set up in business on his own, and the learned judge held that he had behaved badly. Those matters, however, do not bear on the question which we have to decide. A claim was then made by the plaintiffs for repayment of advances of commission.

The monthly statements of commission have been shown to us, but in my view they do not greatly help on the problem before us. It is true that the column in which the amounts of commission to be paid are set out is headed "commission due" and that there appear in it the advance commission which in strict law had not become due. But in my view, as a matter of business common sense, the only convenient way of describing both advance commission and commission already earned would be "commission due", and no inferences can be drawn from them. At the end of the financial year during which the second agreement was current there was placed at the end of the commission account the words: "At the end of the financial year . . . the amount advanced to you as forward commission was £276 1s. 4d.". That is naturally relied on by the employers as indicating that it was at all times understood that the advance commission paid was a matter which, if not earned, was due from the defendant to the plaintiffs.

It is argued for the defendant that there was some kind of estoppel which prevents the plaintiffs from claiming back advances paid in respect of commission. The amounts so paid were treated as remuneration for the purposes of tax. The correspondence shows that the plaintiffs were bound to include in the remuneration from which they deducted P.A.Y.E. sums paid as advance commission; and if those sums ever became repayable by the defendant, it is clear that he would be entitled to tax adjustment in respect of them. In my judgment, the tax position does not affect the question before us. It shows that the advances were not loans simpliciter. They were remuneration paid in advance for commission that had been earned, and as such remuneration they have to be included for tax purposes. Whether or not they had to be repaid if a circumstance developed in consequence of which they could never be earned is still an open question.

In my judgment this case must be decided on the terms of the actual agreement between the parties. Two cases have been cited before us in which different decisions resulted. In *Rivoli Hats, Ltd.* v. *Gooch* (1) HALLETT, J., held that a servant must repay sums paid in advance (and, as events showed, overpaid) in respect of commission. He said (2):

> "In my judgment, it is clear on principle that, if an anticipatory payment is made and that which is anticipated does not occur in the future, and, accordingly, that in respect of which the payment made would have been earned never takes place, but the money has been paid over, it cannot be retained by the recipient."

I agree with that as a general principle subject to the limitation that in each particular contract one has to consider what its effect is in relation to advances

(1) [1953] 2 All E.R. 823. (2) [1953] 2 All E.R. at p. 825.

A made which are never in fact earned. In the same volume there is reported *Clayton Newbury, Ltd.* v. *Findlay* (3) where it was held that the servant who had been overpaid in advance did not have to repay the excess sums which he had received. That case depended on particular facts, as did the case before HALLETT, J., and I would not say that either case was wrongly decided. We have to decide the present case by construing the agreement before us.

B In my judgment the matter turns on the terms of the second agreement together with cl. 2 (c) of the first agreement which relates to discretionary advances of half commission, and which by oral arrangement and the course of business was clearly effective between the parties up to the end of the employment. In the present case there is no express term that sums advanced in respect of half commission must be repaid. It is argued that the express term contained C in cl. 8 as to repayment where an order goes into abeyance, or is cancelled, shows by implication that there is to be no repayment of advance commission in any other circumstance. But that clause was dealing with orders that had gone wrong; it was not purporting to deal with the situation that arose where nothing went wrong with the orders, but the relationship between master and servant terminated. Normally under the second agreement the period of notice was to be three D months, and had it not been for the acrimony which arose between the parties there would have been three months in which the overpayments in respect of orders that would not materialise could have been set against commission that was flowing in, and the problem would not have arisen in the acute form in which it has done.

Advance payments were made under cl. 2 (c) which makes it plain that the E payments were discretionary, and that they were in fact advances. Those advances were admittedly repayable in the sense that they had to be set against the commission of ten per cent. when it became due, and there was a contra account. In my view the use of the words "discretion" and "advance" makes it clear that there was no lawful right to the money in contradistinction to a payment which is received as of right, although it has not yet been fully earned. F I cannot think that the amounts so advanced were to be gifts by the employers if the commission was never earned. They were merely paid as a commercial convenience so that the employee would not have to wait for the money which it was anticipated that he would earn. Had the parties been asked at the time of the agreement whether it was necessary to put in a clause that the advances must be repaid, if it turned out that the commission in question was never earned, G in my view both parties would have said: "Yes, of course; as they are advances, they will have to be returned. It is quite unnecessary to put so obvious a matter into the agreement".

The learned judge set out his point of view very clearly in the following words:

> "It seems to me that 'advance' means: 'I will pay now what I may have to pay in the future. I am paying before due time. If, after the advance, some H event in the future upon which payment becomes due does not occur, you can recover it back'. There are to be found cases where a tenant has paid rent in advance before due time to the landlord. That was held to be a loan by the tenant to the landlord. It was not rent because it was not due; it was in the nature of a loan. When someone says: 'I am going to make you an advance', I think they are saying: 'We will let you have it as a loan I or on an implied understanding that if the event does not occur which makes it legally payable, we must have it back'."

I accept the learned judge's very clear reasoning in his judgment. I would dismiss this appeal.

WILLMER, L.J.: I have come to the same conclusion. In my judgment the learned judge came to the right decision, and for myself I should have been

(3) [1953] 2 All E.R. 826.

disposed to regard this as a very plain case, but for the fact that I understand PEARSON, L.J., takes a different view. Were it not for that circumstance I should have been content to say that I agree with HOLROYD PEARCE, L.J., and nothing more. However, in view of the divergence of view which has emerged, I think it right to endeavour to state as shortly as I can in my own words the reasons which have impelled me to my conclusion.

In my judgment any consideration of this case must start from cl. 3 (1) of the agreement of July 31, 1959, namely, the agreement under which the defendant was serving up to the time when he left the plaintiffs' employment. That clause provides that:

> "commissions shall be payable monthly and only upon deliveries made during your employment with the company upon orders taken by you."

The words following do not, I think, matter for this purpose.

The provisions of that clause make the amount of commission due to the defendant a matter of precise calculation. That which he is entitled to is that which is prescribed by that clause. As HOLROYD PEARCE, L.J., has pointed out, in the agreement of July 31, 1959, made when the defendant was promoted, there is no express provision for advance payments of commission being made, as there had been in the previous agreement. It is, however, clear from the provisions of cl. 8, for instance, that the agreement contemplates that advances of commission may be made. Under the previous agreement of May 19, 1958, there had been express provision in cl. 2 (c) for the making of advance payments. The evidence which the learned judge accepted was that on the defendant's promotion, that is, at the time when the new agreement of July, 1959, was made, the question of advance payment was discussed between the defendant and Mr. Bondt, the sales director of the plaintiffs, and that it was the defendant who requested that the practice under the previous agreement of making advance payments should be continued while he was serving under the new agreement. The plaintiffs raised no objection to that, and the documents show that in practice the same formula as previously was used month by month when calculating the amount which should be paid to the defendant.

Some emphasis has been laid on the fact that P.A.Y.E. deductions were made alike from the commission already due and from the advance commission which was being paid. Beyond showing that the advances cannot be regarded as loans simpliciter, I do not think that the deduction of P.A.Y.E. tax has any further significance. Counsel for the plaintiffs no longer contends that the advances can be regarded as loans simpliciter, though he does invite us to say that the advances were in the nature of loans, in the sense that they must have been made subject to an implied promise to repay. However that may be, the fact is (and it is an inescapable fact in this case) that the defendant has been paid more than he was entitled to be paid under the terms of cl. 3 (1) of the agreement. If the arrangement to pay advance commission had not been made, and if the commission earned had now to be paid to the defendant, it is quite clear that on the termination of his employment he would have been entitled to recover the precise amount due under cl. 3 (1), no more and no less. Why, it might be asked, should he be any better off because the plaintiffs, at his request, paid in advance something more than they were required by the terms of the agreement to pay?

To my mind, the plain fact is that the monthly statements exchanged between the plaintiffs and defendant disclose something in the nature of a running account. It has indeed been conceded by counsel for the defendant who has argued the case for the defendant with considerable force, that it was contemplated when the advances were made that they should be repaid month by month by deduction from the amounts of commission falling due in accordance with cl. 3 (1). It seems to me that once it has been conceded that repayment is contemplated, then it must follow that when the employment is terminated—whether by the defendant

A merely leaving the plaintiffs' service, or by the death of the defendant, or whatever the circumstance is in which the employment comes to an end—a balance must be struck, and whatever is owing one way or the other must be paid or repaid.

It is perfectly true that there is no express provision in the agreement for repayment of any advances made in excess of that which is ultimately found to B be due to the defendant. For myself I should have thought that there might well have been force in the suggestion that this was a case in which the law would impose an obligation to repay sums of money received by the defendant to which he was not entitled. However, the case has not been argued on that basis. It has been put on the basis of implied contract. The question that has been argued has been whether, in the absence of express agreement, there can be any liability C to repay unless a term to that effect can be implied. It is argued that no such term can be implied because it would be inconsistent with existing express terms in the contract. Reliance is placed, for instance, on cl. 8, which deals with the very question of repayment. That clause makes no provision for repayment on the termination of employment, but only deals with repayment in circumstances where an order has been cancelled or has gone into abeyance. The question was D very pointedly asked: Why, if there was to be any question of repayment on termination of the employment, was express provision not made for it in that clause, which does deal with the very matter of repayments? Similarly emphasis has been laid on cl. 13 of the contract, which provides specifically for what is to happen if and when the employment is determined. A number of other provisions are made in that clause, dealing, for example, with the limitation of the defend- E ant's right to solicit orders, but no provision is made for repayment by the defendant of any advances which have been made to him in excess of that to which he is entitled. Those are powerful considerations, but I think that the argument is double-edged, because it can be countered by pointing out that nothing is said in either of those clauses about liability to repay advance payments in excess of what the defendant is entitled to for the reason that the defendant's F liability is so obvious that it needs no express provision.

I should be happy to decide this case on the basis of the well-known test laid down by SCRUTTON, L.J., in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), *Ltd.* (4) which has frequently been quoted, and was cited in *Clayton Newbury, Ltd.* v. *Findlay* (5) to which our attention was drawn (6):

> "The first thing is to see what the parties have expressed in the contract; G and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case?', they would both have replied, 'Of course, H so and so will happen; we did not trouble to say that; it is too clear'."

I think that the present case can be decided by applying that test. I ask myself, what would the parties here have said if someone had asked them at the time when the contract was made—that is, at the time when the defendant was making his request to have the advance payments continued—"What is to happen if the defendant dies, or if he terminates his employment for other reasons?" I I should have thought that the answer of both parties must have been: "Of course, if he has been overpaid, that is, paid more than he is entitled to, the excess must be repaid". It seems to me that on the facts of the present case it might be implicit in the fact of the defendant having asked for and having received advance payments that he should be under the duty to account for any excess if and when his employment terminated.

(4) [1918-19] All E.R. Rep. 143; [1918] 1 K.B. 592. (5) [1953] 2 All E.R. 826.
(6) [1918] 1 K.B. at p. 605; [1918-19] All E.R. Rep. at p. 149.

I reach my conclusion on this case having regard to the particular facts of this particular case. I should like to associate myself with what HOLROYD PEARCE, L.J., has already said about the two other cases which have been cited to us. Each of those cases, as I see it, was a decision on the facts relating to the particular contract in question. I do not wish anything that I have said to be construed as indicating that I think that either of those cases was wrongly decided on its own facts. We have to apply our minds to the particular facts of this case, and for the reasons which I have attempted to give, the facts of this case appear to me to lead irresistibly to the conclusion that this defendant is under a liability to repay the amount by which the payments to him have exceeded that to which he is entitled. I agree, therefore, that the appeal should be dismissed.

PEARSON, L.J.: I have the misfortune to differ in opinion from both my brethren as well as from the learned county court judge, and, therefore, I must express my own view of the matter with the suitable diffidence which that situation creates.

In my view it is necessary to consider the whole story. There is no express provision anywhere in the contract with which we are concerned providing generally that the advance fractions of commission shall or shall not be repayable. The contractual intention has to be collected from all the indications afforded by the two written agreements, some evidence of oral agreement, the monthly statements and statements of account, and generally the course of dealing between the parties. There was no agreement compelling the employers to pay fractions of the commission after acceptance instead of after delivery. The acceleration of payment was a series of voluntary acts not done under contractual obligation, and extending over the whole period from the inception of the first written agreement to the termination of the second written agreement. The eventual sum of £342 14s. 10d. of advance commission may include some commission that was advanced at the time when the first agreement was in force.

On May 19, 1958, the defendant entered the employment of the plaintiffs as sales representative, and there were applied to his contract of service the employers' conditions for employment of representatives. I need read only one of the first two sub-clauses (a) and (b) of cl. 2 because for the present purpose they are to the same effect.

> "(2) After the training period salary and commission ex the company's regular price list will be paid on the following basis: (a) Next three months of successive employment at £7 per week. Commission of ten per cent. on all deliveries made during your employment with us for orders taken by you and accepted by us for a minimum turnover of £45 per week."

It should be pointed out, as a matter affecting construction in a way that will appear later, that these provisions by themselves have an element of unfairness as tending to put the employee in bondage to the employer. So long as he stays in the employment, he will receive commission eventually on most of the orders obtained and accepted, because eventually they will be executed by delivery. If, however, he leaves the employment, he forfeits the commission on any orders not yet executed although he has done all his work in respect of them. Then sub-cl. (c) provides:

> "We may at our discretion advance up to one-half of commission on forward orders when such orders have been confirmed and accepted."

This mitigates the unfairness of (a) and (b). If the employers exercise their discretion with kindness, the employee receives up to one-half of the commission on acceptance of the order.

The exact wording of this sub-cl. (c) is important because the word "advance" is ambiguous. Sometimes it is used as a euphemism for a loan, but properly it ought to refer to some acceleration of payment—some payment made in advance of the time when it would normally or otherwise be made. This sub-cl. (c)

A does not say that there shall be loans or advances on account of commission. It says, as I interpret it, that a fraction of the commission itself may be brought forward from the time of delivery to the time of acceptance. When once a fraction of commission has been paid under a discretionary power, there is no reason why it should be repayable except in the special events for which sub-cl. (h) provides. That says:

B

> "Upon any order going for any reason into abeyance or in the case of non-payment then any commission or bonus paid or credited to you in respect of that order shall become repayable."

The expression "shall become repayable" is of some interest as a slight indication that previously the commission was not repayable. More important is the fact C that here there is a specific provision for repayment in certain events. In particular there may have been a fraction of commission advanced after acceptance and before delivery; then the order goes into abeyance; and then the fraction of commission becomes repayable. There is, however, no express provision that all the advanced fractions of commission are repayable on demand or on termination of the employment. These "Conditions for employment of representatives" D (to which I have referred as the first agreement so far as concerns the defendant) are the employers' document, their standard form. If there is ambiguity, it should be resolved in favour of the employee. Why did the employers not insert such a provision in their standard form? Presumably because it would have been both unfair and likely to be unacceptable to their employees. The effect of such a provision would be to put the employees in even worse bondage. If they left the E employment, they would both forfeit the commission on accepted but unexecuted orders, and also have to repay as a lump sum the advanced fractions of commission. I can see no reason at all for implying such a provision. There is no necessary implication that the employee must have agreed to put himself in that highly disadvantageous situation.

We have in evidence as specimens the statement and statement of account for F March, 1959, when the first agreement was in force. In the statement of account the first column identifies the orders received. The next column is headed "Immediate", and refers to orders immediately executed, and in respect of this the "Commission due" as shown in the last column is at the rate of ten per cent. The third column is headed "Forward", referring to forward orders, that is, orders not yet executed, and the "Commission due" is shown as five per cent. G There is a fourth column headed "Ex. & Comp. contract", meaning "executed and completed contract", and there the "commission due" is usually five per cent., being the remaining five per cent. after prepayment of five per cent. when the order was only a forward order. At the foot of the statement of account there are some deductions, possibly under cl. 2 (h), but that is not stated. The net total of all the commission due under all the headings is £110 12s. 2d.

H When we look at the statement, we find that the sum of £110 12s. 2d. is brought in as "commission due as per statement of account". To that is added five weeks' salary, and the two together make what is called "total taxable earnings" of £150 12s. 2d. and that figure of £150 12s. 2d. is duly subjected to P.A.Y.E. as shown on the face of the statement. In these two documents, the statement of account and the statement, there is no suggestion or indication that the ad- I vanced fractions of commission are repayable. On the contrary, they are lumped together with the rest of the "commission due", and the whole is treated as taxable earnings, and subjected to P.A.Y.E. deductions.

In my view these two documents do show conclusively that the advanced fractions are not loans, because if they were loans, they would not be "commission due" nor "taxable earnings". On the other hand, these two documents do not exclude the possibility that some part of the "commission due" might be contingently repayable; if they became repayable, and were repaid, an adjustment of tax could be effected. Nevertheless, these documents are far from

supporting the supposed necessary implication that the advanced fractions of commission must be repayable on the termination of the employment. One would not expect to find that any part of the "commission due" constituting "taxable earnings" was repayable.

Next, in July, 1959, the defendant was promoted to the rank of district manager. There was a discussion which is referred to in the learned judge's judgment. He said:

> "Mr. Bondt told me that before this agreement was signed, certain discussions took place. He says that the defendant asked whether he could still have advance commissions. Mr. Bondt said he could."

That evidence of Mr. Bondt was accepted by the learned judge. There was, however, no mention orally or in writing of any obligation to repay on the termination of the employment. Then on the promotion, there was the second agreement of July 31, 1959. Reference has already been made to cl. 3 (1) and cl. 8, and I need not, therefore, read them again. It is important to notice that in the second agreement there was nothing corresponding to cl. 2 (c) of the first agreement.

In my view, however, the position remains substantially unchanged. The payments made by way of advances of part of the commission could be described still as voluntary payments, not, however, made under any express discretionary power in the agreement because the second agreement contained no such power. However, cl. 8 of the second agreement (which corresponds to sub-cl. (h) which I have read in the first agreement) still referred by implication to such advance payments of part of the commission. The plaintiffs continued to pay the defendant the money, and the statements of account and statements after the commencement of the second agreement still show commission on forward orders, commission due and taxable earnings. The plaintiffs were not bound to make such payments, but, if they are made, the question may again be asked: Why must they be repayable? I cannot see any necessity for implying that.

The learned judge's decision was based substantially on the following ground. He said this:

> "When someone says: 'I am going to make you an advance', I think they are saying: 'We will let you have it as a loan, or on an implied understanding that if the event does not occur which makes it legally payable, we must have it back'. Here the events upon which commission was payable were actual delivery, and defendant still in employment of plaintiffs. If neither event is present [I think that the learned judge means "if either event were not present"] then the commission would not become due, and any commission paid at an earlier stage could only be an advance, only as a loan or upon the basis of an implied term that the defendant would repay if the conditions were not satisfied."

That passage from the learned judge's judgment puts very plainly what the question is. In my view these payments were clearly not loans for the reasons which have been stated above. The only remaining question is whether there is an implied term for repayment. Clearly the employee is not entitled to demand payment of commission except on orders executed while he is in the employment. It does not follow necessarily that if the employers choose to pay a fraction of the commission in respect of certain orders at an earlier stage, after acceptance, but before delivery, the employee will have to refund the money if he leaves the employment before delivery has been made under these orders. If the employers advance commission to an employee and tell him it is commission due and taxable earnings, and do not tell him that in a certain event he will have to repay it, he can reasonably understand that they intend him to have and keep the money.

Rivoli Hats, Ltd. v. *Gooch* (7) and *Clayton Newbury, Ltd.* v. *Findlay* (8) were decided on their own particular facts, including the provisions of the documents

(7) [1953] 2 All E.R. 823. (8) [1953] 2 All E.R. 826.

A concerned. There is, to my mind, no sufficient reason for saying that either of them was incorrectly decided. McNAIR, J., in the latter case applied the very well established rule for ascertaining whether an unexpressed term can be implied into a contract. There has already been read the citation from the well-known judgment of SCRUTTON, L.J., in *Reigate* v. *Union Manufacturing Co. (Ramsbottom), Ltd.* (9), and I need not, therefore, read it again. I would B have allowed the appeal, but as both my brethren take a different view, the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Coode, Kingdon, Cotton & Ward,* agents for *Herrington & Carmichael,* Aldershot (for the appellant, the defendant); *Malkin, Cullis & Sumption* (for the respondents, the plaintiffs).

C [*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PIDDUCK *v.* PIDDUCK AND LIMBRICK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), July 13, D 1961.]

Divorce—Damages—Co-respondent—Instalments—Whether court has jurisdiction to order payment by instalments.

The Divorce Court has no power to order that damages awarded against a co-respondent should be paid by instalments; that is a matter for arrangement between the parties, and, in order to allow time for such an arrange- E ment to be made, if it can be agreed, payment into court within a period after service of the order may be directed.

[As to the enforcement of an order for damages against a co-respondent, see 12 HALSBURY'S LAWS (3rd Edn.) 397, para. 881.]

Petition.

F In this case the husband petitioned for divorce on the ground of the wife's adultery with the co-respondent and claimed £200 damages against the co-respondent. LORD MERRIMAN, P., granted the husband a decree nisi and awarded £120 damages against the co-respondent. Counsel for the co-respondent then asked for time to pay the damages and the case is reported on this point.

D. R. Ellison for the husband.

G *J. P. Harris* for the co-respondent.

LORD MERRIMAN, P.: I have no power to order damages to be paid by instalments. I can only order that they be brought into court. I am quite willing to listen to any argument about time, but it is not for me to settle instalments for damages. Instalments for damages are matters for arrangement between the parties. I cannot make an order for instalments. All that I can H do is to allow a period for payment into court. I am willing to allow three months from the service of the order. Three months will enable arrangements to be made for the instalments. It is very unusual to allow more than three months after service of the order for payment into court. I speak subject to correction, but that is my experience.

Order accordingly.

Solicitors: *Haslewoods,* agents for *Hardman & Watson,* Deal (for the husband); *Williamson & Barnes,* Deal (for the co-respondent).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(9) [1918-19] All E.R. Rep. at p. 149; [1918] 1 K.B. at p. 605.

CARTLEDGE *v.* E. JOPLING & SONS, LTD. AND CONSOLIDATED APPEALS.

[COURT OF APPEAL (Sellers, Harman and Pearson, L.JJ.), April 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, May 1, 2, 3, June 23, 1961.]

Limitation of Action—Breach of statutory duty—Accrual of cause of action—When serious harm suffered—Pneumoconiosis—Injury caused by acts outside statutory period—Injury first discovered within statutory period—Disablement within statutory period—Limitation Act, 1939 (2 *&* 3 *Geo.* 6 *c.* 21), *s.* 2 (1) (*a*).

Ten workmen employed by the defendants developed pneumoconiosis while employed. Until the summer of 1950 the defendants were in breach of their statutory duties under s. 4 and s. 47 of the Factories Act, 1937, as to ventilation of their premises, and these breaches caused or contributed to the pneumoconiosis. Material breaches ceased in the summer of 1950. All ten workmen developed pneumoconiosis, and suffered serious harm therefrom before October, 1950, by which date the disease was ascertainable in all the workmen, save possibly one of them, S., but was not in fact ascertained in some of them. All the workmen remained at their work until, some years after 1950, they were disabled by their pneumoconiosis. On Oct. 1, 1956, writs were issued by the then surviving workmen and the personal representative of a deceased workman claiming damages for the pneumoconiosis contracted as a result of the defendants' breaches of statutory duty. The defendants pleaded the Limitation Act, 1939, s. 2 (1) (a)*, alleging that the plaintiffs' causes of action all accrued before Oct. 1, 1950. The plaintiffs contended that each of their causes of action did not arise until the earlier of two points of time—(a) when the workman discovered that he had suffered the injury, or (b) when the disease manifested itself by clinical symptoms.

Held: (i) the cause of action accrued in respect of each workman as soon as he had suffered serious harm, whether he then knew that he had suffered it or not, and, whether the disease had or had not then manifested itself (see p. 493, letter F, p. 492, letter E, p. 489, letters A and H, and p. 486, letters A and E, post); accordingly the defence under the Limitation Act, 1939, succeeded (cf. p. 486, letter E, post).

Archer v. *Catton & Co., Ltd.* ([1954] 1 All E.R. 896) approved and applied.

Urie v. *Thompson, Trustee* ((1948), 337 U.S. Rep. 163) distinguished.

(ii) (per HARMAN and PEARSON, L.JJ., in regard to the particular case of S.) the burden of proof was on the plaintiff to show that his cause of action accrued within the limitation period (see p. 489, letter G, and p. 492, letter I; cf. p. 485, letter H, to p. 486, letter A, post).

Appeal dismissed.

[As to when a cause of action for negligence or breach of statutory duty arises, see 24 HALSBURY'S LAWS (3rd Edn.) 223, 224, paras. 408, 409; and for cases on the subject, see 32 DIGEST 340, 341, *237-240*.

For the Limitation Act, 1939, s. 2 (1) (a), see 13 HALSBURY'S STATUTES (2nd Edn.) 1160.]

Cases referred to:

A'Court v. *Cross*, (1825), 3 Bing. 329; 11 Moore, C.P. 198; 4 L.J.O.S.C.P. 79; 130 E.R. 540; 32 Digest 374, *578*.

Archer v. *Catton & Co., Ltd.*, [1954] 1 All E.R. 896; [1954] 1 W.L.R. 775; 3rd Digest Supp.

Associated Indemnity Corpn. v. *Industrial Accident Commission*, (1932), 124 Cal. App. (1st series) 378.

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* The relevant part of s. 2 (1) is printed at p. 484, footnote (2), post.

A *Backhouse* v. *Bonomi*, (1861), 9 H.L. Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 11 E.R. 825; *affg.*, (1859), E.B. & E. 646; 120 E.R. 652; *revsg.* (1858), E.B. & E. 622; 120 E.R. 643; 32 Digest 340, *237*.

Battishill v. *Reed*, (1856), 18 C.B. 696; 20 J.P. 775; 139 E.R. 1544; sub nom. *Bathishill* v. *Reed*, 25 L.J.C.P. 290; 19 Digest 72, *421*.

Beale v. *Nind*, (1821), 4 B. & Ald. 568; 106 E.R. 1044; 32 Digest 547, *1999*.

B *Beaman* v. *A.R.T.S., Ltd.*, [1949] 1 All E.R. 465; [1949] 1 K.B. 550; 2nd Digest Supp.

Coventry v. *Apsley*, (1691), 2 Salk. 420; 91 E.R. 366; 32 Digest 341, *242*.

Darley Main Colliery Co. v. *Mitchell*, (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 32 Digest 341, *238*.

Hardy v. *Ryle*, (1829), 9 B. & C. 603; 7 L.J.O.S.M.C. 118; 109 E.R. 224; C 38 Digest (Repl.) 137, *967*.

Harrington (Earl) v. *Derby Corpn.*, [1905] 1 Ch. 205; 74 L.J.Ch. 219; 92 L.T. 153; 69 J.P. 62; 38 Digest (Repl.) 140, *984*.

Howell v. *Young*, (1826), 5 B. & C. 259; 2 C. & P. 238; 8 Dow. & Ry. K.B. 14; 4 L.J.O.S.K.B. 160; 108 E.R. 97; 32 Digest 342, *250*.

Hurst v. *Parker*, (1817), 1 B. & Ald. 92; 2 Chit. 249; 106 E.R. 34; 32 Digest D 352, *345*.

O'Connor v. *Isaacs*, [1956] 2 All E.R. 417; [1956] 2 Q.B. 328; 120 J.P. 325; [1956] 3 W.L.R. 172; *affg.*, [1956] 1 All E.R. 513; [1956] 2 Q.B. 288; [1956] 2 W.L.R. 585; 38 Digest (Repl.) 136, *965*.

R.B. Policies at Lloyd's v. *Butler*, [1949] 2 All E.R. 226; [1950] 1 K.B. 76; 2nd Digest Supp.

E *Short* v. *M'Carthy*, (1820), 3 B. & Ald. 626; 106 E.R. 789; 32 Digest 342, *249*.

Urie v. *Thompson, Trustee*, (1948), 337 U.S. Rep. 163.

Watson v. *Winget, Ltd.*, (July 28, 1960, H.L.), unreported.

Whitehouse v. *Fellowes*, (1861), 10 C.B.N.S. 765; 30 L.J.C.P. 305; 4 L.T. 177; 26 J.P. 40; 142 E.R. 654; 38 Digest (Repl.) 139, *982*.

Wilby v. *Henman*, (1834), 2 Cr. & M. 658; 4 Tyr. 957; 4 L.J.Ex. 262; 149 F E.R. 924; 32 Digest 547, *2000*.

Appeal.

The plaintiffs appealed from the judgment of GLYN-JONES, J., given on June 10, 1959, dismissing their consolidated actions against the defendants for negligence and breach of statutory duty. The defendants by a respondent's notice sought to sustain the trial judge's decision on various alternative grounds, and G appealed against several of his findings of fact. This case is, however, reported solely on the question whether, as the trial judge held, the defendants were entitled to succeed by virtue of the defence which they had pleaded under the Limitation Act, 1939, s. 2*. The facts relevant to this point, which are summarised in the headnote, are set out in the judgment of SELLERS, L.J., at p. 484, post.

H *G. S. Waller, Q.C.*, and *J. F. S. Cobb* (*P. M. Kennedy* with him) for the plaintiffs.
P. M. O'Connor, Q.C., and *P. M. Taylor* for the defendants.

Cur. adv. vult.

June 23. The following judgments were read.

SELLERS, L.J.: The disease of pneumoconiosis, which attacked all the ten workmen of the defendants whose affliction with the disease gave rise to the I ten consolidated actions the subject of this appeal, is better understood now both medically and from the industrial point of view than it was, it would appear, in some at least of the years which are material to this case. It is perhaps unfortunate, in a period of transition from lack of knowledge of the source of the disease and of practice to prevent it to the present state of greater understanding of the disease and its cause and of preventive measures to combat it, that liability,

* The relevant part of s. 2 is printed at p. 484, footnote (2), post.

which might be said to arise somewhat technically, should be placed on the defendants who were confronted with the requirements and restrictions of war from the autumn of 1939 onwards and who were not lacking in care and consideration for their workmen. It seems no less unfortunate that if liability does lie for breach of statutory duty the claims of the workmen, who had even less knowledge of the disease and their rights and obligations in respect thereof than their employers, should in the circumstances of these unusual cases be confronted with the plea of the Limitation Act, 1939, to defeat their redress. But what caused the disease and whether the claims in respect thereof are statute-barred are the main issues in all these consolidated actions.

The defendants, the respondents to the appeal, make steel castings in their factory at Sunderland and as occupiers have to comply with the requirements of the Factories Act, 1937, and any relevant regulations made thereunder. The workmen concerned in these claims were all steel dressers (or fettlers). This is an occupation which brought them into contact over many years with fine silica dust, which is the cause of the disease of the lungs described as pneumoconiosis. The writs were issued on Oct. 1, 1956. After that Frederick Hector Cartledge died and his widow issued a new writ, as administratrix of his estate, and her action has been treated by agreement as if her writ had been issued also on Oct. 1, 1956.

GLYN-JONES, J., found that the disease of pneumoconiosis had been caused by reason of the defendants' breach of duty in respect of each of the claims but he found in each case that the cause of action had occurred before Oct. 1, 1950—that is, more than six years before the issue of the writs—and he therefore gave judgment for the defendants. In an admirably thorough, careful and clear judgment the learned judge has found the facts fully and in great detail, but both sides have asked this court to take a different view. The plaintiffs have sought to establish breaches of duty by the defendants extending well within the six-year period (1) and causing or accelerating or aggravating the disease in respect of which they claim damages and have contended that no cause of action had accrued in any of the cases prior to Oct. 1, 1950. The defendants, whilst financially satisfied to uphold the judgment as it stands, contended that they were at no time in breach of duty and that if they were it has not been proved that any breach caused or accelerated or aggravated the plaintiffs' disease. After the searching inquiry into the facts which learned counsel on both sides conducted before this court I have come to the conclusion that we ought not to disturb the learned judge's findings either with regard to the breaches of duty or the causes of the disease of pneumoconiosis which in the course of time descended on each of the plaintiffs. These matters have been fully considered by both my brethren, with whose reasonings and conclusions I so entirely agree that I do not propose to cover the ground again, especially as we are all in agreement with the clear findings of the learned judge.

The most anxious part of this case, and that of general importance, is that claims which would otherwise have been established have been held to be barred by the Limitation Act, 1939, s. 2, wherein it is provided that actions founded on tort (as are these actions) shall not be brought after the expiration of six years (in 1954 reduced to three years (2)) from the date on which the cause of action accrued. When did the cause of action accrue? It was accepted that until injury was inflicted on each of the men concerned no cause of action arose. The difficulty

(1) GLYN-JONES, J., found that breaches by the defendants of their statutory duty as to ventilation under s. 4 and s. 47 of the Factories Act, 1937, which caused or contributed to the pneumoconiosis, in each case occurred before, but not after, the summer of 1950.

(2) By the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 2 (1), the period was reduced to three years for actions for negligence, nuisance or breach of duty where the damages claimed are in respect of personal injuries; but causes of action arising before June 4, 1954, were unaffected (see s. 7 of the Act).

A has been to apply the statute to the facts of cases such as these where some latent, slowly accruing and progressive damage may be done to the lungs of a workman during many years without his being aware of it or, even if he had some "suspicion" of the encroachment of the disease, where he was not disabled by it and where to have launched an action would have been imprudent and premature because of the doubt and uncertainty of proof of any injury which could justify B an award of damages for the distress, incapacity for work and curtailment of life which would in course of time arise if the disease of pneumoconiosis could be proved with reasonable certainty to have been suffered. The courts have discouraged delay in seeking redress and so has legislation but on the other hand there has been no encouragement given to precipitate litigation. It is undesirable for workmen to be encouraged to keep their eyes on the courts. These are not, C however, cases where it can be said that the statute might impose a time limit before there was any injury at all, as was argued in *Watson* v. *Winget, Ltd.* (3), where s. 6 (1) of the Law Reform (Limitation of Actions, etc.) Act, 1954, dealing with the period of limitation in Scotland, was under consideration. A man would not lose his right of action before *some* injury had arisen but, as the decision stands, time might well begin to run years before any reasonable man would think D of issuing a writ to get redress for his injuries which physically and medically might be accruing. Damages in actions such as these can only be recovered once and to bring an action on the shadowy evidence of an x-ray photograph when no physical disability or discomfort had arisen might well mean failure to prove in anticipation the probability of the development of the worst features of the disease so that adequate damages could be assessed in respect thereof. If there E were no x-ray or similar aids to clinical ascertainment of bodily injury, which have developed over the last fifty years, probably no problem would have arisen. The time when a man felt ill or incapacitated and a doctor, if consulted, by clinical examination and by balancing the symptoms could have reliably diagnosed pneumoconiosis, might readily have been recognised as the time of the inception of the disease and therefore of the cause of action. A few years hence the x-ray F may be replaced or supplemented by other methods of examination which may detect, earlier and more reliably, the onset and the inevitable progress of the disease. Dependence on such factors seems unsatisfactory and provides no reliable guide as to when a man's rights arise and a period of time commences to run against him. In these circumstances I have been tempted to seek

> ". . . the wisdom of the common law . . . to prevent the injustice which G might arise from too literal an adherence to the words of an Act of Parliament",

to use the words of ABBOTT, C.J. (4), cited by LORD DENNING in *Watson* v. *Winget, Ltd.* (3), but I have come to the conclusion that if our decision is correct and, it is thought, results in real hardship, particularly now that the period is no longer than three years, it should be remedied by legislation.

H The present cases are border-line findings in favour of any liability at all and, as it chanced, in respect of some of the men there were x-rays taken in the summer of 1950 which again provide border-line evidence on which in the case of the men concerned the disease (as distinct from some early damage) might be held to have been established beyond recovery. And it may be, as the medical evidence suggests, that if the other men had been x-rayed at the same time I similar signs would have been found except possibly in the case of South. This was thought to have been conceded on behalf of the plaintiffs but whether this was a misunderstanding or not it would be difficult for this court to hold that it was not a tenable view. Nevertheless I feel some doubt whether the expert medical board set up under the National Insurance Act would have accepted the evidence, including the x-ray signs, at that time as conclusive of the establishment of the disease. It could not, I think, be found affirmatively that any

(3) (July 28, 1960, H.L.), unreported.
(4) In *Gillon* v. *Boddington*, (1824), Ry. & M. at p. 164.

one of the men concerned had in fact not suffered some degree of injury to the lungs which was more than negligible prior to October, 1950. The learned judge's finding of some damage must, I think, be accepted, but it is conceivable that in 1951 an inquiry in a court of law would not have established in each case or perhaps in any of the cases that the disease was so proved that damages for all its future ravages (which in fact developed in these cases) could properly have been taken into account. Beyond this I do not feel able to go.

The cases cited to us holding that a plaintiff's lack of knowledge of the injury done to him does not prevent the cause of action accruing so that time commences to run are all of a different character and would not, I am inclined to think, in themselves be conclusive authority in the circumstances of the present case, but mere lack of knowledge of the true facts does not in itself seem a satisfactory answer to a defence under the statute. Questions would still arise of knowledge of what and whether a man ought to have known if in fact he did not know.

In *Archer* v. *Catton & Co., Ltd.* (5) the plaintiff's disease had arisen from his work between 1923 and 1940 and not after that date. He became aware of it in October, 1943, for the first time because he then became disabled by it. He had "loss of function" and had to give up work by reason of his chest trouble. It would seem unreasonable for the plaintiff to have sued before October, 1943, but the damage had undoubtedly been caused by 1940 and therefore the statute applied from that date.

The citation (6) from CHARLESWORTH'S LAW OF NEGLIGENCE (2nd Edn.), p. 507, may require review, for it is not every cause of action which accrues at the time of the negligence, at least in the sense there stated. See, for instance, *Watson* v. *Winget, Ltd.* (7) as well as *Archer* v. *Catton & Co., Ltd.* (5). *Howell* v. *Young* (8) is, on the other hand, a case where the solicitor's negligence produced then and there the inadequate security for the loan and the damage was done. The security was always inadequate.

In the result, in agreement with GLYN-JONES, J., and my Lords, I have arrived at the decision that the claims are statute-barred. I do so with regret. If our views are correct, the restriction may work so harshly and impracticably in the case of such a disease as pneumoconiosis that some modification of the statute would appear desirable. It would seem undesirable that workmen who have occasion to work amidst silica dust should be encouraged to rush into litigation or to be unduly apprehensive that disease must be on them, especially as it seems that many men are immune from the effect of the dust, or at least do not suffer from any real inconvenience therefrom. An interval of three years (the present period of limitation) would appear too short in respect of a disease of this character. In any case it would seem most desirable that the date from which the time should run for commencing an action should be defined in such a manner that a prospective claimant acting reasonably should be aware that injury had accrued to him. Any hardship to a defendant is to some extent mitigated by the fact that the longer the delay the greater in all probability will be the difficulty of the plaintiff in proving a case on liability.

In the American case, *Urie* v. *Thompson, Trustee* (9), the Supreme Court adopted the principle that

> "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves",

but the time from which a workman suffered "loss of faculty" from the disease, to use the standard of the National Insurance (Industrial Injuries) Act, 1946, s. 12, and the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371, as amended), might be more appropriate if it were used subjectively relating to a man's disability.

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(5) [1954] 1 All E.R. 896. (6) This citation is printed at p. 491, letter D, post.
(7) (July 28, 1960, H.L.), unreported. (8) (1826), 5 B. & C. 259.
(9) (1948), 337 U.S. Rep. 163.

A It is to be hoped, now that the precise source of the deleterious dust is known, that the precautions which can be taken by both employers and men will overcome the risks of the past and the problems of the proper assessment of damages to which these cases would have given rise had our decision permitted damages at all may not again call for consideration in a similar form. Although we heard argument on this issue in case it should arise I refrain from expressing any opinion B on any of the submissions argued before us.

I would dismiss the appeals.

HARMAN, L.J.: This is an appeal by the plaintiffs in a consolidated action tried before GLYN-JONES, J., on no less than sixteen days in 1959. The plaintiffs were employees and in addition in one case the personal representative C of a deceased employee of the defendants who carry on the business of a steel works at Sunderland. It may be taken for the purposes of this appeal that all the writs were issued on Oct. 1, 1956. The claim in each case was for the damage suffered by the plaintiff in that he had contracted pneumoconiosis in the course of his employment by the defendants. The causes of action stated in each case were common law negligence and breach of statutory duty by the defendants, D but only the latter was relied on in this appeal. One of the plaintiffs died after the issue of his writ and his case is carried on by his widow, the date being treated as that of the issue of the original writ. The learned judge decided that the Limitation Act, 1939, pleaded in each case by the defendants was a good answer to all the actions and he therefore dismissed them. He further held in the course of his judgment that but for this plea the plaintiffs would have been successful E and on that footing he made in each case an estimate of damages.

[HIS LORDSHIP then dealt with issues in this case which are not the subject of this report, and continued:] I have left the most difficult question to the last, and this is whether the Limitation Act, 1939, is, as the judge held, a good answer to all these claims. This depends on s. 2 (1) of the Limitation Act, 1939, which is in these terms:

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> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued . . . (a) actions founded on . . . tort . . ."

When does a cause of action in tort accrue? My answer is, when there is wrongdoing by the defendant from which loss or damage (not being insignificant) G is suffered by the plaintiff. Some wrongdoings import damage without proof of it —trespass, for instance—but a wrong of this sort I think is only actionable when it actually causes damage. Authority for this proposition is to be found in *Backhouse* v. *Bonomi* (10). In that case the damage to the plaintiff's house was caused by the working of a mine by the defendant on his own land. These workings caused subsidences in lands immediately adjacent, and after an interval H of more than six years in the plaintiff's land. It was held that the statute began to run not from the date of the workings, but from the time when damage appeared on the plaintiff's property. The question here, then, is, at what time did the plaintiffs first suffer damage of a not negligible kind? Counsel for the plaintiffs submitted that the action did not accrue until the sufferer knew of the wrong, but this is in my opinion an untenable proposition. If it were right, s. 26 of the I Act of 1939, which deals with concealed fraud, would not have been necessary at any rate in its present form. That section prescribes that where the action is based on fraud time shall not begin to run until the plaintiff has discovered the fraud. Moreover, it is well known that in the case of actions for negligence against solicitors where the damage is done when a solicitor makes his mistake time begins to run from the making of the mistake and not from the time when the client discovers it. The leading case on this subject is *Howell* v. *Young* (11).

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(10) (1861), 9 H.L. Cas. 503. (11) (1826), 5 B. & C. 259.

Counsel for the plaintiffs' alternate submission was that the cause of action accrues when some disability in the victim is shown. Some support for this view he extracted from the National Insurance (Industrial Injuries) Act, 1946. Section 11 of that Act is headed "Injury benefit and disablement benefit", and s. 12 speaks of the latter as payable when as the result of injury the workman suffers from "loss of physical or mental faculty". Counsel argued that in October, 1950, none of the plaintiffs was suffering from disablement in this sense, for all of them were at work in the factory and continued for years afterwards so to be, and that therefore though the seeds of the disease were no doubt present in each of them they were not overt or indeed discoverable by clinical examination and that therefore the damage had not accrued. He further supported this proposition by an American decision which, as it is a decision of the Supreme Court of the United States, is of course of high persuasive authority. This case, *Urie* v. *Thompson, Trustee* (12), was concerned with pneumoconiosis. The petitioner, an employee of a railway company, did not raise his action until he had been actually disabled by the progress of the disease and obliged to cease work. He sued under the Federal Employers' Liability Act and the Court of Missouri held that his cause of action accrued in May, 1940, when he became incapacitated and was therefore not barred by the three years' limitation period provided by that Act when he started his action in 1941. The headnote has this paragraph:

> "That petitioner's contraction of silicosis resulted from the inhalation of silica dust over a period of thirty years and he may have had silicosis without knowing it for more than three years before he sued for compensation under the Federal Employers' Liability Act, did not bar his claim when the time which elapsed between his discovery of his condition and the filing of suit did not exceed three years, the period of limitations then prescribed by that Act."

RUTLEDGE, J., giving the judgment of the court, said this (13):

> "Two preliminary contentions first engage our attention. We are met at the outset by the question whether, without regard to the legal sufficiency of petitioner's claim under either Act, that claim is barred as to both Acts by operation of the Federal Employers' Liability Act's statute of limitations. Urie filed suit on Nov. 25, 1941. Under the terms of the then prevailing three-year statute of limitations, the court could not entertain the claim if Urie's 'cause of action accrued' before Nov. 25, 1938. Respondent contends that Urie, having been exposed to silica dust since approximately 1910, must unwittingly have contracted silicosis long before 1938, and hence that his 'cause of action' must be deemed to have 'accrued' longer than three years before the institution of this action. Alternatively it may be argued that each inhalation of silica dust was a separate tort giving rise to a fresh 'cause of action', and that Urie is therefore limited to a claim for inhalations between Nov. 25, 1938, and the spring day in 1940 when he became incapacitated. In our view, however, neither of the outlined constructions of the statute of limitations can be sustained. For, if we assume that Congress intended to include occupational diseases in the category of injuries compensable under the Federal Employers' Liability and Boiler Inspection Acts, such mechanical analysis of the 'accrual' of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose."

There is more to the like effect which he who will may read.

Thus support is given to the proposition that the cause of action accrues when the disease manifests itself. The court supported its decision by reference to workmen's compensation cases and also by the view that the limitation period being included in the same statute, and therefore specially directed to cases of

(12) (1948), 337 U.S. Rep. 163.

(13) (1948), 337 U.S. Rep. at p. 168.

A disease, it would be a frustration of the benevolent intention of Congress to hold that the cause of action might be barred before it was known to the victim to exist.

This case is indeed a powerful ally for the plaintiffs, but I do not think that this court should follow it. In the first place it relies on cases about workmen's compensation, where of course compensation is not payable until disability occurs. B The second reason given is that, the statutory provision of limitation appearing in the same statute and limited to it, Congress must be supposed to have an intention to protect workmen which ought not to be frustrated by lack of knowledge on the workman's part of the existence of the illness. It was found as a fact in that case that the workman was unconscious of the presence of the disease until he was examined after his incapacity supervened. In the present case the facts C were quite different, for each of these men knew years before the issue of the writs in October, 1956, that he was suffering from pneumoconiosis. The defendant company began in 1950 to have x-ray examinations of their employees, as indeed is contemplated by the regulations made by the minister under the National Insurance (Industrial Injuries) Act, 1946—see s. 57 and, for the regulations, S.I. 1948 No. 1371, as amended. Moreover, in our law, as I have said, knowledge D of the wrong cannot be a necessity to the running of time under the Limitation Act, 1939, which is moreover a general statute not directed in particular, and indeed in its terms ill-suited, to cases of disease.

It still remains to consider when the damage first accrued, or rather whether it accrued in all these cases before October, 1950. The learned judge held that it had, and in my opinion he was well justified. Indeed the medical evidence, except in E the case of the plaintiff South, agreed that by that date each one of the plaintiffs not only was suffering from the disease but it had so far developed as to be visible on x-ray examination. There was in substance no divergence of medical testimony. The disease is an insidious one and comes on by slow degrees as the sufferer continues to inhale the noxious particles of dust. For some years, it may be from five to fifteen or more, there is no means apparently of detecting the symptoms, F but after that examination by x-ray will show the skilled reader of the film the signs. In the early days if the sufferer is removed from contact with the dust it may do him no further harm and though present will not shorten his life, but at a later stage it seems improbable that the disease can be arrested. Moreover, the injury to the lung makes the sufferer far more susceptible to tuberculosis or bronchitis or other pulmonary afflictions. The doctors were agreed in every G case except that of South that the signs were or would have been apparent on x-ray examination by the middle of 1950. As to South's case there was a difference of opinion, there being no film in his case before 1952 when the signs were visible but the disease was in an early stage. Where, however, the defendant raises the Statute of Limitations it is, I think, for the plaintiff to show that he is not within it and not for the defendant to prove the opposite (see *Darley Main Colliery* H *Co.* v. *Mitchell* (14)).

By 1950 the presence of the disease was ascertainable in all these cases. It must have been present for years earlier and the statute is therefore a bar in each case to the action.

For the reasons given above as well as those of my brethren I agree that the appeal must be dismissed.

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PEARSON, L.J.: This appeal has been presented with great thoroughness and in considerable detail, most of the evidence having been read in this court. The main features, however, can be stated broadly and simply. [HIS LORDSHIP considered the facts, and concluded therefrom:] Thus the plaintiffs did not establish any cause of action in respect of the defendants' breaches of duty committed after the critical date [viz., Oct. 1, 1950], as those breaches made no

(14) (1886), 11 App. Cas. at p. 135.

material contribution to the causation of the injuries to the plaintiffs' lungs. In regard to the period before the critical date the plaintiffs did establish a cause of action, but it was held to be barred by s. 2 (1) (a) of the Limitation Act, 1939, as having accrued before the critical date and therefore more than six years before the commencement of the actions.

On behalf of the plaintiffs it has been contended in this appeal by counsel that s. 2 (1) of the Limitation Act, 1939, does not apply to this case, because the respective causes of action, even in respect of breaches of duty committed by the defendants before the critical date, did not arise until certain later dates. The contention was, in reference to each of the plaintiffs, that however much internal injury his lungs may have suffered before the critical date, his cause of action did not arise until the earlier of the two following dates, namely (i) the date when he discovered that he had suffered such injury and (ii) the date when the disease manifested itself by clinical symptoms such as shortness of breath. That was counsel for the plaintiffs' opening contention, and I think he adhered to it resolutely throughout the argument, because that contention, if accepted, would entitle all the plaintiffs to succeed. There were, however, other suggestions put forward and discussed in the course of the argument for the purpose of further exploring the subject. It was suggested that the cause of action might arise when the disease became detectible in some way (which might be only the patient's own experience, or clinical examination, or x-ray examination), whether or not it was in fact discovered. It was also suggested that the cause of action might arise as soon as the plaintiff suffered some degree of disability, and the expression "loss of faculty" might be borrowed from s. 12 of the National Insurance (Industrial Injuries) Act, 1946. Another suggestion was that damage occurs when the disease of pneumoconiosis arises or manifests itself. When does that happen? A definition of pneumoconiosis is required. Section 57 (3) of the National Insurance (Industrial Injuries) Act, 1946, provides:

> "In this section the expression 'pneumoconiosis' means fibrosis of the lungs due to silica dust, asbestos dust or other dust, and includes the condition of the lungs known as dust-reticulation."

That definition, however, would not suit the interests of the plaintiffs in this case, as most of them, if not all of them, probably had the condition of dust-reticulation by the critical date.

There are two main points involved, and they can conveniently be related to the two limbs of counsel for the plaintiffs' contention.

First, is the date of the plaintiffs' discovery of injury material? Does the plaintiffs' lack of knowledge, actual or constructive, prevent the cause of action arising or prevent the running of the time for the purposes of the Limitation Act, 1939? The authorities show that a negative answer must be given (*Howell* v. *Young* (15), citing *Short* v. *M'Carthy* (16); *R.B. Policies at Lloyd's* v. *Butler* (17); *Archer* v. *Catton & Co., Ltd.* (18)). The argument derived from s. 26 of the Limitation Act, 1939, is powerful and to my mind convincing. It was put by STREATFEILD, J., in *R.B. Policies at Lloyd's* v. *Butler* (19) as follows:

> "From the wording of s. 26 it seems to me that time runs in an ordinary case even though the plaintiff is ignorant that he has a right of action, and that the section was inserted solely to prevent time running against a plaintiff who was not aware of the fact that he had a right of action because it was concealed from him by the fraud of the defendant. The section does not say the cause of action shall accrue for the first time on the discovery of the fraud; but only that time 'shall not begin to run' until that event . . ."

In *Beaman* v. *A.R.T.S., Ltd.* (20) it was assumed that, unless the right of

(15) (1826), 5 B. & C. at pp. 265, 266.
(16) (1820), 3 B. & Ald. 626.
(17) [1949] 2 All E.R. 226; [1950] 1 K.B. 76.
(18) [1954] 1 All E.R. 896.
(19) [1949] 2 All E.R. at p. 229; [1950] 1 K.B. at p. 80.
(20) [1949] 1 All E.R. 465; [1949] 1 K.B. 550.

A action had been concealed by fraud, the plaintiff's lack of knowledge would not prevent the time from running. Having referred to s. 26 of the Act of 1939, LORD GREENE, M.R., said (21):

> "The only question raised in the present appeal is whether the plaintiff's cause of action, which arose on Aug. 14 or 15, 1940, became barred at the end of six years or is preserved by para. (a) or by para. (b) of s. 26. It is not B suggested that six years have elapsed since the plaintiff discovered the fraud of which she contends the defendants were guilty or since she could with reasonable diligence have discovered it. DENNING, J., held that neither of the two paragraphs applied and dismissed the action."

Secondly, in a case of pneumoconiosis, when does the damage first occur? C That question is material because, in an action based on negligence or breach of statutory duty, the wrongful act or omission does not by itself give any cause of action, and the cause of action only becomes complete, only comes into existence, when the plaintiff suffers damage in consequence of the wrongful act or omission. Cf. *Backhouse* v. *Bonomi* (22).

Normally, of course, there is no appreciable interval of time between the breach D of duty and the happening of the accident which injures the plaintiff. In *Archer* v. *Catton & Co., Ltd.* (23) there was in the judgment a citation from DR. CHARLESWORTH'S LAW OF NEGLIGENCE (2nd Edn.) p. 597:

> "In an action of negligence, the cause of action accrues at the time of the negligence, because it is then that the damage is caused, even though its consequences may not be apparent until later."

E That is correct for the normal case, where the plaintiff's injury happens at approximately the same time as the defendant's breach of duty. Its correctness for the present case depends on the view taken as to the facts, as will appear later. The distinction between the damage and the consequences of the damage is valuable, and it is supported by this passage from the speech of LORD HALSBURY in *Darley Main Colliery Co.* v. *Mitchell* (24):

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> "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more G complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained."

H In that case, however, the defendant's excavation, having caused one damage to the plaintiff in 1868, caused a new and separate damage to him in 1882, and it was held that there was a fresh cause of action. In a case where there is a continuing breach of duty by the defendant continually causing damage to the plaintiff there is a fresh cause of action arising every day, and, if the breach and resulting damage have continued for more than the period of limitation, the I Limitation Act, if relied on by the defendant, will bar the plaintiff's action for the damage occurring before the critical date but not for the damage occurring after it (*Coventry* v. *Apsley* (25); *Hardy* v. *Ryle* (26); *Battishill* v. *Reed* (27); *Whitehouse* v. *Fellowes* (28); *Earl of Harrington* v. *Derby Corpn.* (29)).

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(21) [1949] 1 All E.R. at p. 466; [1949] 1 K.B. at p. 557.
(22) (1858), E.B. & E. at pp. 654, 659; and H.L. (1861), 9 H.L. Cas. 503.
(23) [1954] 1 All E.R. at p. 897.
(24) (1886), 11 App. Cas. at p. 132.
(25) (1691), 2 Salk. 420.
(26) (1829), 9 B. & C. at p. 608.
(27) (1856), 18 C.B. 696.
(28) (1861), 10 C.B.N.S. 765.
(29) [1905] 1 Ch. 226-228.

There are, I think, two possible theories as to the time at which the damage first occurs in a case of pneumoconiosis, on the assumption that there is a continuing breach by the defendants. According to the first theory, there is from the beginning some injury occurring from day to day, as each of the minute particles which enter the lung tissue causes some microscopic injury and permanent scarring, but a reasonable application of the de minimis rule postpones the first damage for legal purposes to the point at which the accumulated scarring is sufficient to diminish appreciably the elasticity of the lungs and deprive them of much of their reserve capacity; that point is not likely to be reached for several years, and may not be reached for many years, but when it is reached there is the damage completing the cause of action, so that the limitation period begins to run in respect of all the injury suffered up to that point, after that there is still a continuing breach of duty continually causing damage, so that a fresh cause of action arises from day to day and the limitation operates accordingly; if later there is a development of clinical symptoms, such as shortage of breath or other disability, or of emphysema, or of progressive massive fibrosis, any such development is a consequence, or one might say progress, of the damage and is not the initial damage. According to the other theory, there is a long preparatory period, in which the foundations are laid for a possible future pneumoconiosis but the man has not yet suffered any appreciable harm, having no pain or disability and being able to work as well as ever; there is no damage for legal purposes until the later stage at which the disease manifests itself in some clinical symptom or disability or illness, which is the initial damage and completes the cause of action, and starts the running of the limitation period.

Both theories have in common this point, which is indeed obvious, that damage has occurred and the cause of action is complete when the plaintiff concerned has suffered serious harm. In the end that must be the test. Had these plaintiffs suffered serious harm by the critical date, Oct. 1, 1950? The injured condition of the lungs has to be advanced—the scarring has to be extensive—before signs of the disease will appear in an x-ray examination. The learned judge made findings which counsel for the plaintiffs was on the evidence unable to challenge, that, in the case of each of the plaintiffs except South, x-ray examination in October, 1950, would have revealed the existence of the disease. It appears from the judgment (unless there was some misunderstanding) that in the court below counsel for the plaintiffs after some discussion conceded that he could not maintain the contention that a man who was shown by x-ray examination to have pneumoconiosis had not suffered damage. In this court counsel for the plaintiffs was not held bound by this concession and argued to the contrary. But without any concession the point is clear from the evidence and the contrary argument cannot succeed.

As to South's case the learned judge said:

> "In South's case I have greater difficulty. When he was x-rayed in 1953 the result showed only early simple pneumoconiosis. Dr. Ogilvie said he could not say whether the condition would have been visible in 1950; and Dr. Craw that on a balance of probabilities he thought that it would. Here I think my finding should be that the defendant company has not proved, if it be for them to do so, in support of their plea of the statute, that an x-ray examination in 1950 would have revealed the disease."

The assumption tentatively made in that passage that the burden of proof is on the defendants to prove their plea of the statute is shown by the authorities to be incorrect. Where there is a joinder of issue on a defendant's plea of the Statute of Limitations (now the Limitation Act, 1939), the burden of proof is on the plaintiff to show that his cause of action accrued within the six years or whatever is the relevant period for the purposes of the statute (*Hurst* v. *Parker*

A (30); *Beale* v. *Nind* (31); *Wilby* v. *Henman* (32); *Darley Main Colliery Co.* v. *Mitchell* per LORD BLACKBURN (33); DARBY AND BOSANQUET'S STATUTES OF LIMITATIONS (2nd Edn.) (1893), p. 146; *O'Connor* v. *Isaacs* (34)). If the burden of proof had been correctly placed on South, he would on the evidence of the doctors have been unable to prove that an x-ray examination of him in October, 1950, would not have revealed the disease. That would have prevented him B from proving that the damage completing his cause of action for the defendants' wrongdoing before the critical date (Oct. 1, 1950) did not occur until after the critical date. However, it is not desirable to base a decision on burden of proof. The learned judge went on to say, with reference to all the plaintiffs including South:

C "I have set out my findings in deference to counsel for the plaintiffs' argument: but I do not accept his argument that no damage is suffered before the condition reaches the point where it is visible on an x-ray examination . . . I appreciate that, for some time after the first exposure, even the cumulative effect of the injury being done may remain so small that it would be disregarded under the de minimis rule; but in my opinion it would D be unreal to say, for example of a man in whose lungs the condition appears after, say, twenty years, that at the end of the nineteenth year of exposure, when his lungs contained the accumulated scar tissue of those nineteen years, he has suffered no appreciable injury. At that stage the area of healthy lung tissue had been appreciably reduced. He was less able to resist respiratory infection; and comparing his condition with what it was at the start E of the exposure he had only one more year in front of him instead of twenty before the damage would be revealed on the x-ray film. The number of years during which he would be able to carry on his employment without suffering serious ill-health had been much reduced. Such a man would no doubt be unaware that damage had been done until the x-ray film revealed it, but the cause of action accrues when the damage is done, and not when F the intending plaintiff first learns that it has been done. In my opinion all these men had suffered damage, and causes of action had accrued in each case before Oct. 1, 1950."

In my view that passage applies the correct test and gives the correct answer: the plaintiffs had suffered serious harm and therefore damage had occurred and the cause of action had accrued before the critical date in respect of the defend- G ants' wrongdoing before the critical date, and the plaintiffs' claims in respect of that wrongdoing are barred by s. 2 of the Limitation Act, 1939.

It was pointed out, as a matter affecting the construction of the Limitation Act, 1939, that it would be a hardship on sufferers from pneumoconiosis if their undetected and undiagnosed internal injuries were held to constitute damage, so that the period of limitation could be running against them when they had H no knowledge of the existence of their cause of action and so were not sleeping on their rights. Undoubtedly there is that potential hardship, but it is not restricted to cases of pneumoconiosis: there is *Beaman* v. *A.R.T.S., Ltd.* (35), where the plaintiff did not become aware of the existence of her cause of action until after the limitation period had expired. Moreover, if this potential hardship on plaintiffs is relied on as a reason for construing the Limitation Act, 1939, as I somehow not applying according to its terms to pneumoconiosis cases, it has to be borne in mind that there is a potential hardship on defendants if there is no effective limitation. Defendants might have to answer complaints about situations existing twenty or more years ago, in relation to which their records have

(30) (1817), 1 B. & Ald. 92.
(31) (1821), 4 B. & Ald. at p. 571.
(32) (1834), 2 Cr. & M. 658.
(33) (1886), 11 App. Cas. at p. 135.
(34) [1956] 1 All E.R. 513; [1956] 2 Q.B. 288; C.A., [1956] 2 All E.R. 417; [1956] 2 Q.B. 328.
(35) [1949] 1 All E.R. 465; [1949] 1 K.B. 550.

been thrown away and some of their witnesses have died and the surviving witnesses retain little, if any, recollection: *A'Court* v. *Cross* (36). A

In deciding whether a cause of action had accrued at the stage of the pneumoconiotic condition which had been reached by the plaintiffs at the critical date, one has to envisage the possibility of an action being brought at that stage. Suppose that some steel dresser, having reached that stage of the condition and having become aware of it by x-ray examination or otherwise, prudently decided to give up his well-paid occupation as a steel-dresser for some less lucrative occupation free from dust, and brought an action against his former employer for damages in respect of the injury to the plaintiff's lungs and his loss of earning capacity. It is assumed that the employer had committed breaches of statutory or common law duty causing or contributing to the causation of the injury. It would be very remarkable if the plaintiff's action failed on the ground that he had not suffered any damage, because there was not yet any clinical symptom such as shortage of breath and not yet any loss of faculty. B C

There were cited to us certain American cases in which it was decided that for the purposes of limitation provisions contained in a workmen's compensation or employers' liability Act

> "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." D

Associated Indemnity Corpn. v. *Industrial Accident Commission* (37); *Urie* v. *Thompson, Trustee* (38). In my opinion it is not possible to apply the same construction to s. 2 of the Limitation Act, 1939, because it is of general application and not restricted to any special class of cases, and it is established in English law that a cause of action may accrue at a time when the owner of it neither knows nor has the means of knowing that he has it. There is a maxim "De non apparentibus et non existentibus eadem est ratio", which will be found on p. 112 of BROOM'S LEGAL MAXIMS (9th Edn.). In itself the maxim is not authoritative, but only a convenient formulation of a possible principle that something which does not appear is treated as though it did not exist. There seems to be no case in which the maxim has been used in any way that would assist in the present case. E F

For these plaintiffs the period of limitation was still six years under the transitional provisions of s. 7 of the Law Reform (Limitation of Actions, etc.) Act, 1954, and each of them had knowledge of his condition some time before the period had expired. But for later personal injury actions the limitation period is only three years, which might be very short for a pneumoconiosis case. If it were considered desirable to make an amendment, introducing special provisions for such cases, I think it would be appropriate to follow the precedent set by s. 26 of the Act of 1939 by not altering the date when the cause of action accrues (which might prejudice a plaintiff who ought to have a valid claim) but postponing the date when the time begins to run. [HIS LORDSHIP referred to, and reserved his opinion as to the way in which damages for pneumoconiosis should be assessed where the disease was caused by a combination of some "innocent" and some "guilty" particles. HIS LORDSHIP concluded:] I agree that the appeal should be dismissed. G H

Appeal and cross-appeal dismissed. Leave to all parties to appeal to the House of Lords granted.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiffs); *T. D. Jones & Co.*, agents for *Linsley & Mortimer*, Newcastle-upon-Tyne (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(36) (1825), 3 Bing. at pp. 332, 333. (37) (1932), 124 Cal. App. at p. 381.
(38) (1948), 337 U.S. Rep. at p. 170.

MERCHANDISE TRANSPORT, LTD. v. BRITISH TRANSPORT COMMISSION AND OTHERS.

ARNOLD TRANSPORT (ROCHESTER), LTD. v. BRITISH TRANSPORT COMMISSION AND OTHERS.

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), June 29, 30, July 3, 4, 5, 6, 7, 10, 28, 1961.]

Road Traffic—Licence—Public carriers' licence—Transport Tribunal's appellate jurisdiction—Objection—Whether tribunal limited to objection—Precedent—Previous decisions not to inhibit tribunal examining the merits of each case.

On appeal from a decision on an application for a carrier's goods vehicle licence the appellate tribunal is not confined to the objection preferred by an objector, but may review the exercise of the discretion of the tribunal on the application (see p. 503, letter I, and p. 511, letter G, post; but cf. p. 506, letters G and H, p. 517, letter B, and p. 520, letter A, post).

British Transport Commission v. *Bristow* ((1955), 30 Traf. Cas. 217) approved.

Although the Transport Tribunal may by reasoned judgments properly and desirably disclose and establish principles on which it proceeds, yet the tribunal, like any other tribunal charged by statute with the exercise of a discretion, is still bound before deciding a particular case to examine it on the merits, and the tribunal's previous decisions must not be allowed to inhibit it from doing that (see p. 507, letters A to D, p. 500, letter G, p. 518, letters G and H, and p. 521, letter I, post).

Dictum of JENKINS, L.J., in *R.* v. *County Licensing (Stage Plays) Committee of Flint C.C., Ex p. Barrett* ([1957] 1 All E.R. at p. 122) adopted.

Road Traffic—Licence—Public carriers' licence—Application—Subsidiary company's application—Undertaking to carry only parent company's goods on outward journeys—Uneconomic competition for return loads—Parent company already having C licence—Conditional B licence appropriate—Whether relationship between subsidiary and parent company could be considered.

H. Ltd., who were large manufacturers of furniture, carried their goods locally in their own C licence vehicles, and on long hauls in A licence vehicles owned by and licensed to its wholly owned subsidiary, M. Ltd. H. Ltd. proposed to transfer their C licence vehicles to M. Ltd. On an application by M. Ltd. for a variation of their A licence to enable them to use thereunder, in addition to their own vehicles already used thereunder, the vehicles proposed to be transferred to them by H. Ltd., H. Ltd. offered to undertake not to apply for additional C licences and M. Ltd. undertook, if their application were granted, to use the vehicles proposed to be transferred only, on outward journeys, for the carriage of H. Ltd.'s goods, thus leaving them free to act as public carriers only on return journeys. The licensing authority dismissed M. Ltd.'s application, but on appeal the Transport Tribunal granted it. On appeal to the Court of Appeal,

Held: the variation of the A licence should have been refused for the following reasons—

(i) the type of licence truly appropriate was a B licence, since conditions could be attached to such a licence, whereas conditions could not (save for one particular type of condition mentioned in s. 174 (2) of the Road Traffic Act, 1960) be attached to an A licence, and the appropriate condition in the present case could be precisely formulated; moreover, on an application for a B licence all existing B licensees, as well as A licensees, could be heard, and the question of conditions as to return loads which did afford opportunity for uneconomic competition with public hauliers would be open; accordingly, either the application should have been dismissed

or a conditional B licence might have been offered (see p. 502, letter I, p. 503, letter F, p. 509, letter E, and p. 513, letter A, post). A

(ii) in considering the application of M. Ltd. the relationship between M. Ltd. and H. Ltd. was material and had the consequence in the present case (where M. Ltd. was a wholly owned transport subsidiary of H. Ltd.) that M. Ltd.'s application should receive no better treatment than an application by H. Ltd. would have received (see p. 513, letter A and p. 503, letter G, post); and (per DANCKWERTS, L.J.) it was against the policy of the Road Traffic Act, 1960, that a C licence holder should be able, by forming a subsidiary company and transferring vehicles to it, to compete with public carriers holding A licences (see p. 518, letters D and E, and cf. p. 503, letter G, post). B

Appeal allowed. C

Road Traffic — Licence — Public carriers' licence — Application — Contract A licence existing—Proposed substitution of A licence—Owner of goods carried under contract supporting application—Question whether proposed change in his best interests irrelevant to the grant of application.

A. Ltd., who were carriers, held a contract A licence authorising the use of their vehicles for the exclusive purpose of fulfilling a contract to carry G. Ltd.'s goods. A. Ltd. now applied for an unrestricted A licence so as to enable them to carry other goods on return journeys. A. Ltd. proposed to work with other carriers, some of whom would carry G. Ltd.'s goods on those other carriers' return journeys, to provide a scheduled service. G. Ltd. supported A. Ltd.'s application and proposed to renounce their existing contract with A. Ltd. and enter into the proposed new arrangement but the licensing authority refused the application principally on the ground that he thought that the existing contract was more in the interests of G. Ltd. than the proposed new arrangement and on appeal the Transport Tribunal held that an A licence ought to be granted, and referred back to the licensing authority the question of quantum of vehicles. D E F

Held: this ground was irrelevant, for G. Ltd. must be accepted as the best judges of their own interests (see p. 505, letter B, p. 514, letter E, and p. 521, letter G, post); in the circumstances the court would not interfere with the Transport Tribunal's decision.

Appeal dismissed.

[**Editorial Note.** In regard to decisions of the Transport Tribunal as precedents, it should be noted that by statute the tribunal have power to review their decisions; see Transport Act, 1947, Sch. 10, para. 4. For a consideration of the appellate jurisdiction from the Transport Tribunal, although not in relation to goods vehicle licensing but in relation to a railway charges scheme, see *British Transport Commission* v. *London County Council* ([1953] 1 All E.R. 801). G H

As to the discretion of the licensing authority, see 33 HALSBURY'S LAWS (3rd Edn.) 752-754, paras. 1275, 1276; as to the discretion of the Transport Tribunal on appeals from the licensing authority, and as to appeals therefrom to the Court of Appeal, see ibid., 768, para. 1316, text and notes (i)-(l); and for cases on these subjects, see respectively 8 DIGEST (Repl.) 262-281, *1683-1807* and 298-301, *1922-1981.* I

As to the doctrine of stare decisis in special courts or tribunals, see 22 HALSBURY'S LAWS (3rd Edn.) 805, para. 1693.

For the Road Traffic Act, 1960, s. 164, s. 166, s. 168, s. 173, s. 174, s. 175, see 40 HALSBURY'S STATUTES (2nd Edn.) 853, 855, 857, 861, 865.]

Cases referred to:

Allison's Transport (Contractors), Ltd. v. *British Transport Commission*, (1955), 30 Traf. Cas. 238.

A *Barratt & Co., Ltd.* v. *London, Midland & Scottish, London & North Eastern & Great Western Ry. Cos.*, (1936), 24 Ry. & Can. Tr. Cas. 127; 8 Digest (Repl.) 281, *1810*.

British Transport Commission v. *Bristow*, (1955), 30 Traf. Cas. 217.

Cattell v. *British Transport Commission*, (1958), 31 Traf. Cas. 179.

Daimler Co., Ltd. v. *Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] B 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 2 Digest (Repl.) 219, *315*.

Edwards v. *Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; [1955] 3 W.L.R. 410; 28 Digest (Repl.) 397, *1753*.

King v. *British Transport Commission (No. 2)*, (1957), 31 Traf. Cas. 77.

R. v. *County Licensing (Stage Plays) Committee of Flint C.C., Ex p. Barrett*, C [1957] 1 All E.R. 112; [1957] 1 Q.B. 350; 121 J.P. 80; [1957] 2 W.L.R. 90; 3rd Digest Supp.

Reed Transport, Ltd. v. *British Transport Commission*, (1957), 31 Traf. Cas. 50.

Salomon v. *Salomon & Co., Salomon & Co.* v. *Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 9 Digest (Repl.) 30, *11*.

Stepney B.C. v. *Joffe, Stepney B.C.* v. *Diamond, Stepney B.C.* v. *White*, [1949] D 1 All E.R. 256; [1949] 1 K.B. 599; [1949] L.J.R. 561; 113 J.P. 124; 26 Digest (Repl.) 483, *1694*.

Unit Construction Co., Ltd. v. *Bullock*, [1959] 3 All E.R. 831; [1960] A.C. 351; [1959] 3 W.L.R. 1022; 3rd Digest Supp.

Appeals.

E These were two appeals by objectors to applications for carrier's A licences from decisions of the Transport Tribunal allowing appeals by applicants against decisions of the licensing authority refusing their applications for licences. The appeals were heard consecutively, but the judgments were reserved and then delivered together.

In the first appeal British Transport Commission and sixty-two other objectors F appealed against the decision of the tribunal dated Jan. 13, 1961, allowing the appeal of Merchandise Transport, Ltd. against the decision of the Licensing Authority for the Metropolitan Traffic Area given on June 17, 1960, refusing their application for a variation of their A licence N2250724 by adding seventy-one vehicles and forty-eight vehicles authorised to be hired without drivers.

The facts are stated in the judgment of SELLERS, L.J.

G *E. S. Fay, Q.C.*, and *D. L. McDonnell* for the objectors.

Maurice Lyell, Q.C., and *C. R. Beddington* for the applicants.

In the second appeal British Transport Commission and twenty-three other objectors appealed against the decision of the tribunal dated Jan. 13, 1961, allowing the appeal of Arnold Transport (Rochester), Ltd. against the decision of the Licensing Authority for the South Eastern Traffic Area given on July 13, H 1960, refusing their application for a public A carrier's licence in respect of forty vehicles of a total unladen weight of 225½ tons.

The facts are stated in the judgment of SELLERS, L.J.

E. S. Fay, Q.C., and *J. R. C. Samuel-Gibbon* for the objectors.

C. R. Beddington for the applicants.

Cur. adv. vult.

I July 28. The following judgments were read.

SELLERS, L.J.: I have prepared two separate judgments.

MERCHANDISE TRANSPORT, LTD. *v.* BRITISH TRANSPORT COMMISSION AND OTHERS.

This is the first goods vehicle licensing appeal from the Transport Tribunal to this court and quite properly the argument has travelled over a wide area covering matters incidental to, as well as those more directly involved in, the appeal.

Counsel for the appellant objectors commenced his submissions by a consideration of the extent of this court's jurisdiction. It is to be found in s. 17 of the Railway and Canal Traffic Act, 1888, which permits no appeal on a question of fact but expressly empowers this court to draw all such inferences as are not inconsistent with the facts expressly found and are necessary for determining the question of law and this court is given such powers for that purpose as if the appeal were an appeal from a judgment of a superior court. This court may make any order which the commissioners (now the Transport Tribunal) could have made and its decision is final except where there has been a difference of opinion between any two appellate courts. It was conceded by counsel on behalf of the respondent [the applicants for variation of their carriers' A licence] that that section governs this appeal and it becomes unnecessary to set out the tortuous statutory route which the section (1) has taken.

The cases which have been cited have been in relation to earlier relevant statutes, in particular the Road and Rail Traffic Act, 1933, the Transport Acts, 1947 and 1953, and much of the argument has been in relation thereto; but the Road Traffic Act, 1960, consolidated, with corrections and improvements, the relevant enactments, and it will be more convenient and perhaps now more helpful to make reference only to the provisions of this Act which came into operation, as far as material here, on Sept. 1, 1960. The hearing before the licensing authority was in May, 1960, and before the Transport Tribunal, on appeal, in November, 1960.

Part 4 of the Act of 1960 deals with the regulation of carriage of goods by road. By s. 164 a " carrier's licence " is required by a person who uses a goods vehicle for the carriage of goods (a) for hire or reward, or (b) for or in connexion with any trade or business carried on by him with some exceptions not here material. The classes of carriers' licences and acts authorised thereby are set out in s. 166 in three classes: A public carrier's licences; B limited carrier's licences; C private carrier's licences; and s. 168 stipulates conditions which apply or may be applied in the circumstances stated, some of which call for consideration in the present case.

It is difficult to summarise the differences in the classes without being as exhaustive as the sections of the Act. The public carrier's licence conveys by its name the nature of the trade to which it refers and, apart from contract A licences under special provisions in s. 174, it refers to the general carriage of goods for the public within the locality and according to the nature of the goods contemplated. The A licence only permits the carriage of goods of others and not carriage for or in connexion with any other business carried on by the holder of the licence, except goods carried incidentally to his haulage business. The B licence may be used for two alternative purposes, either private carriage or for hire and reward subject to conditions. The C licence does not permit the holder to use his vehicle for any but his own goods unless specially authorised in an emergency and an application for a C licence cannot be refused by the licensing authority if there is no objection to the character and conduct of the applicant: s. 174 (3). The private carrier, therefore, cannot make inroads on the traffic which is to be carried under A licences for it permits of no return loads not owned by the holder and no question of competition arises. Under a B licence competition may arise, but as I read the Act it is subject to control and gives rise to the main issue in this case. Section 174 (1) gives full power in his discretion to the licensing authority to grant or refuse an application for a licence, subject to the Act and to a right of appeal to the Transport Tribunal by a person aggrieved: s. 175 (1) and (2).

Before considering the procedure governing the granting of carriers' licences it is convenient to turn to the facts which brought the applicants to require

(1) The statutory route is traced in 31 HALSBURY'S LAWS (3rd Edn.) 828, para. 1345, note (e).

A and apply for additional A licences. Harris Lebus, Ltd. are large manufacturers of furniture with premises at Tottenham for the manufacture of cabinet furniture and at Reading for upholstered furniture. I read from the detailed findings of the licensing authority:

"3: From 1928 until 1949 Harris Lebus, Ltd. used public hauliers, but after nationalisation they found the services of British Road Services not B altogether satisfactory and went in for C hiring, supplying the drivers themselves. They continued to use British Road Services to some extent but as business expanded they started to build up their C licensed fleet. After denationalisation they formed Merchandise Transport, Ltd., the applicants, in 1955 as a separate road haulage company to tender for British Road Services' units and they were granted thirteen special A licences for C nineteen vehicles and three trailers which were later converted to ordinary A licences. The applicants are a wholly owned subsidiary of Harris Lebus and many of the directors are common to the two companies. Ninety-eight shares are held by Harris Lebus, Ltd. and two by Mr. A. Lebus. In 1957 the applicants acquired C. E. Dormer (Leyton), Ltd., and in 1958 C. E. Dormer (Islington), Ltd. Ninety-eight shares of each company are held D by the applicants and two by Mr. Chidwick, secretary of Harris Lebus, Ltd. These acquisitions brought the applicants to thirty-eight additional vehicles on A licence and two on B licence. The two Dormer companies have now no customers of their own, as their fleets have been amalgamated with the applicants' fleet. Mr. Forrest, the transport manager of the applicants, estimates that of the total carryings of the combined fleet sixty-one per E cent. is for Harris Lebus and that 95½ per cent. of the 39 per cent. carried for other customers represents return loads. Thus to all intents and purposes the three haulage companies work entirely for Harris Lebus on outward journeys. The A licensed vehicles are said to be used mainly on long haul work, the local work being done mainly by Harris Lebus vehicles on C licence and C hiring. The vehicles of all four companies are said to be F garaged at one place.

"4: The principal object of the applications is stated to be to form a single integrated fleet of A licensed vehicles primarily to serve the extensive transport needs of Harris Lebus, Ltd. It is claimed that there would then be simplification of record keeping, ability to interchange drivers and general economy on overheads. It is not denied that there would be a consider- G ably increased opportunity to carry return loads and that there might be a certain amount of abstraction from existing hauliers."

The application by the applicants, dated Feb. 5, 1960, to the Metropolitan Licensing Authority was for a variation of an A licence so as to permit them to use in addition to the vehicles then authorised thereunder (a) 112 Luton (furniture) vans and seven articulated units (tractors and trailers) and (b) seven Luton H vans "to be acquired". At the date of the application all the vehicles (other than the seven vans "to be acquired") were the subject of a C licence held by Harris Lebus, Ltd., and were in regular operation. In these circumstances what was sought to be achieved was not inappropriately referred to as a "switch" from the manufacturers to their subsidiary and controlled company, the applicants. It was a "switch" on a considerable scale. I

The licensing authority refused the application and his conclusion and findings are stated in the decision of June 17, 1960, as follows:

"As in deciding this application I have to have regard to the public interest, I do not think it would be right to ignore the obvious implications of a grant. It may be that there are not many large C licensed operators who by the simple device of establishing a transport subsidiary would be able profitably to switch to A licence activities; but obviously there are some and there is substance in the fears of some objectors that

if the application is granted it will be the precursor of others. In the Act of 1933, Parliament decided that it would be in the public interest that public hauliers should be protected against the inroads of private hauliers with spare capacity, unless these private hauliers could establish a case for a limited B licence. The grant of the application in this case would nullify the clear intention of Parliament and would thus be contrary to the public interest. On this part of the principal application therefore my findings are as follows:

"(i) The desire of Harris Lebus, Ltd. to employ the applicants to carry their goods is less than genuine and is subordinate to the desire of Harris Lebus, Ltd. and its subsidiaries to use A licensed vehicles in order substantially to increase the capacity they can offer for the carriage of return loads. (ii) It is not necessary in view of findings (iii), (iv) and (v) to determine the quantum of the grant. (iii) In a limited number of cases the objectors satisfied me that a surplus of vehicles already existed which could carry the return loads sought to be carried by the applicants. (iv) All the objectors satisfied me that if the application was granted there would be a likelihood of abstraction of their traffic and this again would lead to facilities being in excess of requirements. (v) It would not be in the public interest that this part of the application should be granted."

By its judgment the Transport Tribunal set aside this decision and remitted the appeal to the licensing authority for him to determine the number and unladen weight to be authorised with this direction:

"that upon the [applicants] procuring and producing to the licensing authority an undertaking in writing by Harris Lebus, Ltd. (a) to surrender all such C licences as are now held by them and (b) not to apply for any C licence during the currency of the licence to be granted to the [applicants] under this order the licensing authority do vary the [applicants'] said A licence by authorising the use thereunder of such vehicles as may be required to carry the traffic now carried by Harris Lebus, Ltd. under the C licences to be surrendered by them."

Both decisions rely on previous judgments of the Transport Tribunal or its predecessors and it was submitted to us that the Transport Tribunal, whilst properly making decisions for the guidance of those concerned with this branch of the law, tended to apply too rigidly and authoritatively their pronouncements without due regard to the discretion which each application involves and to the changing and developing circumstances in which the Act, as distinct from the decisions, calls for interpretation and application. In my view it is desirable and no doubt inevitable that a body of guiding authority should be built up as the various circumstances call for adjudication but viewing this matter for the first time and recognising that the whole field has not been traversed the criticism does not seem wholly unjustified. Where discretion lies it should not be hidebound by authority.

I turn now to the sections of the Act of 1960 dealing with procedure. Section 171 provides that an application for an A or a B licence shall be made to the licensing authority for the area in which the applicant's operating centre is situated, and s. 172 requires the applicant to furnish specified information on a prescribed form of the motor vehicles proposed to be used. The objectors, who objected in large numbers, were empowered to object under s. 173 of the Act and it is important to observe these provisions which I extract from sub-s. (3), (4), (5) and (6), and from s. 174 (4).

Section 173 provides:

"(3) It shall be the duty of the licensing authority . . . to take into consideration any relevant objection to the application which may be made by a person who is already providing facilities, whether by means of

A road transport or any other kind of transport, for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve . . .

"(4) In this section, 'relevant objection' means an objection on any of the following grounds, that is to say,—(a) that suitable transport facilities in the district, or between the places, which the applicant intends to serve B are or, if the application were granted, would be, either generally or in respect of any particular type of vehicles, in excess of requirements . . .

"(5) The onus of proof of the existence of the grounds on which a relevant objection is made shall lie on the objector.

"(6) In considering, for the purposes of an objection on grounds such as are referred to in para. (a) of sub-s. (4) of this section, whether existing C transport facilities are to be treated as suitable, the licensing authority shall have regard to the relative efficiency, reliability and adequacy of the existing facilities at the date of the application and the facilities which the applicant will provide if his application is granted, and to all other relevant considerations, including, to such extent as may in all the circumstances appear proper, the charges made and to be made in respect of those D facilities respectively."

Section 174 (4) provides:

"The licensing authority, in exercising his discretion under this section, shall have regard to the interests of the public generally, including primarily those of persons requiring facilities for transport, and secondarily E those of persons providing facilities for transport . . . and, in the case of an application for a B licence, also to the extent to which the applicant intends that the vehicles proposed to be used under the licence shall be used for the carriage of goods for hire or reward."

The objectors are concerned not with the applicants' outward traffic from London, for that is dealt with by an undertaking which I shall have to con- F sider later, but with the right which an A licence would give the applicants to collect, without control or limitation, return loads to the probable detriment of the objectors who are public carriers who have already provided facilities, which they say are ample and which would be excessive if the applicants are allowed to intervene by taking return loads and depriving the objectors to whatever extent to which they do so, of what would be their outward traffic. It G appears that where there are free and unfettered A licences, that is where the traders are in fact public carriers, there is a give and take in the matter and in the past carriers have not been concerned to resist the competition for return loads. Here it is said the position is very different and has not arisen before. Indeed Mr. Fay, who is one of the seasoned practitioners in this branch of the law, went so far as to say at the outset of his argument for the objectors that H if the decision stands it will alter the whole character of the road transport industry.

It is this broad question which calls for consideration. I attach importance to what took place at the hearing before the licensing authority. It is stated in his decision. Harris Lebus, Ltd. undertook that they would not apply for additional vehicles or C licence or C hiring allowance but, more important in my I view, the subsidiary company, the applicants, gave an undertaking that if the application for additional vehicles on A licence was granted these vehicles on outward journeys would be used for the carriage of Harris Lebus, Ltd.'s goods only. The licensing authority said:

"This means that on outward journeys these vehicles would do no more than they now do under the C licence and C hiring allowance."

This undertaking in my opinion altered the whole nature of the applicants' application. With such a restriction on outward journeys it would scarcely fit

the description of public carrier, and the licence to carry for others with such a restriction on outward traffic would create, in effect, an A licence subject to a condition. Such an undertaking would be enforceable, it is true, not by penalty as would a condition but at the discretion of the authorities by a termination of the licence. A

It does not seem to be surprising that an application of this character gave rise to doubts in the mind of the licensing authority, and he dismissed the application on the ground that the desire of Harris Lebus to employ the applicants to carry their goods was less than genuine and was subordinate to the desire of Harris Lebus and its subsidiaries to use A licensed vehicles in order substantially to increase the capacity which they could offer for the carriage of return loads. With respect to the Transport Tribunal, who showed little sympathy with that conclusion, I feel that there is much force in what the licensing authority said. It was, I think, unnecessary to use the word "genuine" at all, even though it did appear in an earlier judgment of the tribunal, but the suspicion which the finding expressed seems to me justified. B C

The evidence of the objectors stood alone and unchallenged with regard to facilities for return loads and on that evidence the licensing authority held that in limited localities an ample supply or even a surplus of vehicles already existed and a surplus would arise if they were increased. The applicants boldly called no evidence on return loads and relied on authority to permit evidence of need for outward traffic, in this case guaranteed in effect, as sufficient to justify an A licence without further proof, particularly without consideration for return traffic. D

I am not concerned in this appeal to decide whether it is necessary in the ordinary application for an A licence to trade as a public carrier, in any real sense, for the licensing authority to inquire into the effect on return load facilities already existing. Strictly the Act does seem so to require but if an outward demand were clearly proved the facility would have to be granted and it may be objectors would not be forthcoming. E

It is here, I think, that the undertaking which was given calls for consideration and as the matter has been left by the Transport Tribunal the applicants have acquired a right to trade which fulfils the circumstances of a B licence but not that of an A licence. Under s. 166 a B licence entitles the holder thereof to use the authorised vehicles as he thinks fit from time to time, either (a) for the carriage of his goods, or (b) subject to conditions, for the carriage of goods for hire or reward. These are clear alternatives and I find no restriction on the use of a B licence in the words "from time to time", which permits of the alternative use. Section 168 (2) provides that a licensing authority may attach to a B licence the conditions (b) that certain classes or descriptions of goods only shall be carried and (c) that goods shall be so carried only for specified persons. That is in effect what has been done here under the guise of an A licence. The Act contemplates an A licence as unfettered and gives the authority no right to impose conditions (except under the special provisions of s. 174 (2) which deals with what have been called contract A licences). F G H

On the face of it, therefore, it would seem to me that the Transport Tribunal, confronted with the applicants' undertaking with regard to outward traffic, either should have dismissed the appeal or at their discretion should have offered a B licence with the conditions attached and, if this had been accepted, shall have sent the case back to the licensing authority to say what restrictions, if any, should be placed on the applicants' rights to pick up return loads. As far as the objectors are concerned the return loads are the sting of the matter. I

The ideal for economy of transport would, I suppose, be that every outward vehicle should return as near as possible to its headquarters with a full load. On the other hand, from a short view of the public interest it might be said that the more vehicles available and over the widest areas the better, whether they were fully laden or not. But in this regulation of traffic by licences there is

A clearly an element of monopoly and an endeavour to build up and retain a stable system of goods transport by road. Section 173 (3), (4) (a) and (6), which I have already read, impose the duty on the licensing authority to consider the relevant objections and, in the case of a B licence application and therefore in this case, which, as I see it, is completely analogous, there is a duty to consider the return facilities.

B The 119 vehicles will travel as trade requires to all parts of the British Isles bringing vehicles at some time or another to nearly all localities with empty space for return loads. No doubt there will be concentration on the bigger industrial centres and further concentration at some points as the returning vehicles advance on the main routes to London and become available, with fair frequency, to collect traffic at given points on their way home. It was argued that a hun-
C dred or more vehicles would make no appreciable difference having regard to the large number of vehicles operating on the roads all over the country and that their outward journeys would be so widespread. I should have thought that the concentration was one of the matters which ought to be considered. One vehicle a month might go to, say, Sunderland, but twenty a week might, let us suppose, go to Leeds and the odd vehicle to Sunderland, or Newcastle or Scot-
D land, might return through Leeds and swell the number of returning vehicles week by week to the possible detriment of those public carriers already serving the needs of Leeds. I cannot see why such a situation does not call for inquiry and decision under the Act. Under a B licence granted to the applicants certain centres might be excluded from the right to pick up return loads. It would be a matter for exercising discretion on a judicial assessment of the facilities and
E the interest of the public.

In *Barratt & Co., Ltd.* v. *London, Midland & Scottish, London & North Eastern & Great Western Ry. Cos.* (2) it was held by the Road and Rail Traffic Appeal Tribunal (which the Transport Tribunal supplanted) that the carrying of return loads for hire and reward is not generally in the public interest and the applicant for a B licence there showed no case for exceptional treatment.

F I would allow the appeal on the ground that the appropriate licence which the Act provides on the facts of this case is a B licence and that under the Act an A licence is not available and the only application before the authority was for an A licence. If a B licence were to be sought then I am of opinion that full consideration should be given to the objectors' concern over return loads.

I would allow the appeal equally with my brethren, whose judgments I have
G read, on the ground of the relationship of the main company with its subsidiary company, the applicants, and for the reasons given in my Lords' judgments.

In an administrative matter of this kind where licences have to be obtained and granted for the efficient provision and regulation of road transport and where discretion has to be exercised on the information available the authority
H is justified in looking at the substance of the matter and where effective control lies. If it is just that public carriers should be protected against the unfettered competition of private carriers with spare capacity, as the Act seems to indicate, then this should not be evaded by an artificial "switch" but should be established as fair and reasonable under an application for a B licence.

I am in agreement with the decision in *British Transport Commission* v.
I *Bristow* (3), relied on by the objectors. The appeal before us is not restricted to that part of the Transport Tribunal's decision which held that their objections as to excess of facilities were not made out.

The error in the decision appealed from, in my opinion, is an error of law and no question arises of interfering with the discretion of the Transport Tribunal. The Transport Tribunal as a reviewing body of the various orders of the licensing authorities throughout the country is an expert body responsible for the proper

(2) (1936), 24 Ry. & Can. Tr. Cas. 127. (3) (1955), 30 Traf. Cas. 217.

administration of the Road Traffic Act, 1960, and I would be reluctant to interfere with any matter of discretion, although there is power to do so in exceptional circumstances. The tribunal has for so long given the final judgment in these matters and it is with deference that I differ from them but I am of the opinion that the decision of the licensing authority was right and should be restored.

ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* BRITISH TRANSPORT COMMISSION AND OTHERS.

This appeal was heard immediately after *Merchandise Transport, Ltd.* v. *British Transport Commission and Others* which we have just decided, and Mr. Fay was again for the appellant objectors and Mr. Beddington for the respondent applicants. The arguments overlapped and I would therefore incorporate into this judgment so much as is relevant from the preceding case. Here also the Transport Tribunal reversed the decision of the licensing authority and granted the application for an ordinary A licence and sent the case back to the licensing authority for him to quantify the number of vehicles to be allowed and with suggestions for his consideration when assessing the requirements.

The applicants Arnold Transport (Rochester), Ltd., sought an A licence in respect of forty vehicles to carry goods described as " plaster board products, paper, building materials and steel " and stated that the normal use of the vehicles would be " mainly [in the] southern half of England and Wales with occasional loads to and from Scotland ". The applicants had a contract A licence authorising the use of thirty-eight vehicles for the exclusive purpose of fulfilling a contract with Gyproc Products, Ltd., for the carriage of their goods. They also had some relatively small other business as public carriers trading in the Rochester area.

The purpose of the application was to remove the restrictions of the contract A licence in order to enter into a larger and different trade which became apparent in the course of the hearing before the licensing authority. It was described as a " trunking system " and it would appear that what was desired was that the vehicles of the applicants should carry Gyproc goods to Southern England and South Wales, more especially, as they were already doing and should bring back return loads on a scheduled basis giving a regularity of service and linking up with A licence carriers from those districts who would on their return journeys carry Gyproc goods as well thereby supplementing the applicants' vehicles. On the face of it this seems a sensible and economic scheme, with advantage to the applicants, the carriers with whom they intend to work, Gyproc and other traders who would benefit by a regular scheduled service.

The contract A licence already held by the applicants would not allow of this. That is a special variation of an A licence which falls outside the three main classes and arises under s. 174 (2) of the Road Traffic Act, 1960. If an applicant satisfies the licensing authority that his vehicles will be used exclusively for the purposes of a contract entered into by him with a manufacturer or trader (not a carrier) for the carriage of his goods for not less than a year, then subject to good character and conduct, the applicant is entitled to an A licence restricted to that carriage and terminating at the conclusion of the contract unless otherwise directed. Haulage under this form of contract licence does not compete, it would seem, with the ordinary public carrier and is in that respect comparable to private carriage of goods under a C licence. The objectors, the British Transport Commission and other public carriers, are apprehensive that the increased capacity of return loads which would arise in respect of the forty vehicles operating under an A licence might make inroads on their trade.

By s. 174 (4) the licensing authority, when he comes to exercise his discretion on an application, has to have regard to the interests of the public generally, including primarily those of persons requiring facilities for transport and secondarily those of persons providing facilities for transport.

A Although counsel for the objectors maintained his argument to the contrary, I think that the licensing authority was not entitled to refuse the respondents a licence, as he did, because he thought that the existing contract for seven years which did not expire until June, 1965 (but which of course could be renounced by agreement) was more in the interest of Gyproc than the proposed new arrangement. Gyproc supported the application and I think that they B must be accepted as the best judges of their own interest. Both the contracting parties are free and friendly and are entitled to look after themselves. In this matter I entirely agree with the Transport Tribunal. I think it was irrelevant. In any case I am inclined to think that advantages would accrue to both, for there is a basis of economy in running which, while not perhaps producing a reduction in rates, might well prevent increases or reduce their extent. Clause 6 C of the contract provides for the rates to be agreed from time to time. It may be that the licensing authority adopted this course thinking it was an acceptable ground, not covered by adverse authority, for refusing the licence which he thought ought not in all the circumstances to be granted. The Transport Tribunal's hand was perhaps felt to be pressing too hardly on him and I hope our two decisions will, in future, tend to lighten the pressure and give recogni- D tion to the scope which the statutory power of "full discretion" establishes.

The objectors in this case did not call any evidence but it would appear probable by inference that the scheme envisaged would mean some abstraction of traffic from the railways or other public carriers. This was a matter for secondary consideration. It is difficult to say that the Transport Tribunal gave any regard, secondarily, to the interests of persons providing facilities for transport which, E having regard to the contemplated trading, would include those who are interested in carrying what would be the applicant's return traffic. The Transport Tribunal expressed their views thus:

> "Once it is accepted that the applicants and Gyproc were as free to agree to 'unmake' their contract as they were to make it, the case, as indeed the licensing authority perceived, presented no difficulty. The F evidence entitled the applicants to say 'We are asking for a licence to enable us to carry for Gyproc as public hauliers. Gyproc want us to carry for them in that capacity. There is no evidence that any other haulier can do their work'. Evidence to this effect has always been treated as justifying the grant of an A licence."

G That I think means justifying in itself the grant of an A licence.

I think that is an indication and illustration of the rigidity complained of by the objectors in both these cases. The past decisions may well have fitted the cases which they decided, but here the existing contract A licence *was* fulfilling all Gyproc's needs and the licensing authority and the tribunal in these circumstances were clearly not bound to grant an A licence on the basis that H Gyproc's traffic would not otherwise be carried and both were bound, as I see it, before doing so to regard all the provisions of s. 174 (4), primary and secondary, and to exercise a discretion in the light of all these relevant considerations.

On the other hand, whilst the tribunal held that an A licence ought to be granted they sent the application back for the licensing authority to assess the number of vehicles to be allowed and with this direction or guide:

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> "He will no doubt before doing so think it desirable to require the applicants to provide him with the latest possible particulars of the amount of work which had been performed under the contract A licence. We suggest for his consideration that he should also require of them further information about the 'trunking system' with which, Mr. Atkins (4) said, the applicants were 'experimenting'. Under that 'system' some of the Gyproc traffic was to be carried from Rochester to South Wales not by

(4) A director of Arnold Transport (Rochester), Ltd.

the applicants' vehicles but by South Wales hauliers as 'return loads'. To the extent to which any such system was in operation the need for the services of the applicants' vehicles in the case of the Gyproc traffic would obviously be reduced."

That still leaves some scope in the licensing authority to limit the quantum so that it will do as little damage as possible to those already established to whom consideration should be given. I feel some doubt about it but I am not prepared to interfere in this case with what the tribunal has ordered and I would therefore dismiss the appeal.

DEVLIN, L.J.: In these two cases we have to consider the machinery whereby road licences are granted to goods vehicles. Most of it was originally enacted by the Road and Rail Traffic Act, 1933. That statute, subject to some amending legislation, was the statute in force at the time when these proceedings began. All of this has now been re-enacted in the Road Traffic Act, 1960; and as we are told that it would be more convenient to refer to the provisions of that Act, I shall do so. The appeal is from the decision of the Transport Tribunal, a body which is authorised by s. 175 (1) to hear appeals from persons who are aggrieved by the decision of the licensing authority. It is unnecessary to set out the complicated route (5) by which appeals from the decisions of the Transport Tribunal come to this court. It is agreed that they are governed by the Railway and Canal Traffic Act, 1888, s. 17. We may not entertain any appeal on a question of fact although we have a certain power to draw inferences of fact. Subject to this, we may make any order which the tribunal could have made.

The grant or refusal of a road licence is essentially a matter of discretion. The application is made in the first instance to the licensing authority of the appropriate district and he has "full power in his discretion" to grant or refuse it; s. 174 (1). On an appeal from him the tribunal has power "to make such order as it thinks fit": s. 175 (3). The question has therefore arisen how far on this appeal we are bound by the exercise of the discretion of the tribunal. It is agreed that it is to the tribunal that we have to look in this respect and not to the licensing authority; they may substitute their discretion for that of the licensing authority. But they are not, in my opinion, when they sit, as they usually do, as an appellate tribunal without hearing the witnesses, free to substitute their own findings of fact without good cause for those findings of the licensing authority which are based on and derive their force from his observation of the witnesses; if they did that, they would commit an error of law, for that is a limitation inherent in the nature of appellate work. Apart from this, the question is to what extent we can interfere with the discretion exercised by the tribunal. On the one side it is agreed that we should not interfere unless we discover some error of principle, such as may cause an appellate court to differ from the decision of a judge in chambers. It is conceded on the other side that if there lies at the root of the exercise of the discretion any error of law, we are entitled to correct it and, if necessary, to exercise our own discretion, making such order as the tribunal itself could have made. I need not explore the territory that lies between these limits since in my opinion both cases fall outside them. I am satisfied in the first case that the tribunal has fallen into an error of law; in the second case I am not satisfied that there is as much as an error of principle.

The other question on discretion is whether the tribunal can fetter—and, if so, whether it has fettered—the exercise of the discretion by the licensing authorities and by itself. It is said by counsel for the objectors that the tribunal has constructed a rigid system of rules embodied in reported cases which licensing authorities are required to follow as binding precedents. He submits that that

(5) See footnote (1), p. 498, ante.

A is wrong; and this submission arises for consideration particularly in the second case. In my opinion a series of reasoned judgments such as the tribunal gives is bound to disclose the general principles on which it proceeds. I think that that is not only inevitable but also desirable. It makes for uniformity of treatment and it is helpful to the industry and to its advisers to know in a general way how particular classes of applications are likely to be treated; but the B tribunal may not in my opinion make rules which prevent or excuse either itself or the licensing authorities from examining each case on its merits. That is a power which the High Court has assumed. If the High Court has made a rule for the proper administration of justice generally—as, for example, that there should be no communication of any sort between a party and a juror —the court will enforce the rule without inquiring whether the breach of it in a particular C case has actually caused any injustice. There is no warranty for an inferior court making rules of that sort; and in my opinion it would not be open to a tribunal charged by statute with a duty to decide each case as a matter of discretion, to inhibit itself from going fully into the facts. I respectfully adopt what JENKINS, L.J., said on a similar point in *R.* v. *County Licensing* (*Stage Plays*) *Committee of Flint C.C., Ex p. Barrett* (6): a tribunal must not pursue consis- D tency at the expense of the merits of individual cases. If the discretion is to be narrowed, that must be done by statute; the tribunal has no power to give its decisions the force of statute.

It is necessary now to say something about the framework of the relevant sections of the Act. Section 166 divides licensees into three classes —A, B and C: public, limited and private. The fundamental distinction is between the E public and the private carrier. The private carrier is a man who uses his vehicle for delivering his own goods; and unless he has misbehaved himself in some way, he is entitled to his licence as of right: s. 174 (3). Such a vehicle will normally be empty on the return journey and it would therefore pay the private carrier to solicit a load back at a very cheap rate. If he were allowed to do this, there would be unfair or uneconomic competition with the public carrier or A F licensee whose function is to carry goods generally for hire or reward. It is plainly the policy of the Act to prevent this. The C licensee or private carrier is forbidden, except when authorised in an emergency, to carry goods for hire or reward: s. 166 (4) and s. 168 (3). The Act also provides for the possibility that a public carrier or A licensee may have as well a different business in which he delivers his own goods and forbids such a carrier from using his A licence G vehicles for carrying such goods: s. 168 (1). In between these two main categories, the Act provides for what have come to be regarded as three other categories. Although there is only one other class mentioned in the Act, the B licence, this licence has come to be used for two rather distinct purposes; and there is also a modification of the A licence, which although it has no official name is known as the contract A licence. It is convenient to deal with that H first. Although in form it is a modification of the A licence, in substance it is a variant of private carriage. Instead of carrying his own goods, a trader may find a carrier who is prepared under contract to set aside vehicles exclusively for the trader's goods. Such a carrier may obtain a licence in the same way as a C licence as of right, but he is then subject to the essential disability of the C licensee, namely, that he may not carry any other person's goods in that I vehicle: s. 174 (2).

The next category to be considered is that of the public carrier who is prepared to submit to some restriction. The A licence in theory gives the carrier power to travel all over the country and to carry what goods he wants. The only condition which can be imposed on him is that which I have already noticed, namely, that if he carries on another business, he may not transport the goods of that other business. In the limited or B licence conditions can be imposed:

(6) [1957] 1 All E.R. at p. 122; [1957] 1 Q.B. at pp. 367, 368.

s. 168 (1). The carrier may be limited to a specified district, to travel between specified places, to certain classes or descriptions of goods, or to the carriage of goods only for specified persons. A public carrier who wanted only a limited licence of this sort should apply for a B licence. But it appears that there are public carriers who, while not wishing to bind themselves stringently, are prepared to submit to what in effect are restrictions of a more general character. In his application an applicant must state "the facilities for the transport of goods intended to be provided by the applicant" (s. 172 (2) (a)). The wider the facilities for which he asks, for example in the area to be covered or in the classes of goods to be carried, the less likely he is to get his licence. So he is not likely to ask for more than he hopes to get. This statement is not binding on him as a condition would be. If he goes outside the facilities for which he has asked, he does not, as in the case of a B licensee who breaks a condition, commit a criminal offence; but s. 178 (1) (d) provides that if for the purposes of an application the applicant has made a statement of intention or expectation which has not been fulfilled, the licensing authority may revoke, suspend or curtail his licence. No doubt, therefore, the penalty for departure from the statement of intention by an A licensee is practically as effective as that for the breach of a condition by a B licensee; but the revocation of the licence is discretionary and I presume that the departure from the intention would have to be more than trivial; the procedure is useful in the sort of case where the restraint which is acceptable to the carrier does not lend itself easily to the formulation of a rigid condition. I have observed that a word such as "mainly" often qualifies a statement of intention, so that the question would be whether the carrier poached outside the area mentioned in his application or made a regular trade in classes of goods which he had not included in it.

Finally, in the third category, there is the private carrier who wants to be relieved to some extent of his disability from carrying other people's goods. He, too, can apply for a B licence and that is why I have said that that one class seems to include two categories. Under a B licence he can not only carry goods of his own but he can also carry other people's goods for hire or reward subject to conditions. These may include, in addition to those I have already mentioned, any condition imposed "in the public interest and with a view to preventing uneconomic competition": s. 168 (2) (d). That is the protection given to the A carrier who would otherwise start from a position of economic disadvantage in that he would have to compete with the surplus capacity of the private trader.

In the first case the nominal applicant for an ordinary A licence is Merchandise Transport, Ltd. Their application was refused by the licensing authority and granted by the tribunal. This applicant company is a wholly owned subsidiary of Harris Lebus, Ltd., who are manufacturers of furniture on a very big scale and therefore have to have at their disposal a fleet of furniture vans for delivering their goods. The applicant company, together with two subsidiaries of their own, handles or wishes to handle all this transport. The application in this case is in respect of a number of vehicles known as Luton vans which have hitherto been used by Harris Lebus, Ltd. for delivery of their furniture on C licence; it is proposed that they should be transferred to the applicant company and used by that company on A licence for the transport of "mainly new furniture, any distance, and on return, goods suitable for carriage in Luton vans". It is said that the object of this transfer is to simplify record-keeping and administration. Two witnesses, who are officers of both companies, spoke about this and were examined and cross-examined on the point; and the licensing authority who heard them came to the conclusion

> "that the driving motive behind all these applications is not the customer's wish to change his business method, but the desire of the organisation of which the customer is the head to carry return loads in all their vehicles."

A I do not think that the tribunal anywhere rejects this finding; as one made by the licensing authority who heard and saw the witnesses, I think that it should be accepted. It is not suggested that the applicant company was formed simply for the purpose of getting round the Act; but the situation that will result is that by a "simple device", as the licensing authority rightly describes it, the Harris Lebus group will be put in the position of a manufacturer who can carry B his own goods to their destination and pick up return loads where he can get them without having to submit to the conditions which on the grant of a B licence would probably be imposed to protect public carriers.

An A licence is not granted as a matter of course and it is open to existing A licensees to object on certain grounds, principally that the grant of it would increase capacity above requirements. The British Transport Commission, C for whom Mr. Fay appears, heads the list of objectors who gave evidence at the hearing. In the course of the hearing, and I suppose in order to meet some of the objections, the applicants gave an undertaking that they would not on outward journeys seek to carry any traffic other than Harris Lebus' goods. Effect was given to this by means of "a statement of intention" within s. 178 (1) (d). In my opinion this was not correct. It is a precise limitation, capable D of exact enforcement, and should be made the subject of a condition and of a limited licence in accordance with the design of the Act. I do not say that the line between a statement of intention and a condition must always be drawn too meticulously; but if it is completely blurred, if as in this case a restriction on trade of a sort for which a B licence was clearly designed is imposed on an A licence by way of a statement of intention, injustice may result. All existing E A licensees and B licensees may oppose an application for a B licence; but only an A licensee may oppose an application for an A licence: s. 173 (3). If the distinction between a condition and a statement of intention is not observed and application is made for an A licence in cases where a B licence is for this reason the appropriate one, what is in effect a B licence will be granted without existing B licensees having had an opportunity to be heard. This ground is in F my judgment sufficient to justify the refusal of the A licence in this case. But although it was taken by counsel for the objectors before us, it does not appear to have been pressed below; and I shall therefore proceed to consider the essential matter in issue, on which the licensing authority took one view and the tribunal the other.

Before doing so, it will be convenient to see just what advantage the Harris G Lebus group gains by applying for an A rather than for a B licence. They have consented to carry Harris Lebus' goods only on their outward journeys. Since the main object of the enterprise is to deliver Harris Lebus' furniture, the concession does not involve much sacrifice, though I dare say they would have liked to have kept their hands entirely free. What they insist on retaining is their freedom to pick up return loads; if they had not wanted that, they could have H got a contract A licence as of right. They do not, however, they told us, wish to cut rates on return loads. It may be asked therefore why they are not willing in accordance with the commercial realities of what they are doing to apply for a B licence enabling them to carry their own goods on the outward journey and other traders' goods on the return. The answer lies in the different conditions which are laid down either by the Act or have been followed as a matter of prac- I tice in relation to the burden of proof and which distinguish the application for the A licence from that for the B licence. On an application for an A licence existing A licensees can object on the ground (I shall give the exact phraseology later on) that their existing capacity is already sufficient and that the grant of any additional services would be in excess of requirements. When such an objection is taken, as in this case, the onus of proof is on the objector: s. 173 (5). But when an application is made by a C licensee to switch to a B licence so that he can carry return loads, the practice is to put the onus of proof the other way round. In *Barratt & Co., Ltd.* v. *London, Midland & Scottish, London & North*

Eastern & Great Western Ry. Cos. (7), the Road and Rail Traffic Appeal Tribunal said (8) that a facility to take return loads should be granted to a B licensee only in exceptional circumstances; and this principle seems thereafter to have been followed. As a general rule, that appears to me to be in accordance with the intent of the Act and in particular with the intent that is manifest in s. 168 (2) (d) that B licences should not be used for the purpose of uneconomic competition. Prima facie it is uneconomic competition, if a public carrier is forced to cut his rates so as to compete with private carriers who can afford to take cut rates (the licensing authority has no power to impose conditions with respect to rates) on his return loads.

Now, on the facts of this case the onus of proof appears to be all-important. If the application were confined to a specified area, it might be easy enough on investigation of the facts to prove either that there was or was not already sufficient capacity. Since the application is to carry loads all over the country, it is extremely difficult to give any satisfactory proof of needs one way or the other. Both counsel for the objectors and Mr. Beddington, in the useful argument with which he followed Mr. Lyell for the applicants, accepted this. By asking for A licences rather than B licences the Harris Lebus group thus put themselves in a position of great advantage.

I turn now to the main question. The licensing authority, as I have said, regarded the arrangements made by the Harris Lebus group as "a simple device" to evade the intent of the Act, which he concisely describes in para. 22 of his judgment as follows:

> "Parliament decided that it would be in the public interest that public hauliers should be protected against the inroads of private hauliers with spare capacity, unless these private hauliers could establish a case for a limited B licence."

No doubt a man may so arrange his affairs as not to bring them within the purview of a statute. Certainly the applicant is as a legal person quite distinct from Harris Lebus, Ltd. If the duty imposed on the licensing authority was to grant the applicant a licence provided certain conditions were satisfied, he could not withhold it because he properly regarded the applicant as the alter ego of a person who would not himself be qualified; but the grant of an A or B licence is discretionary and not mandatory. Is it a proper exercise of the discretion to refuse a licence to someone who is seeking, either for himself or for a group of which he is a member, an advantage which, though it may be within the letter of the law, is contrary to the spirit of the Act?

This is a broad and simple way of approaching the point. The licensing authority and the Transport Tribunal have approached it by a narrower route. They have not considered the exercise of the discretion at large but have related it to the specific matters to which under s. 174 (4) and s. 173 (3) and (4) the licensing authority must have regard to take into consideration. Section 174 which, as I have already noted, gives the licensing authority "full power in his discretion" either to grant or refuse the application, requires by sub-s. (4) that he

> ". . . shall have regard to the interests of the public generally, including primarily those of persons requiring facilities for transport, and secondarily those of persons providing facilities for transport . . ."

Were Harris Lebus "persons requiring facilities for transport"? Had Harris Lebus a "genuine desire" (a phrase taken from the report of an earlier decision of the tribunal (9)) to give up its C licences and change over to public transport?

(7) (1936), 24 Ry. & Can. Tr. Cas. 127.
(8) (1936), 24 Ry. & Can. Tr. Cas. at p. 134.
(9) *Allison's Transport (Contractors), Ltd.* v. *British Transport Commission*, (1955), 30 Traf. Cas. at p. 242.

A This was all investigated in the evidence, and there is certainly something bizarre about evidence from witnesses who as officers of both companies spoke of the needs of the parent and the willingness of the child to help. It is as if a man explained that his right hand felt that it was time to give up work but fortunately his left hand was able to take over. If s. 174 (4) imposed conditions precedent to the grant of a licence, it would no doubt be necessary to consider B carefully whether the literal requirements of the subsection were fulfilled. Since it is only a matter to which the licensing authority in the broad exercise of his discretion must have regard, it seems to me to be unnecessary to take up time determining whether the letter of the Act has been fulfilled.

The other material matter which the licensing authority was required by s. 173 (3) " to take into consideration " is whether

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> " suitable transport facilities in the district, or between the places, which the applicant intends to serve are or, if the application were granted, would be, either generally or in respect of any particular type of vehicles, in excess of requirements ":

s. 173 (4) (a). The British Transport Commission contended that facilities D would be in excess of requirements and this is the ground of their objection to which I have already referred. Evidence was called on this point. The licensing authority found that the objection was made out and the Transport Tribunal found that it was not. We have been invited to set aside the tribunal's finding and I dare say that we have power to do so. The finding that there would be no excess of requirements within the meaning of the Act was based on an evaluation E of the evidence; it was an inference from the facts proved and I think that we have power to interfere with it. We should, however, be very reluctant to do so for it is an inference drawn by a tribunal which is specially experienced in matters of which we have no special knowledge. As I think that the appeal should be allowed whether the objection is sustainable or not, I need express no concluded view on this point.

F The way is now almost clear to consider the central point of how in the end the discretion should be exercised, but there is still one further matter which I must get out of the way. Counsel for the applicants pressed on us the argument that the only locus standi which the British Transport Commission had in this case was that of an objector. They could therefore appeal to us only against so much of the tribunal's decision as affected their objection, that is that part G of the decision which decided that the objection had not been made out. If we upheld the tribunal's decision on this point, as he submitted we ought to, the whole appeal must fail; and, as I understood the argument, the subject-matter of the appeal being confined to the objection, we had no power under s. 17 of the Act of 1888 to review the exercise of the discretion by the tribunal in allowing the application. An argument on the same lines as this was advanced to the H tribunal in *British Transport Commission* v. *Bristow* (10). The wording of the Act on this point is undoubtedly difficult but for the reasons given by the tribunal in the case which I have cited I think that the argument fails.

I now come to the central point in the case which the licensing authority decided in para. 22 of his judgment. I have already quoted a sentence from that paragraph but I think that it is best that I should set it out in full:

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> " As in deciding this application I have to have regard to the public interest, I do not think it would be right to ignore the obvious implications of a grant. It may be that there are not many large C-licensed operators who by the simple device of establishing a transport subsidiary would be able profitably to switch to A licence activities. But obviously there are some and there is substance in the fears of some objectors that if the application is granted it will be the precursor of others. In the Act of 1933,

(10) (1955), 30 Traf. Cas. 217.

Parliament decided that it would be in the public interest that public hauliers should be protected against the inroads of private hauliers with spare capacity, unless these private hauliers could establish a case for a limited B licence. The grant of the application in this case would nullify the clear intention of Parliament and would thus be contrary to the public interest."

It will be seen from this extract that the licensing authority justifies his decision as being in the public interest. He has in mind the words from s. 174 (4) which I have quoted that in exercising his discretion he is to "have regard to the interests of the public generally". I am not sure that the phrase when used in s. 174 (4) was intended to have quite such a wide meaning; but I think it to be quite immaterial. It is not necessary to justify every exercise of the discretion by reference to something to which the licensing authority is required to have regard; it would have been quite sufficient if he had said that he had exercised his discretion in a way which in his view best fulfilled the objects of the Act and was in accordance with its general design.

The licensing authority's reasoning which I have quoted was dealt with by the tribunal in para. 8 of its judgment in the following terms:

"We are by no means certain that we understand this passage. It is sufficient however for us to say that we rejected this contention four years ago in [*Reed Transport, Ltd.* v. *British Transport Commission* (11)] and that we see no reason to qualify what was said in that case at pp. 54 and 55."

I agree with DANCKWERTS, L.J., whose judgment I have had the advantage of reading, that there is nothing obscure in the reasoning of the licensing authority on this point or on any other in his decision.

The argument which the tribunal had earlier accepted in *Reed's* case (11) was repeated before us by counsel for the applicants. It is based on *Salomon* v. *Salomon & Co.* (12) and on the undoubted legal proposition that a company is a legal entity distinct from its shareholders. The reasoning of the licensing authority is said to conflict with this proposition. I cannot see that it does. If he had refused a licence to the applicants on the ground that they had no legal existence apart from Harris Lebus, Ltd. and that the latter ought to have applied themselves, that would be wrong. Or if, for example, the applicants had contracted with Harris Lebus to carry all their goods and had applied for a contract A licence, the licensing authority would be bound to grant it; he could not refuse it on the ground that in reality the applicant was only the transport department of Harris Lebus. If there could be any doubt about that, s. 180 would settle the point. That section provides that when a holding company applies for a licence it can signify to the licensing authority its desire that goods vehicles belonging to its subsidiaries shall be treated as if they belonged to itself. The main object of this provision is no doubt to ensure that one company in a group does not break the law if under a C licence it carries the goods of another group company. But the section shows that it must be the choice of the applicant and not the act of the licensing authority that pierces the corporate fiction. The fact that two persons are separate in law does not mean that one may not be under the control of the other to such an extent that together they constitute one commercial unit. It may be a case of parent and subsidiary; or it may be a case in which one man, though nominally independent, is in truth the instrument of another; or it may be a case in which a man has simply put his vehicles in the name of his wife. Whenever a licensing authority is satisfied that that sort of relationship exists and that the dominant party is using it to obtain contrary to the intent of the Act an advantage which he would not otherwise get, he is entitled if not bound, to exercise his discretion so as to ensure that the scheme of the Act is complied with in the spirit as well as in the letter. This does not mean

(11) (1957), 31 Traf. Cas. 50. (12) [1897] A.C. 22.

A that the applicants are not entitled to a licence at all. It means that it is not to be given better treatment than Harris Lebus would have had if they had retained the ownership of their vehicles and applied themselves. The applicants should be given a licence, if they apply for one, subject to whatever conditions would be imposed on Harris Lebus if they were the applicants. It is common ground that some conditions would have been imposed and that means that the application B should have been for a B licence and not for an A licence.

The judgment of the tribunal is wrong in law because they wrongly described the decision of the licensing authority as "giving the go-by in this way to a fundamental legal doctrine" (I take these words from the passage in *Reed's* case (13) which they incorporate into their judgment in the present case) and on that erroneous interpretation of it dismiss his reasoning as fallacious. That C leaves it open to us to exercise our discretion and I think we should do it in the way the licensing authority did and adopt his reasoning and dismiss the application.

Theoretically this leaves over the question whether if in a future case of such an application by a subsidiary company, a licensing authority or the tribunal exercise their discretion on a correct view of the law but nevertheless permitting D the use of the device, it would be a wrong exercise of it. I prefer to leave the matter in this way because I have not added to a long judgment by exploring the full extent to which we are entitled to interfere with the exercise of the discretion below; I have based my conclusion on the presence of an error of law. It is most unlikely that any tribunal would exercise its discretion so as to sanction a way of getting round the Act; I do not believe that the tribunal in this case E would have done so had they not thought they were legally compelled. If such a case ever arises, I am certainly not saying that it would be beyond our power to declare that the exercise of the discretion was unlawful in that it ignored the intent and purpose of the Act and was unjudicial.

I turn now to the facts in the second case which have something in common with the first. It also is a case in which a company engaged in what is in effect F private carriage for the delivery of goods manufactured by a single firm and which therefore has to return empty, wishes to free its hands so that it can solicit return loads. In this case, however, the connexion between the two parties, the manufacturer and the carrier, is not that of parent and subsidiary but rests solely on the contract. Gyproc Products, Ltd. carry on business in Rochester as manufacturers of plaster board and for many years past their G goods have been delivered under contract by the applicants, Arnold Transport (Rochester), Ltd., who hold a contract A licence. The current contract was made on June 1, 1958, and is terminable not earlier than June 1, 1965. The applicants now apply for an ordinary A licence and, if the application is successful, Gyproc is prepared to release the applicants from the contract so as to free them to take return loads on the understanding that they will continue on an H ad hoc basis to carry the applicants' outward traffic. The applicants are not prepared to undertake to carry no other outward traffic from Rochester but they have in fact no other customer in view whose interests they could serve at present; no other haulier has come forward who is prepared to carry Gyproc's goods if the applicants do not.

The licensing authority who refused the application formed the view that I Gyproc were acting unwisely in giving up their contract with the applicants and that they would do much better to stick to it. By far the greater part of his decision is devoted to a consideration of this point. I agree with the Transport Tribunal that it is quite irrelevant; and it was put forward by counsel for the British Transport Commission, who objects to the grant by the tribunal of the A licence, only as the lesser ground of his appeal. It may be convenient, therefore, to get it out of the way at once.

(13) (1957), 31 Traf. Cas. at p. 55.

Mr. Fletcher and Mr. Atkins, who represent respectively Gyproc and the applicants, have dealt with each other for over thirty years, trust each other completely and have never had any previous quarrels. I doubt if that result could have been achieved if either party had been too insistent on the letter of their contract. No doubt Mr. Fletcher could hold Mr. Atkins bound by his contract for the next four years but Mr. Atkins tells him that he is not making a profit and that it would help if he could take return loads. Mr. Fletcher is willing to allow that and to trust Mr. Atkins to see that the service given to Gyproc does not suffer. I find it rather ridiculous that such an arrangement should be scrutinised as if it were an infants' settlement to be approved by the court. It is said that the licensing authority is driven, or at least tempted, to undertake this task in order to escape from the straitjacket into which the rulings of the tribunal have put him. Section 174 (4) undoubtedly requires the licensing authority to have regard primarily to the interests " of persons requiring facilities for transport ". It is said that the decisions of the tribunal virtually oblige the licensing authority, even though there is only one prospective customer and even though he is a person who could conveniently use some other form of transport, for example his own or as in this case that of a person who is under contract to him, to grant the carrier a licence. This leads to a narrow scrutiny of the requirement in s. 174 (4) that the licensing authority " shall have regard to the interests . . . of persons requiring facilities for transport "; and, it is said, enables the licensing authority to set himself up as a judge of whether it is really in the best interests of a person who says that he requires a particular form of transport that he should have it. If he does not think that the prospective customer is running his business properly, then he exercises his discretion so as to prevent him in his own interests from doing anything unwise. In my judgment this is not at all what is intended by s. 174 (4); and I agree with the tribunal that the question whether Gyproc were well advised in agreeing to a change is irrelevant.

If this point is removed, or rather if it is reduced to its proper proportions, the licensing authority's decision as expressed in the last paragraph of his judgment has much to be said for it. By reducing the point to its proper proportions, I mean that the licensing authority is entitled to give some weight to the fact that the person who requires facilities for transport has already got them in a form that cannot be regarded as unsatisfactory. The licensing authority may think that he is a fool to change; that is neither here nor there; what is relevant, so far as it goes, is that his interests are not going to suffer very seriously if the change is not made; he will still have his existing facilities for transport. The weight to be given to the interests of persons requiring facilities for transport is in the first instance a matter for the licensing authority (subject to a general direction that he shall put the interests of those who require facilities before the interests of those who provide them). Where he finds that there is only one person who requires such facilities and that person one who has got all the facilities he wants anyway, though not perhaps in just the form that he wants them, he is certainly entitled to attach more importance to other factors which he considers more weighty. He thought in this case that the interests of other hauliers should prevail. He thought that the grant of an ordinary A licence

> " would mean the abstraction of a very considerable amount of traffic from hauliers already licensed, mostly return load traffic",

and he refused the grant. There was no concrete evidence that the interests of any particular haulier would have been affected—probably it is impossible to produce such evidence; but the licensing authority was no doubt justified by his experience in reaching this conclusion. If it were the exercise of the licensing authority's discretion which we have to respect, I should be quite unable to differ from this conclusion. But the discretion which binds us, if it is properly exercised, is that of the tribunal. They did not mention the interests of other

A hauliers. They said simply that Gyproc wanted the applicants to carry for them in the capacity of public hauliers and that there was no evidence that any other haulier could do their work. Evidence to that effect, they said, " has always been treated as justifying the grant of an A licence ".

It is argued by both counsel for the objectors that this reasoning contains two errors of law. I shall take the one suggested by junior counsel first because it B comes logically first. He invited us to lay down as a proposition of law that an ordinary A licence could not or should not be granted where the only evidence of " persons requiring facilities for transport " was that of one customer. He submitted that where there was only one customer the intent of the Act was that the carrier should have a contract A licence and nothing more. In my judgment this is unsound. Section 174 (2) provides that an applicant who C satisfies the licensing authority that his vehicles will be used exclusively for the purposes of a contract entered into with a single customer is entitled as of right to what is called a contract A licence for that purpose, provided that the contract is for not less than a year. If the Act had intended that a person who carries for one customer only on an ad hoc basis should not be entitled to an A licence at all unless he makes a contract for more than a year and uses the vehicle D exclusively for the purposes of the contract, very different language would have been employed. A licensing authority may well be more influenced if there is a number of members of the public who want to employ the carrier than if there is only one; but it is quite impossible for us to lay down as a proposition of law that an application which is supported by only one customer must be refused.

E The other error of law, the main one advanced by leading counsel for the objectors, is that the tribunal failed to take into consideration at all a relevant circumstance to which they ought to have had regard, namely, the interests of those persons already providing facilities for transport on the routes that would be followed by the applicants' return journeys. This is the point that the licensing authority regarded as decisive, that is, the abstraction of traffic from hauliers already licensed due to the fact that the applicants' lorries, hitherto F compelled to be empty on return journeys, would be seeking return loads. It is undoubtedly true that this is not mentioned at all in the judgment of the tribunal. Ought we to infer from this that the tribunal disregarded it entirely?

There is no doubt, and counsel for the applicants so told us, that it has not been the practice of the tribunal to attach very much importance to the fact G that an applicant for an A licence is not able to show that there is any need for his services on the return journey, provided he can show that there is a need for him on the outward journey. I cannot see any objection to this as a general rule. The interests that have primarily to be considered are those of persons requiring facilities for transport. If, for example, there are persons who require their goods to be carried from Rochester to Cardiff and the applicant is H the only person who will undertake to do it, it may well be right to say as a general rule that such persons must have their facilities even though work will be abstracted from existing hauliers in the form of return loads: the customer comes first and the other hauliers second. I cannot see that there is anything wrong in the tribunal having such a general rule and letting it be known that they have it so long as they are always prepared to examine each case on its I merits. In examining this case on its merits I should have been disposed, if the discretion were mine, to be very little impressed by the needs of the customer and maybe rather more impressed, as the licensing authority was, by the effect of surplus capacity at the other end. Nevertheless, if the tribunal had said that having taken all these matters into consideration they were not prepared to depart from their general rule, their judgment could not be faulted. The language of the tribunal does in this respect create a difficulty. It does suggest that so long as the tribunal was satisfied that there was one customer who wanted to change from a private to a public haulier and that there was no other public

haulier who could do the work, that was sufficient; and the tribunal would look no further into the matter. A

I have, however, come to the conclusion that this is not the right interpretation of their attitude. I have very little doubt that if the tribunal had suspected for a moment that after many years of immunity from review their decision in this case would be selected for appeal, they would have assisted an appellate court with some further elaboration. They were talking to people very familiar with their usual approach to this sort of problem and might well have felt that a restatement of general principles was unnecessary. It must be remembered also that most of their judgment, as of the decision of the licensing authority, was taken up with a discussion of the point about the true interest of Gyproc. It does not appear that the attention of the tribunal was really directed to any other point; they state in their judgment that B C

> "the only reason why the licensing authority declined to exercise his discretion in the applicant's favour was that he thought that Gyproc were unwise in deciding to forgo the benefits of the contract of June, 1958."

Counsel for the objectors agreed that the point about the interest of return hauliers was not pressed on the tribunal. Indeed, his case was that it would have been hopeless to do so. He said that what has been accepted by counsel for the applicants as the general rule was in truth an absolutely rigid principle from which the tribunal could never be persuaded to depart. If that were so, I should agree that it would be as good from counsel for the objectors' point of view as if the tribunal had expressly said in this case that they would hear no argument on the subject and that the contention was inadmissible; but the only reported decision of the tribunal to which counsel for the objectors drew attention in support of this contention, is *Cattell* v. *British Transport Commission* (14). That case, like this one, was one in which the carrier wanted to switch from a contract A licence to an ordinary A licence. The tribunal said that applications of that kind should be very narrowly scrutinised. The applicant had said in his application form that he wished to be able to carry return loads and it was submitted to the tribunal that when an applicant made that sort of statement, he must always justify the need. The tribunal said that they did not agree with that. In saying this the tribunal were refusing to lay down a binding rule; they were not imposing one. The same observation can be made about some of the other complaints that were made to us about their decisions. It seems to have been assumed in the industry that whenever the tribunal declined to accept a positive rule, it was laying down the negative. D E F G

I have come to the conclusion that this is not a case in which it can be shown that the tribunal has disregarded any relevant factor or one in which it has held itself precluded by some ruling of its own from considering the merits of the case. I think, therefore, that the appeal in the second case should be dismissed.

MERCHANDISE TRANSPORT, LTD. *v.* BRITISH TRANSPORT COMMISSION AND OTHERS. H

DANCKWERTS, L.J., stated the facts and continued: The Transport Tribunal is the successor of the Railway Rates Tribunal (15) established by legislation many years ago. The limited jurisdiction of the Court of Appeal under the provisions of s. 17 of the Railway and Canal Traffic Act, 1888, has already been referred to in the judgments which have been delivered. But, though an appeal may not lie from an inferior court on a question of fact, none the less, as has been explained in the much quoted speeches of VISCOUNT I

(14) (1958), 31 Traf. Cas. 179.

(15) See, as regards the Railway Rates Tribunal and its change of name and functions, 31 HALSBURY'S LAWS (3rd Edn.) 809, para. 1308, p. 814, para. 1315; as regards the tribunal's subsequent succession to the jurisdiction of the former appeal tribunal constituted for determining appeals concerning goods vehicles carriers' licences, see 33 HALSBURY'S LAWS (3rd Edn.) 766, para. 1311.

A SIMONDS and LORD RADCLIFFE in *Edwards* v. *Bairstow* (16), and as we were duly reminded, a Court of Appeal is entitled to interfere with the decision of the inferior court, if it has been based on a view of the facts which could not reasonably be entertained. On the other hand, as was pointed out by LORD GODDARD, C.J., in *Stepney B.C.* v. *Joffe* (17), the court must be satisfied that the judgment appealed from is wrong, and is not entitled to interfere merely B because it is not satisfied that the judgment was right. The exercise of the lower court's discretion may be vitiated if it has failed to consider relevant factors, or has based the exercise of its discretion on matters which ought not to have been taken into consideration.

I need not go through the statutory provisions which deal with the licensing of road vehicles as they have been dealt with very fully in the judgments which C have already been delivered. The way in which the licensing authority treated this application, in my view, showed both practical approach and good sense. He accepted the proposition that Harris Lebus, Ltd., who were put forward as the customer dealing with the applicants as their intended hauliers, were entitled to concern themselves with efficient transport arrangements for the delivery of furniture which it was suggested would be more easily administered D and more economical if the application were granted. The secondary reason, which, I think, the licensing authority correctly described as the collective desire of Harris Lebus, Ltd. and the three subsidiaries (four limited companies speaking with one voice) is undoubtedly to make the best and most profitable use of the combined fleet by obtaining the opportunity to carry return loads in all their vehicles. When the licensing authority expressed the view that the E customer's desire was less than genuine, it seems quite clear to me that his meaning was (as indeed he went on to say) that the driving motive behind the application was not the customer's wish to change his business methods, but the desire of the organisation of which the customer is the head to carry return loads on all their vehicles. The tribunal treated this point somewhat roughly. They say in their judgment

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> "the mistake in the authority's reasoning is fairly obvious. He was confusing the object sought with the motive for seeking it. Harris Lebus, Ltd.'s object was to be able to use the applicants' vehicles. Their motive in aiming at this object was to make money. It is a mere misuse of language to regard Harris Lebus, Ltd. as torn between two desires one genuine the other 'less than genuine'."

G

This comment seems to me to miss the point completely. What the authority had in mind and was questioning as legitimate was an approach which put in the forefront a desire to simplify the administration of the delivery of furniture when the overriding motive was to make more money by obtaining return loads for vehicles, which might by their competition reduce the profits of established H hauliers.

Furthermore, the question arises, whether in the circumstances Harris Lebus ought to be treated as no more than genuine customers of the applicants, "persons requiring facilities for transport" who are given priority in the all-important provisions of s. 174 (4) of the Road Traffic Act, 1960. Ought they not to be treated rather as persons "providing facilities for transport" who I are relegated to secondary consideration under the provisions of that subsection? Counsel for the applicants relied strongly on the technical (and irrefutable) legal distinction between a company formed under the Companies Acts and the persons who hold its shares, as shown by *Salomon* v. *Salomon & Co.* (18), an income tax case, in which sphere of the law technicality is no doubt of the essence. But *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Gt. Britain*),

(16) [1955] 3 All E.R. 48; [1956] A.C. 14.
(17) [1949] 1 All E.R. at p. 258; [1949] 1 K.B. at pp. 602, 603.
(18) [1897] A.C. 22.

Ltd. (19) (a trading with the enemy case) and *Unit Construction Co., Ltd.* v. *Bullock* (20) (an income tax case on the residence of a company), and other cases, show that where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance. This is plainly what the authority had in mind when he explained his doubts about precedents which might be created if a licence were to be granted in the circumstances of the present case. It appears to me that if a manufacturer, who holds a C licence for vehicles for the carriage of his goods, has only to form a subsidiary company in order to secure an A licence for the latter company to carry the holding company's goods and enter into competition with public hauliers, the whole scheme of the Act might thus be evaded.

The tribunal, who stated that they were by no means certain that they understood this passage in the authority's decision (though to me it seems entirely lucid), dealt with it shortly by saying that they had rejected this contention four years ago in *Reed Transport, Ltd.* v. *British Transport Commission* (21) and that they saw no reason to modify what is said in that case. In my view, the tribunal were entirely wrong to adopt that position. It seems to me that the authority was right in the conclusion which he reached that it is contrary to the intention of the Acts that a manufacturer owning vehicles, which have been carrying his goods under C licences, should be able, by merely forming a subsidiary company and transferring his vehicles to that company, which he is able to control and direct by virtue of his ownership of the shares in the company and the nomination of the directors, to claim and obtain an A licence for the same vehicles so as to compete with genuine and independent public carriers. In substance the applicants are really Harris Lebus, Ltd., holders of a C licence, who are seeking to obtain an A licence for return loads. It is plainly against the policy of the Act that C licence holders should compete with public carriers holding A licences. This factor (which the tribunal rejected) is, in my opinion, a sufficient reason for setting aside the decision of the tribunal.

There are, however, other points with which it is advisable to deal. One feature of this jurisdiction, which the tribunal's reference to *Reed's* case (22) brings into notice, is that, over the years since the tribunal's predecessor was founded, a system of case law has been built up in law reports which are now in the thirty-first volume. It is no doubt an advantage to traders and those who advise them to have records of this kind to show how applications are likely to be dealt with. No doubt also it is right that the tribunal should have regard to a consistent practice in dealing with applications for licences. But in the exercise of a discretionary power of this kind, an applicant is entitled to have his application considered on its merits and in the circumstances of his particular case. If the tribunal makes a practice of relying on previous decisions in respect of other applications that have come before the tribunal, there is, in my opinion, danger that the discretion of the tribunal may not be applied in an unfettered and proper manner having regard to the merits of the particular case, and, of course, having regard to the principles which are regarded as being incorporated in the provisions of the Act.

A few observations must be made on the position of the objectors. The admissible objections or "relevant objections", as they are termed in s. 173 of the Road Traffic Act, 1960, are strictly limited by the terms of that section, and, since the amendments [of the then Road and Rail Traffic Act, 1933] which were introduced by the Transport Act, 1953, s. 9 (3) (a) the onus of proving the objections is placed on the objectors (now by s. 173 (5) of the Act of 1960). In the present case there were a large number of objectors, whose opposition

(19) [1916] 2 A.C. 307.
(20) [1959] 3 All E.R. 831; [1960] A.C. 351.
(21) (1957), 31 Traf. Cas. at pp. 54, 55.
(22) (1957), 31 Traf. Cas. 50.

A was plainly stimulated by the apprehension which they felt in regard to their businesses by reason of competition of the applicants in carrying return loads and is easily understandable. Under s. 173 (3) the duty of the licensing authority is

> " . . . to take into consideration any relevant objection to the application which may be made by a person who is already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve."

B

Section 173 (6) directs the licensing authority, in considering, for the purposes of an objection on grounds such as are referred to in sub-s. (4) (a) of the section, whether existing transport facilities are to be treated as suitable, to have regard to the relevant efficiency, reliability and adequacy of the existing facilities at the date of the application and the facilities which the applicant will provide if his application is granted, and to all other relevant considerations, including to such extent as may in all the circumstances appear proper, the charges made and to be made in respect of these facilities respectively. Under sub-s. (4) (a) a relevant objection may be

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> " that suitable transport facilities in the district, or between the places, which the applicant intends to serve are or, if the application were granted, would be, either generally or in respect of any particular type of vehicles, in excess of requirements."

D

Other passages in this Act and the earlier Acts also indicate that one of the objects of the legislation was the prevention of uneconomic competition between carriers, which it was presumably thought would be against the interests of the public as well as those of the carriers, who would not be able to maintain services unless they could obtain a fair return for their efforts.

E

The licensing authority was satisfied in a limited number of cases that a surplus of vehicles already existed, and, as to all the objectors, that if the application were granted there would be a likelihood of abstraction of their traffic and that this again would lead to facilities being in excess of requirements. The tribunal rejected this conclusion. They remarked that only twenty-seven out of sixty-four objectors had " persevered to the point of supporting their opposition by evidence ". This seems to me to be rather an unfair criticism, as where objectors are making common cause it cannot be incumbent on each and every one of the objectors to produce evidence, which might largely be duplication of evidence given on behalf of other objectors. The comment of the tribunal that the authority, having come to the conclusion that the objectors had proved the grounds of their objection, concluded that the application must necessarily fail, seems to me not to be a correct reproduction of the process adopted by the authority. The tribunal say:

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> " We do not however think that the evidence came near to proving what the objectors set out to prove. All that was proved in our view was what in truth hardly needed proof, namely, that if the application were granted there would every now and then at unpredictable intervals be available at a number of places more vans than if the application were not granted, and that on these occasions persons who would otherwise have perforce employed the services of one of the objectors might prefer to sample the services of the stranger."

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This seems to me to do less than justice to the evidence on behalf of the objectors. Evidence in regard to a future situation not yet an established fact, that is the competition of the applicants' vehicles in respect of return loads, must necessarily be speculative, and, indeed, must be partly a matter of opinion expressed by those with some ability to estimate the probable result. The effect of the new facilities must be a matter of degree. It may be that this is a question of fact, on which no appeal lies to this court. But I am bound to say that I think that the conclusion of the authority is more realistic, though it may not be possible to say

that the conclusion of the tribunal is one which could not reasonably be reached. A

However that may be, in my opinion the tribunal have erred in not taking into consideration relevant matters which they ought to have taken into consideration, and their decision should be set aside, with the result that the decision of the licensing authority should be restored, so that the application is refused.

I will turn now to the other case.

B

ARNOLD TRANSPORT (ROCHESTER), LTD. *v.* BRITISH TRANSPORT COMMISSION AND OTHERS.

This is an appeal by the British Transport Commission and other objectors from a decision of the Transport Tribunal given on Jan. 13, 1961, which reversed a decision of the Licensing Authority for the South Eastern Traffic Area.

Arnold Transport (Rochester), Ltd., the applicants, applied for an A licence in respect of forty vehicles. Of these forty vehicles all but two were the subject of a contract A licence held by them, which provided that the vehicles were to be used exclusively for the purpose of a contract made between the applicants and Gyproc Products, Ltd.; the applicants stated that if the application were granted they would surrender the contract A licence. The goods to be carried were described as "plaster board products, paper, building materials, steel", and it was stated that the districts in which the vehicles would normally be used would be mainly the southern half of England and Wales with occasional loads to and from Scotland. There was evidence that the carriage of the products of Gyproc Products, Ltd. require great care in transport, and that the applicants' vehicles were particularly suitable for the purpose, and their drivers were skilled in dealing with these rather delicate products. C D E

Under the provisions of the Road Traffic Act, 1960, an A licence is the public carriers' licence which entitles a public carrier to use his vehicle for hire or reward and normally entitles him to carry the goods of any other person. Conditions cannot be attached to such a licence, though in effect limitations may be imposed through undertakings given or statements made by the applicant in the course of the application. A contract A licence (which is dealt with by s. 174 (2) of the Act) is one under which the authorised vehicles are to be used exclusively for the purposes of a contract entered into by the applicant with a person carrying on a trade or business during a period of not less than one year. The licensing authority on proof of such a contract is bound (subject to fitness of the applicant) to grant an application for a contract A licence, and must attach to it conditions for securing the use of the vehicles for the purpose of the contract. Other kinds of licence are a C licence, for the carriage by a trader of his own goods (which the licensing authority is bound to grant on application), and a B licence, which entitles a trader to carry his own goods or (subject to conditions imposed by the authority) to carry goods for hire or reward. The general direction to the licensing authority in the exercise of his discretion, contained in s. 174 (4), is that he shall have regard to the interests of the public generally, including primarily those of persons requiring facilities for transport, and secondarily those of persons providing facilities for transport, and in particular to certain circumstances, specifically referred to in the subsection. F G H

At the inquiry before the authority the contract of June 1, 1958, with Gyproc was produced. It provided for a period of seven years but could be terminated by either party giving two months' notice to terminate after June 1, 1965, though it was said in evidence that for practical purposes it could be determined at any time. It was stated in evidence that the rates provided for were from twenty-five per cent. to thirty-five per cent. in excess of those generally quoted by other hauliers for the carriage of goods outward from Rochester. The applicants called two witnesses, a Mr. Joseph Atkins, who was one of their directors, and a Mr. Fletcher, who was a director of Gyproc. Mr. Atkins naturally supported the application and said that the main object of the change was to stabilise rates. Mr. Fletcher said Gyproc did not oppose the application though I

A it was difficult to see how any advantage would accrue to his company from the change and on the face of it it would appear that the change might be disadvantageous to that company. No witnesses were called on behalf of the objectors.

The licensing authority refused the application. It was plain that what Mr. Atkins had in mind (as the authority pointed out) when he referred to B "stabilising rates" was the additional profits to be made out of return loads, but, as the rates were not expected to be reduced, the authority could not see what benefit Gyproc would gain from the change, and he thought that they might suffer some deterioration in service. He states the basis of his decision, I think, in the final paragraph of his statement of Sept. 15, 1960:

> C "As a grant would, in my view, benefit only the applicants, and as the operation of forty vehicles of 225½ tons unladen weight under ordinary A licence would mean the abstraction of a very considerable amount of traffic from hauliers already licensed, mostly return load traffic but some outward traffic for the carrying of which no customers' evidence of need was forthcoming, I considered that it would not be in the interests of other hauliers or in the public interest to grant an application for the D provision of facilities from which the customer firm, in my interpretation of the evidence, had no real assurance of benefit."

In referring to the abstraction of traffic from other hauliers, the authority was, I think, relying on his own experience, rather than any evidence given in the course of the inquiry.

E In the course of their decision reversing that of the authority, the tribunal observed:

> "It will be seen that the only reason why the licensing authority declined to exercise his discretion in the appellants' [that is, the applicants'] favour was that he thought that Gyproc were unwise in deciding to forgo the benefits of the contract of June, 1958, and for the future to rely on the F appellants' service as a public haulier. It is unnecessary for us to decide whether or not the licensing authority was a more reliable judge of Gyproc's commercial interests than were Gyproc themselves, because in our opinion the sort of consideration he treated as decisive was irrelevant. We had so held in a passage (to which he had been referred) in our judgment in [*King* v. *British Transport Commission* (*No. 2*) (23)]";

G and they then set out the passage.

The tribunal are not accurate in saying that the interest of Gyproc (as he saw it) was the only reason of the authority for his refusal to grant the licence. From the passage of his statement which I have quoted it is clear that he was also influenced by the effect that he foresaw on the businesses of rival hauliers, but I agree with the view of the tribunal that it was not for the authority to H regard the interests of Gyproc as being different from those shown by their own attitude.

The references to the tribunal's previous decision in the *King* case (23), as well as their comment later in their decision "Evidence to this effect has always been treated as justifying the grant of an A licence", invite the criticism which I have voiced in my judgment in the *Merchandise Transport, Ltd.* case (24). Of course it I is entirely reasonable to adopt a policy of consistency, but in exercising their discretionary power, the tribunal ought surely to have regard first of all to the merits and circumstances of the particular application before them. Perhaps this criticism should not be pressed too far. The tribunal may have meant no more than to express a conclusion reached on the facts of a particular case and to add a remark that a similar result had been reached by them on similar facts in another case.

The tribunal decided that the authority ought to have granted an ordinary

(23) (1957), 31 Traf. Cas. at p. 79. (24) See p. 518, ante.

A licence to the applicants. They remitted the case to him to quantify the grant, that is to decide how many vehicles should be included in the licence. They suggested that he should require the applicants to provide him with the latest particulars of the amount of work which had been performed under the contract A licence, and also, that he should require of them further information about the " trunking system " with which, Mr. Atkins said, the applicants were experimenting. This was a reference to a proposal which emerged during the hearing and was not even hinted at in the application, so far as I can see. That is not very satisfactory from the point of view of actual or possible objectors. " Trunking system " does not seem a very accurate description of the proposal, which apparently involved co-operation between the applicants and certain South Wales hauliers in regard to loads in different directions.

On the whole, though I have commented on some questionable features of this case, I am not prepared to say that the decision of the tribunal was incorrect and that their discretion was wrongly exercised. I am not able to say that the appeal should be allowed, and so, in my opinion, it should be dismissed.

Appeal in Merchandise Transport, Ltd. case allowed; appeal in Arnold Transport (Rochester), Ltd. case dismissed.

Solicitors: *Solicitor, British Transport Commission; Peacock & Goddard,* agents for *Cartwright, Taylor & Corpe,* Bristol (for the other objectors to the application of Merchandise Transport, Ltd.); *Mawby, Barrie & Letts* (for the applicants); *Waterhouse & Co.,* agents for *Champion & Champion,* Tenterden, Kent (for the other objectors to the application of Arnold Transport (Rochester), Ltd).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Slade and Veale, JJ.), October 5, 1961.]

Criminal Law—Appeal—Leave to appeal—Order—Form of order—Reasons not to be given.

Criminal Law—Appeal—Practice—Application for leave to appeal not to be treated as the appeal unless counsel for the applicant consents.

Criminal Law—Appeal—Sentence—Power to increase sentence.

[As to powers of the Court of Criminal Appeal as to sentence, see 10 HALSBURY'S LAWS (3rd Edn.) 541, para. 995, especially note (d). See also the Criminal Appeal Act, 1907, s. 4 (3), 5 HALSBURY'S STATUTES (2nd Edn.) 929.]

LORD PARKER, C.J., at the sitting of the court, made the following direction: We would like to draw attention to the fact, which is often forgotten, that the Court of Criminal Appeal have power on an appeal against sentence not merely to decrease the sentence but also to increase it. The court from time to time come across cases where in their opinion the sentence is inadequate and the court will not hesitate in appropriate cases to exercise their power to increase the sentence.

For the future, when leave to appeal against sentence is given, whether by the single judge or by this court, the order will be:

> " Leave to appeal against sentence. Legal Aid. Counsel ", or " Solicitor and counsel "

as the case may be.

Neither the court nor the single judge will indicate the reasons for granting such leave. Further, the court will discontinue the practice of treating the application when granted as the hearing of the appeal, except in cases where counsel for the applicant is present and consents.

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

A

BRATTY v. ATTORNEY-GENERAL FOR NORTHERN IRELAND.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Tucker, Lord Denning, Lord Morris of Borth-y-Gest and Lord Hodson), September 4, 5, 6, October 3, 1961.]

B *Criminal Law—Automatism—Alternative defences of automatism and insanity—Evidence—No defence of automatism when only cause alleged for unconscious state is disease of the mind within the M'Naghten rules—Evidence forming a proper foundation for automatism necessary before issue can be left to jury—Burden of proof—No other pathological cause than psychomotor epilepsy put forward—Psychomotor epilepsy a disease of the mind—Issue of automatism not left to jury.*

C

Where the only cause alleged for an unconscious or involuntary act is defect of reason from disease of the mind within the M'Naghten rules and the jury reject a defence of insanity there is no room for the alternative defence of automatism (see p. 528, letter F, p. 529, letter A, p. 533, letter C, and p. 536, letter D, post); the fact, however, that a plea of insanity is rejected by the jury does not of itself always prevent the accused from raising the alternative defence of automatism (see p. 528, letter H, p. 537, letter F, post).

D

If such a defence is to be left to the jury, a proper foundation must be laid for it by evidence emanating from the defence or prosecution from which the jury can reasonably infer that the accused acted in a state of automatism, such evidence not being evidence attributing the automatism solely to a disease of the mind (see p. 530, letter A, p. 535, letter C, p. 536, letter D, p. 537, letter D, post). Whether there is such evidence, proper to be left to the jury, is a question of law for the judge (see p. 530, letter G, p. 532, letter C, p. 536, letter E, and p. 537, letter E, post).

E

Once a proper foundation for a defence of automatism is laid by evidence the proper direction to the jury is that, if the evidence leaves them in a state of real doubt whether the accused did or did not act in a state of automatism, they should acquit (see p. 532, letters B and C, p. 536, letter A, and p. 537, letter B, post).

F

Dicta of DEVLIN, J., in *Hill* v. *Baxter* ([1958] 1 All E.R. at p. 196) followed. Dicta of NORTH, J., in *R.* v. *Cottle* ([1958] N.Z.L.R. at p. 1029) considered and explained.

G

Mancini v. *Director of Public Prosecutions* ([1941] 3 All E.R. 272) and *Woolmington* v. *Director of Public Prosecutions* ([1935] All E.R. Rep. 1) applied.

The accused killed a girl, with whom he was driving in his car on an errand. He took off her stocking and strangled her with it. He gave evidence that a "blackness" came over him and that "I didn't know what I was doing. I didn't realise anything." He also said that previously he had had "feelings of blackness" and headaches, and there was evidence of his odd behaviour at times, of his mental backwardness and his religious leanings. There was medical evidence that the accused might have been suffering from an attack of psychomotor epilepsy, which was a disease of the mind affecting the reason and which could cause ignorance of the nature and quality of acts done. No other pathological cause for the accused's acts, or a state of automatism on his part was assigned by medical evidence at the trial. The defences of automatism (*i.e.*, unconscious involuntary action) and of insanity within the M'Naghten rules were raised at the trial. The trial judge refused to leave the defence of automatism to the jury, but left to them the defence of insanity, which the jury rejected. On appeal against conviction of murder,

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Held: the trial judge was justified in not putting the defence of automatism to the jury since the evidence attributed any involuntariness in the appellant's act solely to a disease of the mind and there was no sufficient evidence of automatism, apart from insanity, to be left to the jury. A

Appeal dismissed.

[As to proof of murder, see 10 HALSBURY'S LAWS (3rd Edn.) 704, para. 1349; as to the burden of proof, see ibid., 436, 437, paras. 808-811; and for cases on the burden of proof, see 14 DIGEST (Repl.) 493-495, *4767-4791.*] B

Cases referred to:

Advocate, H.M. v. *Ritchie*, 1926 S.C. (J.) 45; 14 Digest (Repl.) 64, *227.*

A.-G. for South Australia v. *Brown*, [1960] 1 All E.R. 734; [1960] A.C. 432; 44 Cr. App. Rep. 100; [1960] 2 W.L.R. 588; 3rd Digest Supp. C

Cooper v. *McKenna, Ex p. Cooper*, [1960] Qd. R. 406.

Director of Public Prosecutions v. *Beard*, [1920] All E.R. Rep. 21; [1920] A.C. 479; sub nom. *R.* v. *Beard*, 89 L.J.K.B. 437; 122 L.T. 625; 84 J.P. 129; 14 Cr. App. Rep. 159; 14 Digest (Repl.) 71, *332.*

Felstead v. *R.*, [1914] A.C. 534; 83 L.J.K.B. 1132; 111 L.T. 218; 78 J.P. 313; 10 Cr. App. Rep. 129; 14 Digest (Repl.) 365, *3546.* D

Hill v. *Baxter*, [1958] 1 All E.R. 193; [1958] 1 Q.B. 277; 122 J.P. 134; 42 Cr. App. Rep. 51; [1958] 2 W.L.R. 76; 3rd Digest Supp.

Kennedy v. *H.M. Advocate*, 1944 S.C. (J.) 171; 14 Digest (Repl.) 73, *300.*

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Town St. Tr. 314; 1 Car. & Kir. 130, n.; 14 Digest (Repl.) 60, *246.* E

Mancini v. *Director of Public Prosecutions*, [1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 28 Cr. App. Rep. 65; 14 Digest (Repl.) 337, *3294.*

R. v. *Bastian*, [1958] 1 All E.R. 568; 42 Cr. App. Rep. 75; [1958] 1 W.L.R. 413; 3rd Digest Supp. F

R. v. *Byrne*, [1960] 3 All E.R. 1; [1960] 2 Q.B. 396; 44 Cr. App. Rep. 246; [1960] 3 W.L.R. 440; 3rd Digest Supp.

R. v. *Carter*, [1959] V.R. 105.

R. v. *Charlson*, [1955] 1 All E.R. 859; 119 J.P. 283; 39 Cr. App. Rep. 37; [1955] 1 W.L.R. 317; 14 Digest (Repl.) 32, *41.* G

R. v. *Cottle*, [1958] N.Z.L.R. 999; 3rd Digest Supp.

R. v. *Foy*, [1960] Qd. R. 225.

R. v. *Gauthier*, (1943), 29 Cr. App. Rep. 113; 15 Digest (Repl.) 938, *8986.*

R. v. *Harrison-Owen*, [1951] 2 All E.R. 726; 115 J.P. 545; 35 Cr. App. Rep. 108; 14 Digest (Repl.) 422, *4110.*

R. v. *Kemp*, [1956] 3 All E.R. 249; [1957] 1 Q.B. 399; 120 J.P. 457; 40 Cr. App. Rep. 121; [1956] 3 W.L.R. 724; 3rd Digest Supp. H

R. v. *Lobell*, [1957] 1 All E.R. 734; [1957] 1 Q.B. 547; 41 Cr. App. Rep. 100; [1957] 2 W.L.R. 524; 3rd Digest Supp.

R. v. *Minor*, (1955), 15 W.W.R. (N.S.) 433; 14 Digest (Repl.) 34, *45.*

R. v. *Nott*, (1959), 43 Cr. App. Rep. 8; 3rd Digest Supp.

R. v. *Podola*, [1959] 3 All E.R. 418; [1960] 1 Q.B. 325; [1959] 3 W.L.R. 718; 3rd Digest Supp. I

R. v. *Tolson*, (1889), 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 15 Digest (Repl.) 890, *8578.*

Russell v. *H.M. Advocate*, 1946 S.C. (J.) 37; 14 Digest (Repl.) 68, *251.*

Woolmington v. *Director of Public Prosecutions*, [1935] All E.R. Rep. 1; [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 332; 25 Cr. App. Rep. 72; 14 Digest (Repl.) 493, *4768.*

A **Appeal.**

Appeal by leave of the Court of Criminal Appeal in Northern Ireland by the appellant, George Bratty, from an order of the Court of Criminal Appeal in Northern Ireland, dated July 18, 1961, dismissing the appeal of the appellant against conviction for murder on May 4, 1961, at Downpatrick Assizes before McVEIGH, J., sitting with a jury. The facts are set out in the opinion of B VISCOUNT KILMUIR, L.C.

B. Kelly, Q.C., and *R. Ferguson* (both of the Bar of Northern Ireland) for the appellant.

The Attorney-General for Northern Ireland (*W. Brian Maginess, Q.C.*), *C. A. Nicholson, Q.C.*, and *R. J. Babington* (all of the Bar of Northern Ireland) for the C Crown.

Their Lordships took time for consideration.

Oct. 3. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, this is an appeal from the D Court of Criminal Appeal in Northern Ireland (judgment having been delivered by LORD MACDERMOTT, C.J.). On May 4, 1961, the appellant was convicted at Downpatrick Assizes of the murder of Josephine Fitzsimmons on Dec. 22, 1960. The appellant appealed to the Court of Criminal Appeal and by order dated July 18, 1961, his appeal was dismissed. On July 27, 1961, counsel on behalf of the appellant applied, pursuant to the provisions of sub-s. (1) and sub-s. (2) of s. 1 and s. 2 (1) of the Administration of Justice Act, 1960, for a certificate E that a point of law of general public importance was involved in the decision of the Court of Criminal Appeal, and for leave to appeal to the House of Lords. The court certified that the decision involved two points of law of general public importance, namely:

> "(i) Whether, his plea of insanity having been rejected by the jury, it F was open to the accused to rely on a defence of automatism; and
>
> "(ii) If the answer to (i) be in the affirmative, whether, on the evidence, the defence of automatism should have been left to the jury."

Further it appeared to the court that the points of law so certified ought to be considered by the House of Lords and the court granted leave to appeal to this House.

G

Josephine Fitzsimmons, who was eighteen years old, lived with her widowed mother near Hillsborough in the Monument Road—a road which has been described as lonely and quiet. Her mother had a cousin, Miss Morrow, who resided with her brother at 44, Irwin Place, Donacloney, a village six or seven miles from Hillsborough. With them there lived the appellant, George Bratty, H a young man aged about twenty-six. He had been living with the Morrows for about twenty years. On Dec. 22, 1960, the appellant asked Miss Morrow if she would come with him in the car to visit the Fitzsimmons in order to deliver Christmas boxes for Mrs. Fitzsimmons and Josephine. The families were in the habit of seeing each other regularly and often. He had a black Ford Popular car in which he and Miss Morrow left Donacloney about 8.20 p.m. I and arrived at Mrs. Fitzsimmons' house about 8.40 p.m. Miss Morrow went into the house and after the appellant had turned the car and got out Josephine came out and asked him to drive her into Hillsborough to deliver a message and get some sweets. She was seen in Hillsborough but neither she nor the appellant reached her home again. At 11.15 p.m. her dead body was found in Grove Road on the grass verge. She had been strangled by a stocking from her left leg. She had not been sexually assaulted but her underpants had been removed and were found with her left boot a short distance from the body on the grass verge. The appellant did not call back to take Miss Morrow home, but drove his

car in the direction of Donacloney. When some two or three miles from Donacloney the car broke down and was left at the side of the road, an offer of a tow having been refused. He arrived at Donacloney on foot about 4 a.m. He was found by the police nearly an hour later in a garage at the bottom of the Morrows' garden and taken to the police station.

Shortly after 1 p.m. on Dec. 23 the appellant was seen by Detective-Head-Constable Russell, Dr. Howard of the Forensic Science Laboratory being present. Russell asked what was the cause of two scratches on his neck. The appellant said: "It was a young girl did it." He was then cautioned and made the following statement:

> "Something terrible came over me. When I went up last night to the young girl's house—turned the car. I had the engine stopped and got out of her. I noticed her coming running out. She asked me to take her down to Hillsborough to get some sweets and deliver a message. I done so and coming back again, just about half ways up the road from her house, I had some terrible feeling and then a sort of a blackness. Just with that I took one look at her, caught her, threw her right over the back of the seat into the back. I caught her with my two hands. When I caught her with my two hands I took one of her stockings and put it round her neck. I tightened the stocking. Afterwards I went down the road a piece—down the road to the left of her house—took her out of the car and left her on the side of the road. Drove on towards home. Half ways down the Ballygowan Road the battery gave up on me. I got help later on to try and get her started. Couldn't get her started. Then we pushed her into side of a field gateway. I walked home afterwards. I saw a policeman. I went into the garage and the police came. I didn't mean to do what really happened. Manys a time I took her down to Hillsborough at week-ends and nothing like that ever happened until last night. I apologise for what happened. I don't think it would have happened only that terrible feeling came over me at the time. I don't know really what caused it at all. I think that's about all I can say."

In evidence the appellant later described the terrible feeling that came over him as a feeling that he wanted to put his arms round the girl. Without setting out any further evidence in detail, but having in mind particularly this description of the "terrible feeling", the scratches on the appellant's neck, and the removal of the underpants, I agree with the Court of Criminal Appeal when they say:

> "That the appellant killed Miss Fitzsimmons is not in dispute. On the evidence there can be no doubt at all that he made some sort of advance which was resisted, and that he attacked the girl, breaking a small bone in her neck and then caused her death by taking off one of her stockings and tying it tightly round her neck. It is also beyond question that, at some stage, the appellant got the girl from the front passenger seat to the back of the car, and that it was he who removed the body from the car and dumped it on the grass verge."

In the opening speech for the defence at the trial the jury were asked to find "one of three separate and completely independent verdicts":

(i) The primary verdict requested, which it was submitted was the proper one, was that of not guilty on the basis that the appellant "was not master of the situation but that he was in a state of automatism". (The only cause suggested for his being in such a state was psychomotor epilepsy.)

(ii) Secondly, if the jury rejected the first defence, then it was submitted that the appellant was incapable of forming the particular intent to constitute murder, that is, an intent to kill or cause grievous bodily harm, on the ground

A that " his mental condition was so impaired and confused and he was so deficient in reason, that he was not capable of forming this intent ", and that the verdict should be manslaughter.

(iii) Thirdly, it was submitted that, if the jury were unable to come to either the first or second verdict, " at the material time the accused may be guilty but he was insane " on the ground that he did not know the nature and quality B of his acts, or if he did, that he did not know that they were wrong.

On the first and second of these submissions it was claimed that the appellant should get the benefit of any doubt, the implication being that the Crown must prove that the acts of the appellant were conscious and voluntary acts.

The learned trial judge left the defence of insanity to the jury. The insanity alleged was that the appellant was suffering from an attack of psychomotor C epilepsy and as a result had such a defect of reason as not to know the nature and quality of his acts or, if he did, not to know that they were wrong. As respects that defence the Court of Criminal Appeal said:

> " There is now no complaint of the summing-up as respects this defence, and it is no longer disputed that, on the material before them, the jury were fully entitled to reject it as in fact they did."

D The learned judge refused to leave the first and second defences to the jury and it was from this refusal that the main grounds of the appeal to the Court of Criminal Appeal and ultimately to this House arise.

In his notice of appeal to the Court of Criminal Appeal the appellant's first ground was stated in these words:

E > " The learned trial judge was wrong in law in failing to leave to the jury the issue as to whether the killing was committed by the appellant in a state of automatism and whether his actions resulting in the said killing were voluntary or conscious."

Automatism was defined by the Court of Criminal Appeal in this case as connoting the state of a person who, though capable of action,

F > " is not conscious of what he is doing . . . It means unconscious involuntary action, and it is a defence because the mind does not go with what is being done."

This is very like the words of the learned President of the Court of Appeal of New Zealand in *R.* v. *Cottle* (1) where he said:

G > " With respect, I would myself prefer to explain automatism simply as action without any knowledge of acting, or action with no consciousness of doing what was being done."

The first portion of the argument before them that " automatism " should have been left to the jury was summarised by the Court of Criminal Appeal as being that the whole of the evidence on the issue of insanity was relevant H on the issue whether automatism itself existed however it was caused; in view of the onus being on the defence to show on a preponderance of probability that the necessary constituents of the M'Naghten formula (2) were present, it was therefore submitted that, although the evidence might have failed to prove some constituent of insanity, the lack of consciousness itself might have seemed a genuine possibility to the jury, and the jury might at least have' of accident I able doubt whether the appellant was conscious. I think that this provides of murder. ...t of Criminal Appeal in the present

Before your Lordships the argument ...TH, J. It is is necessary that a proper

1. The ultimate burden on the Crow...
and voluntary act.

2. There was a volume of e...
and voluntary.

...*lic Prosecutions*, [1935] All E.R. Rep. 1; [1935] ...2] A.C. 1.

(7) [1958] N.Z.L.R. 999.

...; [1942] A.C. at p. 12.

(1) [1958] N.Z.L.R. at p. 10...[1935] A.C. 462.

3. The jury should be told to examine this evidence with a view to answering the following questions: A

A.—Are you satisfied that the acts resulting in the death were involuntary or unconscious conduct?

B.—If this is so you must go on to consider whether this was due to a defect of reason from disease of the mind of such a kind that the defendant did not know the nature and quality of his act, in which case the form of acquittal would be guilty of the acts charged but insane at the time. B

C.—If you are satisfied that the acts were not conscious and voluntary but not satisfied that they are due to a defect of reason from disease of the mind, then the verdict should be not guilty because the prosecution have failed to satisfy you that the acts were conscious and voluntary. C

D.—If you are left in doubt whether the acts were conscious or voluntary then, if the acts were not within the M'Naghten rules (3), the proper verdict would still be not guilty.

The Court of Criminal Appeal rejected that "first portion of the argument" on the ground that the learned judge was right in not leaving to the jury the defence of automatism in so far as it purported to be founded on a defect of reason from disease of the mind within the M'Naghten rules (3). In this I think that they were right. To establish the defence of insanity within the M'Naghten rules (3) the accused must prove on the preponderance of probabilities first a defect of reason from a disease of the mind, and, secondly, as a consequence of such a defect, ignorance of the nature and quality (or the wrongfulness) of the acts. We have to consider a case in which it is sought to do so by medical evidence to the effect that the conduct of the accused might be compatible with psychomotor epilepsy, which is a disease of the mind affecting the reason, and that psychomotor epilepsy could cause ignorance of the nature and quality of the acts done, but in which the medical witness can assign no other cause for that ignorance. Where the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind within the M'Naghten rules (3), a rejection by the jury of this defence of insanity necessarily implies that they reject the possibility. D E F

The Court of Criminal Appeal also took the view that where the alleged automatism is based solely on a disease of the mind within the M'Naghten rules (3), the same burden of proof rests on the defence whether the "plea" is given the name of insanity or automatism. I do not think that statement goes further than saying that when one relies on insanity as defined by the M'Naghten rules (3) one cannot by a difference of nomenclature avoid the road so often and authoritatively laid down by the courts. G

What I have said does not mean that, if a defence of insanity is raised unsuccessfully, there can never, in any conceivable circumstances, be room for an alternative defence based on automatism. For example, it may be alleged that the accused had a blow on the head after which he acted without being conscious of what he was doing or was a sleep-walker. There might be a divergence of view whether there was a defect of reason from disease of the mind (compare the curious position which arose in *R.* v. *Kemp* (4)). The jury might H

accept the evidence of a defect of reason from disease of the mind, but at the

In the opening [illegible] evidence that the prisoner did not know what he was doing. I

find "one of three separate [illegible] of the facts they would find him not guilty.

(i) The primary verdict requested [illegible] fence would only have succeeded because one, was that of not guilty on the basis [illegible] by positive evidence which, properly the situation but that he was in a state [illegible] than a defect of reason from disease suggested for his being in such a state was psy[illegible]

(ii) Secondly, if the jury rejected the first a[illegible] the two defences (insanity and that the appellant was incapable of forming the [illegible] murder, that is, an intent to kill or cause grievous

A automatism) shows that where the only cause alleged for the unconsciousness is a defect of reason from disease of the mind, and that cause is rejected by the jury, there can be no room for the alternative defence of automatism. Like the Court of Criminal Appeal, I cannot therefore accept the submission that the whole of the evidence directed to the issue of insanity should have been left to the jury to consider whether there was automatism due to another cause. It B was conceded before this House, and this is stated in the judgment of the Court of Criminal Appeal, that there was nothing to show or suggest that there was any other pathological cause for automatism.

I next consider the submission that even so the question of automatism ought to have been left to the jury.

Great reliance was placed on a passage in the judgment of NORTH, J., in C the New Zealand case to which I have already referred (*R.* v. *Cottle* (5)). Strictly this passage was obiter in view of the findings on the first two grounds of appeal but its importance is none the less obvious.

> "For the reasons I have earlier mentioned, however, as the authorities at present stand he [the judge] could not treat a plea of automatism as D something akin to insanity, and therefore subject to the same rule as to the burden of proof, for this would be an unwarranted extension of the rule laid down so positively in *Woolmington's* case (6) . . . On the other hand, in cases like the present one, where the form of the plea is that the prisoner acted unconsciously—in a state of automatism—the rejection of the evidence that he was suffering from a disease of the mind does not wholly dispose of E the defence, for it is still possible, though perhaps unlikely, that the jury may not be completely satisfied that the act was the conscious and intended act of the prisoner. In my opinion then, the presiding judge must anticipate this possible situation. He must be careful to tell the jury that—apart from the plea of insanity—the onus of proving all the facts necessary to establish guilt rests on the Crown and remains with the Crown throughout the trial. F Consequently, if the jury is of opinion that it has not been made out that the prisoner was suffering from a disease of the mind, it must remember that it is the responsibility of the Crown to satisfy it that the prisoner did know and understand the nature of the act he committed."

If by this passage in his judgment NORTH, J., meant to imply that in every case where insanity is raised, automatism must always be left to the jury as a G defence, I should, with respect, be unable to accept what he says as a correct statement of the law. But what NORTH, J., said must be considered in the light of the view expressed by the whole court (and set out in the headnote (7) to the report) that not only must automatism be expressly put forward as a defence but also that a proper foundation must be laid for it. In my view the learned judge was only considering the situation where there was positive H evidence which would justify a finding by the jury that the accused acted in a state of automatism. This is in accordance with the view taken by this House in *Mancini* v. *Director of Public Prosecutions* (8) in which it was pointed out (9) that the decision in *Woolmington's* case (10) did not mean that the judge must deal in his summing-up with the issues of accident and provocation merely because these defences were raised. There must be some evidence of accident I or provocation on which a reasonable jury could act. I think that this provides the synthesis between the reasoning of the Court of Criminal Appeal in the present case and the passage just quoted from NORTH, J. It is necessary that a proper

(5) [1958] N.Z.L.R. at p. 1029.
(6) *Woolmington* v. *Director of Public Prosecutions*, [1935] All E.R. Rep. 1; [1935] A.C. 462.
(7) [1958] N.Z.L.R. 999.
(8) [1941] 3 All E.R. 272; [1942] A.C. 1.
(9) [1941] 3 All E.R. at p. 279; [1942] A.C. at p. 12.
(10) [1935] All E.R. Rep. 1; [1935] A.C. 462.

foundation be laid before a judge can leave "automatism" to the jury. That foundation, in my view, is not forthcoming merely from unaccepted evidence of a defect of reason from disease of the mind. There would need to be other evidence on which a jury could find non-insane automatism. What the Court of Criminal Appeal say about the onus of proof must be read in the context of evidence directed simultaneously to defences of insanity and automatism.

Certain very relevant problems were discussed in *Hill* v. *Baxter* (11) where the court (LORD GODDARD, C.J., DEVLIN and PEARSON, JJ.), held that, in spite of the justices accepting the defendant's evidence that he became unconscious while driving, there was no evidence which justified the justices in finding that the defendant was not fully responsible in law for his actions. LORD GODDARD expressed the view (12) that the onus of proving that the defendant was in a state of automatism was on him because automatism is akin to insanity and further is a fact exclusively within his own knowledge. The other members of the court reserved this point. Nevertheless, DEVLIN, J. (13), used these words, with which I respectfully agree and which are relevant to the present case:

> "It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleepwalking or not in a trance or black-out."

Later on (14) he continued:

> "In my judgment there is not to be found in the Case Stated evidence of automatism of a character which would be fit to leave to a jury . . . he was not saying that he was a victim of any disease of the mind. Unless there was evidence which showed that his irrationality was due to some cause other than disease of the mind, the justices were not entitled simply to acquit."

I have also read with great interest and profit the Victorian case of *R.* v. *Carter* (15) and the Queensland cases of *R.* v. *Foy* (16) and *Cooper* v. *McKenna, Ex p. Cooper* (17). I do not think that this is the occasion to pursue the particular facts or the effect of particular statutes but it seems to me that none of the learned judges would question the proposition that, for a defence of automatism to be "genuinely raised in a genuine fashion", there must be evidence on which a jury could find that a state of automatism exists. By this I mean that the defence must be able to point to some evidence, whether it emanates from their own or the Crown's witnesses, from which the jury could reasonably infer that the accused acted in a state of automatism. Whether or not there is such evidence is a matter of law for the judge to decide. In the case before your Lordships, in my opinion, MCVEIGH, J., was right in ruling that there was no evidence on this point fit to be left to the jury. I have already dealt with the unsuccessful attempt to prove psychomotor epilepsy and the concession before us that there was nothing in the evidence to show or suggest that there was any other pathological cause. If one subtracts the medical evidence directed to the establishment of psychomotor epilepsy, I am of opinion that there was not any evidence on which a jury could properly have considered the existence of automatism. Counsel for the appellant directed our attention to the appellant's statement, to his evidence and to his previous conduct. In my view they do not provide evidence fit to be left to a jury on this question. They could not form the basis of reasonable doubt.

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(11) [1958] 1 All E.R. 193; [1958] 1 Q.B. 277.
(12) [1958] 1 All E.R. at p. 195; [1958] 1 Q.B. at p. 282.
(13) [1958] 1 All E.R. at p. 196; [1958] 1 Q.B. at p. 284.
(14) [1958] 1 All E.R. at p. 197; [1958] 1 Q.B. at p. 285.
(15) [1959] V.R. 105. (16) [1960] Qd. R. 225. (17) [1960] Qd. R. 406.

A McVEIGH, J., did not, therefore, have to consider what direction he would have given to the jury if he had felt that there was evidence fit for them to consider. It is not, strictly speaking, necessary for the decision of this appeal for this House to consider what this direction should have been, but in view of the mention of onus in the judgment of the Court of Criminal Appeal and the argument addressed to us, I think that it is right for me to deal with it.

B Where the defence succeeds in surmounting the initial hurdle (see *Mancini* v. *Director of Public Prosecutions* (18) and ante p. 529, letter H), and satisfies the judge that there is evidence fit for the jury to consider, the question remains whether the proper direction is—(a) that the jury will acquit if, and only if, they are satisfied on the balance of probabilities that the accused acted in a state of automatism, or (b) that they should acquit if they are left in reasonable C doubt on this point.

In favour of the former direction it might be argued that, since a defence of automatism is (as LORD GODDARD, C.J., said in *Hill* v. *Baxter* (19)) very near a defence of insanity, it would be anomalous if there were any distinction between the onus in the one case and in the other. If this argument were to prevail it D would follow that the defence would fail unless they established on a balance of probabilities that the prisoner's act was unconscious and involuntary in the same way as, under the M'Naghten rules (20), they must establish on a balance of probabilities that the necessary requirements are satisfied.

Nevertheless, one must not lose sight of the overriding principle, laid down by this House in *Woolmington's* case (21), that it is for the prosecution to prove E every element of the offence charged. One of these elements is the accused's state of mind; normally the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily and the prosecution need go no further. But, if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the F necessary mens rea—if indeed the actus reus—has not been proved beyond reasonable doubt. I find support for this view in the direction given by BARRY, J., to the jury in *R.* v. *Charlson* (22). In that case the prisoner was charged on three counts, namely, causing grievous bodily harm with intent to murder, causing grievous bodily harm with intent to cause grievous bodily harm, and G unlawful wounding. The defence raised the issue of automatism and called medical evidence in support of it. The learned judge, on the basis—which has aroused some discussion—that insanity did not come into the case, after directing the jury that on each of the first two charges the prosecution must prove the specific intent, went on to deal with the third charge, that is, unlawful wounding, in these words (23):

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> "Therefore, in considering this third charge you have to ask yourself 'was the accused knowingly striking his son, or was he acting as an automaton without any control or knowledge of the act . . .?' . . . If you are left in doubt about the matter, and you think he might well have been acting as an automaton without any real knowledge of what he was doing, then the proper verdict would be not guilty . . ."

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I am also supported by the words of SCHOLL, J., in *R.* v. *Carter* (24) where he said:

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(18) [1941] 3 All E.R. 272; [1942] A.C. 1.
(19) [1958] 1 All E.R. at p. 195; [1958] 1 Q.B. at p. 282.
(20) (1843), 10 Cl. & Fin. 200. (21) [1935] All E.R. Rep. 1; [1935] A.C. 462.
(22) [1955] 1 All E.R. 859. (23) [1955] 1 All E.R. at p. 862.
(24) [1959] V.R. at p. 111.

"It must be for the defence in the first instance genuinely to raise the issue, but if the defence does raise the issue in a genuine fashion then the Crown which, of course, may call rebutting evidence on the matter, is bound in the long run to carry the ultimate onus of proving all the elements of the crime including the conscious perpetration thereof."

My conclusion is, therefore, that once the defence have surmounted the initial hurdle to which I have referred and have satisfied the judge that there is evidence fit for the jury's consideration, the proper direction is that, if that evidence leaves them in a real state of doubt, the jury should acquit.

On the second ground of appeal, that the learned judge was wrong in failing to leave the issue of manslaughter to the jury, I find myself in entire agreement with the words of LORD MACDERMOTT, C.J., in giving the judgment of the Court of Criminal Appeal on this point and respectfully adopt his reasoning. I think that this appeal should be dismissed.

LORD TUCKER: My Lords, I agree. I also desire to express my agreement with the opinion to be delivered by my noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, which I have had the advantage of reading in print.

LORD DENNING: My Lords, in *Woolmington* v. *Director of Public Prosecutions* (25) VISCOUNT SANKEY, L.C., said:

"When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused."

The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily: and an involuntary act in this context—some people nowadays prefer to speak of it as "automatism"—means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking. The point was well put by STEPHEN, J., in 1889:

"... can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing";

see *R.* v. *Tolson* (26). The term "involuntary act" is, however, capable of wider connotations: and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence for him to say "I don't know what happened. I cannot remember a thing": see *Hill* v. *Baxter* (27). Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time; see *Russell* v. *H.M. Advocate* (28); *R.* v. *Podola* (29). Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it. When a man is charged with murder, and it appears that he knew what he was doing, but that he could not resist it, then his assertion "I couldn't help myself" is no defence in itself: see *A.-G. for South Australia* v. *Brown* (30): though it may go towards a defence of diminished responsibility, in places where that defence is available, see *R.* v. *Byrne* (31): but it does not render his act involuntary so as to entitle him to an unqualified acquittal. Nor is an act to be regarded as an involuntary act

(25) [1935] All E.R. Rep. at p. 8; [1935] A.C. at p. 482.
(26) (1889), 23 Q.B.D. at p. 187.
(27) [1958] 1 All E.R. 193; [1958] 1 Q.B. 277.
(28) 1946 S.C. (J.) 37.
(29) [1959] 3 All E.R. 418; [1960] 1 Q.B. 325.
(30) [1960] 1 All E.R. 734; [1960] A.C. 432.
(31) [1960] 3 All E.R. 1; [1960] 2 Q.B. 396.

A simply because it is unintentional or its consequences are unforeseen. When a man is charged with dangerous driving, it is no defence for him to say, however truly, "I did not mean to drive dangerously". There is said to be an absolute prohibition against that offence, whether he had a guilty mind or not (see *Hill* v. *Baxter* (32) per LORD GODDARD, C.J.), but even though it is absolutely prohibited, nevertheless he has a defence if he can show that it was an involuntary B act in the sense that he was unconscious at the time and did not know what he was doing (see *H.M. Advocate* v. *Ritchie* (33), *R.* v. *Minor* (34) and *Cooper* v. *McKenna, Ex p. Cooper* (35)).

Another thing to be observed is that it is not every involuntary act which leads to a complete acquittal. Take first an involuntary act which proceeds from a state of drunkenness. If the drunken man is so drunk that he does C not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary; see *Beard's* case (36). Again, if the involuntary act proceeds from a disease of the mind, it gives rise to a defence of insanity, but not to a defence of automatism. Suppose a crime is committed by a man D in a state of automatism or clouded consciousness due to a recurrent disease of the mind. Such an act is no doubt involuntary, but it does not give rise to an unqualified acquittal, for that would mean that he would be let at large to do it again. The only proper verdict is one which ensures that the person who suffers from the disease is kept secure in a hospital so as not to be a danger to himself or others. That is, a verdict of guilty but insane.

E Once you exclude all the cases I have mentioned, it is apparent that the category of involuntary acts is very limited. So limited indeed that until recently there was hardly any reference in the English books to this so-called defence of automatism. There was a passing reference to it in 1951 in *R.* v. *Harrison-Owen* (37) where a burglar, who broke into houses, said he did not know what he was doing. I should have thought that, in order to rebut this defence, he could F have been cross-examined about his previous burglaries: but the Court of Criminal Appeal ruled otherwise. I venture to doubt that decision. The next is the singular case of *R.* v. *Charlson* (38). Stanley Charlson, a devoted husband and father, hit his ten-year-old son on the head with a hammer and threw him into the river and so injured him. There was not the slightest cause for the attack. He was charged with causing grievous bodily harm with intent, G and with unlawful wounding. The evidence pointed to the possibility that Charlson was suffering from a cerebral tumour in which case he would be liable to a motiveless outburst of impulsive violence over which he would have no control at all. Now comes the important point—no plea of insanity was raised, but only the defence of automatism. BARRY, J., directed the jury in these words (39):

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> "If he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit and no responsibility rests on him at all, then the proper verdict is 'not guilty' . . ."

I On that direction the jury found him not guilty. In striking contrast to *R.* v. *Charlson* (38) is *R.* v. *Kemp* (40). A devoted husband of excellent character made an entirely motiveless and irrational attack on his wife. He struck her

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(32) [1958] 1 All E.R. at p. 195; [1958] 1 Q.B. at p. 282. (33) 1926 S.C. (J.) 45.
(34) (1955), 15 W.W.R. (N.S.) 433. (35) [1960] Qd. R. 406.
(36) *Director of Public Prosecutions* v. *Beard*, [1920] All E.R. Rep. at pp. 25, 27, 30; [1920] A.C. at pp. 494, 498, 504.
(37) [1951] 2 All E.R. 726. (38) [1955] 1 All E.R. 859.
(39) [1955] 1 All E.R. at p. 864. (40) [1956] 3 All E.R. 249; [1957] 1 Q.B. 399.

violently with a hammer. He was charged with causing her grievous bodily harm. It was found that he suffered from hardening of the arteries which might lead to a congestion of blood in the brain. As a result of such congestion, he suffered a temporary lack of consciousness, so that he was not conscious that he picked up the hammer or that he was striking his wife with it. It was therefore an involuntary act. Note again the important point—no plea of insanity was raised but only the defence of automatism. Nevertheless, DEVLIN, J., put insanity to the jury. He held that hardening of the arteries was a "disease of the mind" within the M'Naghten rules (41) and he directed the jury they ought so to find. They accordingly found Kemp guilty but insane.

My Lords, I think that DEVLIN, J., was quite right in *R.* v. *Kemp* (42) in putting the question of insanity to the jury, even though it had not been raised by the defence. When it is asserted that the accused did an involuntary act in a state of automatism, the defence necessarily puts in issue the state of mind of the accused man: and thereupon it is open to the prosecution to show what his true state of mind was. The old notion that only the defence can raise a defence of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large. The Trial of Lunatics Act, 1883, s. 2, says that where "it is given in evidence" that the person was insane, the jury shall return a verdict of guilty but insane. It does not say that the defence alone can give such evidence. The prosecution can give it. And in either case inasmuch as the verdict is one of acquittal; see *Felstead* v. *R.* (43), it should be decided on the balance of probabilities. So it has been held in England that where a man sets up a defence of diminished responsibility, the prosecution are entitled to show that he was insane; see *R.* v. *Bastian* (44): and conversely when a man sets up insanity, the prosecution are entitled to give evidence of diminished responsibility; see *R.* v. *Nott* (45).

On the other point discussed by DEVLIN, J., namely, what is a "disease of the mind" within the M'Naghten rules (41), I would agree with him that this is a question for the judge. The major mental diseases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. But in *R.* v. *Charlson* (46), BARRY, J., seems to have assumed that other diseases such as epilepsy or cerebral tumour are not diseases of the mind, even when they are such as to manifest themselves in violence. I do not agree with this. It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.

It is to be noticed that in *R.* v. *Charlson* (46) and *R.* v. *Kemp* (42) the defence raised only automatism, not insanity. In the present case the defence raised both automatism and insanity. And herein lies the difficulty because of the burden of proof. If the accused says he did not know what he was doing, then, so far as the defence of automatism is concerned, the Crown must prove that the act was a voluntary act; see *Woolmington's* case (47). But so far as the defence of insanity is concerned, the defence must prove that the act was an involuntary act due to disease of the mind; see *M'Naghten's Case* (48). This apparent incongruity was noticed by SIR OWEN DIXON, Chief Justice of the High Court of Australia, in an address which is to be found in 31 Australian Law Journal 255 and it needs to be resolved. The defence here say: Even though we have not proved that the act was involuntary, yet the Crown have not proved that it was a voluntary act: and that point at least should have been put to the jury.

My Lords, I think that the difficulty is to be resolved by remembering that,

(41) (1843), 10 Cl. & Fin. 200. (42) [1956] 3 All E.R. 249; [1957] 1 Q.B. 399.
(43) [1914] A.C. 534. (44) [1958] 1 All E.R. 568.
(45) (1959), 43 Cr. App. Rep. 8.
(46) [1955] 1 All E.R. 859. (47) [1935] All E.R. Rep. at p. 8; [1935] A.C. at p. 482.
(48) (1843), 10 Cl. & Fin. at p. 210.

A whilst the *ultimate* burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the Crown is entitled to rely on the *presumption* that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred. Thus a drunken man is presumed to have the B capacity to form the specific intent necessary to constitute the crime, unless evidence is given from which it can reasonably be inferred that he was incapable of forming it; see the valuable judgment of the Court of Justiciary in *Kennedy* v. *H.M. Advocate* (49) which was delivered by the Lord Justice-General (LORD NORMAND). So also it seems to me that a man's act is presumed to be a voluntary act unless there is evidence from which it can reasonably be inferred that it was C involuntary. To use the words of DEVLIN, J., the defence of automatism "ought not to be considered at all until the defence has produced at least prima facie evidence," see *Hill* v. *Baxter* (50); and the words of NORTH, J., in New Zealand "unless a proper foundation is laid," see *R.* v. *Cottle* (51). The necessity of laying this proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury, any more than the defences of drunken- D ness (*Kennedy* v. *H.M. Advocate* (52)), provocation (*R.* v. *Gauthier* (53)) or self-defence (*R.* v. *Lobell* (54)) need be.

What, then, is a proper foundation? The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, E it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to F the cause of the mental incapacity. It is not sufficient for a man to say "I had a black-out": for "black-out" as STABLE, J., said in *Cooper* v. *McKenna* (55) "is one of the first refuges of a guilty conscience, and a popular excuse". The words of DEVLIN, J., in *Hill* v. *Baxter* (56) should be remembered:

> G "I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent."

When the only cause that is assigned for an involuntary act is drunkenness, then it is only necessary to leave drunkenness to the jury, with the consequential directions, and not to leave automatism at all. When the only cause that is assigned for it is a disease of the mind, then it is only necessary to leave insanity H to the jury, and not automatism. When the cause assigned is concussion or sleepwalking, there should be some evidence from which it can reasonably be inferred before it should be left to the jury. If it is said to be due to concussion, there should be evidence of a severe blow shortly beforehand. If it is said to be sleepwalking, there should be some credible support for it. His mere assertion that he was asleep will not suffice. Once a proper foundation is thus laid for I automatism, the matter becomes at large and must be left to the jury. As the case proceeds, the evidence may weigh first to one side and then to the other: and so the burden may appear to shift to and fro. But at the end of the day the

(49) 1944 S.C. (J.) at p. 177.
(50) [1958] 1 All E.R. at p. 196; [1958] 1 Q.B. at p. 285.
(51) [1958] N.Z.L.R. at p. 1025. (52) 1944 S.C. (J.) 171.
(53) (1943), 29 Cr. App. Rep. 113. (54) [1957] 1 All E.R. 734; [1957] 1 Q.B. 547.
(55) [1960] Qd. R. at p. 419.
(56) [1958] 1 All E.R. at p. 197; [1958] 1 Q.B. at p. 285.

legal burden comes into play and requires that the jury should be satisfied beyond reasonable doubt that the act was a voluntary act. A

This brings me to the root question in the present case: Was a proper foundation laid here for the defence of automatism apart from the plea of insanity? There was the evidence of the appellant himself that he could not remember anything because "this blackness was over me". He said "I did not realise exactly what I was doing", and added afterwards "I didn't know what I was doing. I didn't realise anything". He said he had four or five times previously had "feelings of blackness" and frequently headaches. There was evidence, too, of his odd behaviour at times, his mental backwardness and his religious leanings. Added to this there was the medical evidence. Dr. Sax, who was called on his behalf, said there was a possibility that he was suffering from psychomotor epilepsy. It was, he said, practically the only possibility that occurred to him. Dr. Walker, his general practitioner, said you could not leave the possibility out of account. Dr. Robinson, a specialist, who gave evidence on behalf of the Crown, said he thought it was extremely unlikely that it was an epileptic attack, but one could not rule it out. All the doctors agreed that psychomotor epilepsy, if it exists, is a defect of reason due to disease of the mind: and the judge accepted this view. No other cause was canvassed. B C D

In those circumstances, I am clearly of opinion that, if the act of the appellant was an involuntary act, as the defence suggested, the evidence attributed it solely to a disease of the mind and the only defence open was the defence of insanity. There was no evidence of automatism apart from insanity. There was, therefore, no need for the judge to put it to the jury. And when the jury rejected the defence of insanity, they rejected the only defence disclosed by the evidence. E

I think that McVeigh, J., was right in the course he took at the trial, and I find myself in entire agreement with the judgment of Lord MacDermott, C.J., in the Court of Criminal Appeal. I would, therefore, dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the Court of Criminal Appeal certified that their decision in dismissing the appellant's appeal involved two points of law of general public importance. The first was "whether, his plea of insanity having been rejected by the jury, it was open to the accused to rely on a defence of automatism". This raises the question whether a person who by legal tests and standards is sane and who is charged with a criminal offence could be held to be non-accountable for his actions so as to be not guilty of the offence charged against him on the basis that his actions had been unconscious ones and in that sense involuntary. My Lords, I can conceive that this could be so though the cases where such a situation could arise must be very rare. Each set of facts must require a careful investigation of its own circumstances but if, by way of taking an illustration, it were considered possible for a person to walk in his sleep and to commit a violent act while genuinely unconscious, then such a person would not be criminally liable for that act. Apart altogether from any question whether some particular criminal charge requires proof of some particular intent, in the possible case that I have postulated there would be immunity from any conviction for the reason that the act in question could not really be considered to be the act of the person concerned at all. F G H

The "golden" rule of the English criminal law that it is the duty of the prosecution to prove an accused person's guilt (subject to any statutory exception and subject to the special position which arises where it is given in evidence that an accused person is insane) does not involve that the prosecution must speculate as to and specifically anticipate every conceivable explanation that an accused person might offer. The evidence of the commission of certain acts may suffice to prove that they were intentional. In a charge of murder malice may by implication be proved where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given an accused person may, however, either by adducing evidence or I

A by examining the circumstances adduced by the Crown, show that his actions were either unintentional or provoked. In such a situation the continuing and constant obligation of the prosecution to satisfy the jury beyond any reasonable doubt is in no way abated (see *Woolmington* v. *Director of Public Prosecutions* (57)). In the conceivably possible case that I have postulated (of a violent act committed by a sleepwalker) it would not necessarily be the duty of the prose-
B cution in leading their evidence as to the commission of the act specifically to direct such evidence to negativing the possibility of the act having been committed while sleepwalking. If, however, during the trial the suggested explanation of the act was advanced and if such explanation was so supported that it had sufficient substance to merit consideration by the jury, then the onus which is on the prosecution would not be discharged unless the jury, having considered
C the explanation, were sure that guilt in regard to the particular crime charged was established so that they were left in no reasonable doubt. The position would be analogous to that which arises where a defence of self-defence is raised. Though the onus is on the prosecution to negative that defence, the obligation to do so only arises effectively when there is a suggestion of such defence (see *R.* v. *Lobell* (58)).

D Before an explanation of any conduct is worthy of consideration such explanation must be warranted by the established facts or be supported by some evidence that has been given by some witness. Though questions whether evidence should or should not be accepted or as to the weight to be attached to it are for the determination of the jury, it is a province of the judge to rule whether a theory or a submission has the support of evidence so that it can properly be passed to
E the jury for their consideration. As human behaviour may manifest itself in infinite varieties of circumstances it is perilous to generalise but it is not every facile mouthing of some easy phrase of excuse that can amount to an explanation. It is for a judge to decide whether there is evidence fit to be left to a jury which could be the basis for some suggested verdict.

My Lords, the fact that a plea of insanity was advanced on behalf of the
F appellant did not of itself prevent the raising of alternative or additional matters and in regard to the first point of law presented by the Court of Criminal Appeal I consider that though the appellant's plea of insanity was rejected by the jury it was "open" to him to rely on the suggested defence which is denoted by the word "automatism".

On this basis the second point of law certified by the Court of Criminal Appeal
G calls for consideration. It was expressed in these words:

> "If the answer to (i) be in the affirmative, whether, on the evidence, the defence of automatism should have been left to the jury."

This raises the question whether there was any evidence of "automatism" which was fit to be left to the jury. The argument on behalf of the appellant
H involved consideration both of the medical evidence and of the non-medical evidence. In his statement made on Dec. 23, 1960, the appellant had spoken of "a sort of blackness" and in his evidence in court he had spoken of a "blackness" having come over him and of previous occasions when he had had feelings of blackness. There were three medical witnesses called (either by the prosecution or by the defence) during the trial. In questions that were put to them and in
I the course of their evidence the only pathological explanation of what the appellant might have been suffering from that was suggested or in any way canvassed was the possibility that he might have been suffering from psychomotor epilepsy. Psychomotor epilepsy was said to be a functional disorder amounting to defect of reason due to disease of the mind. There was some evidence that during an attack of psychomotor epilepsy a person might commit a violent act unconsciously. There was no medical evidence which was directed to the

(57) [1935] All E.R. Rep. 1; [1935] A.C. 462.
(58) [1957] 1 All E.R. 734; [1957] 1 Q.B. 547.

suggestion of "automatism" other than automatism of an epileptic character. It was, however, urged that in spite of this and notwithstanding that the plea of insanity was rejected the jury should have been told that the medical evidence could still support the view that the appellant though sane had acted unconsciously. It was urged that the jury on a balance of probabilities might not have considered that the appellant was insane but might have had reasonable doubts whether his actions were conscious ones and accordingly had this possible view of the matter been left to them might have returned a verdict of not guilty. The only medical evidence, however, which could lend any support at all to the suggestion that the appellant had acted unconsciously was such evidence as could tend to show that he might have suffered from psychomotor epilepsy—which was a disease of the mind. When the plea of insanity failed the presumption of sanity remained and no medical evidence was adduced which was at all directed to the question whether on the assumption that the appellant was sane he might yet for some reason have acted unconsciously. The submission on behalf of the appellant that the medical evidence could support a plea of automatism so that the jury might have had reasonable doubt whether the actions of the appellant which caused the death were conscious and voluntary involved in effect a repetition of the plea of insanity while endeavouring to avoid the well-established rules as to how insanity must be established.

The non-medical evidence which was relied on as supporting the suggestion that the appellant had acted in a state of automatism was the evidence of the appellant himself and all the evidence as to his general behaviour and backwardness and his characteristics and all the evidence relating to the circumstances attending the death of the deceased. The argument for the appellant was that there was evidence on which the jury would have been warranted in finding that the appellant acted unconsciously because he was in a state of automatism which was not due to a disease of the mind and that either on this basis or on the basis of having reasonable doubts whether the actions of the appellant were conscious and voluntary ones the jury would have been warranted in returning a verdict of not guilty. In his statement on Dec. 23, 1960, the appellant gave an account of what he had done. The appellant said in the witness-box that he did not at the time know what he was doing or "did not realise exactly" what he was doing or realise at the time what he had done or did not remember what he had done. He also said that he had not "meant to do any harm". A consideration of his evidence and of the other evidence in the case leads me to the view that it did not provide a proper foundation for a submission that (apart from any question of insanity) the actions of the appellant had been unconscious and involuntary. There was no sufficient evidence, fit to be left to a jury, on which a jury might conclude that the appellant had acted unconsciously and involuntarily or which might leave a jury in reasonable doubt whether this might be so. There was much evidence which showed that the appellant had been and was in many respects backward. He had, however, always been well-behaved and ordinarily he was quiet and kindly: his actions on Dec. 22, 1960, seemed out of keeping with his character. The evidence amply warranted the learned judge in saying to the jury that they

> "might think he was an odd fish, an odd fish, this boy—indeed not only as a boy but when he grew up later he was an odd sort of a being, not just quite normal, and that he behaved in these, perhaps minor, ways of abnormality."

However relevant all the evidence so referred to might have been if a different defence than insanity had been available and however relevant it may be in considering questions which are not for your Lordships' determination, such evidence does not tend to support a plea that the actions of the appellant were unconscious ones. Accordingly I consider that the learned judge at the trial was right in the course that he took.

I am in agreement with the reasons given by the Court of Criminal Appeal for

A concluding that the learned judge was right in not leaving the issue of manslaughter to the jury.

I would dismiss the appeal.

LORD HODSON: My Lords, I agree with the speech which has been delivered by my noble and learned friend on the Woolsack and also with that which has just been delivered by my noble and learned friend LORD MORRIS OF B BORTH-Y-GEST.

Appeal dismissed.

Solicitors: *Prothero & Prothero*, agents for *David H. Smyth*, Newtownards, Northern Ireland (for the appellant); *Linklaters & Paines*, agents for *Chief Crown Solicitor*, Ulster (for the Crown).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

C

COOPER v. COOPER AND ANOTHER.

[COURT OF APPEAL (Ormerod, Upjohn and Davies, L.JJ.), July 21, 1961.]

Divorce—Practice—Custody—Chambers—Agreement by parties that matter be referred to chambers—Judge's rejection of application for reference—Order D *for custody made at hearing—Respondent's non-appearance in reliance on agreement—Order not open to objection.*

In an undefended petition for divorce in which the wife was found guilty of adultery and a decree nisi of divorce was granted to the husband, the solicitors for the parties agreed in advance that the question of the custody of the child of the marriage (a daughter aged four) should be referred to E chambers. The wife was not represented at the hearing and counsel for the husband applied for the question of custody to be referred to chambers as agreed. The judge refused the application and made an order that the husband should be given custody, but that the care and control of the child should remain with the wife, intimating that if he had granted the application he would have reserved the matter to himself and would have made F the same order. On appeal by the wife,

Held: the order for custody must be upheld, since the matter was within the jurisdiction of the judge, of which he could not be deprived by an agreement between the parties.

Appeal dismissed.

[As to the making of orders for custody in divorce proceedings, see 12 HALS- G BURY'S LAWS (3rd Edn.) 392, para. 868; and for cases on the subject, see 27 DIGEST (Repl.) 557, 558, *5086-5093.*]

Appeal.

The wife appealed against an order made by LORD MERRIMAN, P., on May 30, 1961, whereby, after pronouncing a decree nisi of divorce in favour of the husband on the ground of the wife's adultery, he granted the husband custody of the H child of the marriage. The child of the marriage was a daughter, then aged four. The grounds of appeal were that the order so far as it related to custody ought not to have been made without the wife's being given an opportunity of presenting evidence to the court and being heard thereon; particularly as the husband had agreed before the hearing that the question of custody should be referred to chambers and that, in reliance on that agreement, the wife was not I represented in court when the order was made and her evidence on the matter was not available to the court.

J. Jackson for the wife.

A. S. Trapnell for the husband.

ORMEROD, L.J.: This is an appeal by the wife against part of an order made by the President of the Probate, Divorce and Admiralty Division on May 30, 1961. At that time he was hearing a petition by the husband for dissolution of marriage on the ground of his wife's adultery, and he made an

order that the custody of the only child of the marriage, a child at that time aged four, should be with the father, but that the care and control of the child should remain with the mother. The parties, according to the petition, were married at the register office, Abingdon, on Apr. 4, 1956, and the only child was born on Jan. 30, 1957. The decree nisi was pronounced on May 30, 1961, on the ground of the wife's adultery, and the learned President at the same time exercised his discretion in favour of the husband for adultery admittedly committed by him. There was also a co-respondent against whom damages had been claimed. By agreement, these damages had been limited to the sum of £25 and the President made an order against the co-respondent for that sum in damages, the sum to be paid into court within twenty-eight days. So far as that part of the hearing of the petition is concerned, there is no complaint.

Counsel appeared for the husband. The suit was dealt with as an undefended one until the question of custody arose. It appears that prior to the hearing there had been some correspondence between the solicitors to the parties, when the question of the amount of damages to be paid by the co-respondent was agreed, and in addition it was agreed between the parties that the question of custody should be referred to chambers, and that an application should be made to the court at the hearing for that to be done.

At the hearing that correspondence was produced and the learned President was in due course invited to refer the matter of custody into chambers. We have been given a transcript of the shorthand note of that part of the proceedings, and this is what was said. Counsel appearing then, as he does today, on behalf of the husband, said:

> "Then as to the question of custody, your Lordship has the position before you. I am bound to make the application to refer it to chambers."

The fact that he had the position before him was a reference to the correspondence between the parties prior to the hearing in which it had been agreed that the question of custody should be referred to chambers. The President then said:

> "On the question of custody there is nothing more to be said at the moment. I am not going to refer it to chambers; I am going to give the husband custody of the child. I do so for this reason; I think it is essential for the child. This wife is now carrying on an adulterous association with a fifth man . . ."

Stopping there, we are told that the evidence does not amount to that, or, at least, that there was no allegation in the petition that there were five men involved, and, in the circumstances, objection is taken to that. The President then goes on:

> ". . . and it is perfectly plain that the husband must have some control; on the other hand it is equally plain that the immediate care and control must be left with the wife and that is what I propose to do."

The gravamen of the criticism of counsel for the wife of this part of the judgment lies in the next sentence or two. The learned President says:

> "I cannot see any point whatever in sending it to chambers for further consideration. If I did I would reserve it to myself and make precisely the order I am making now. You can tell those who think it necessary to make these elaborate arrangements about referring the matter to chambers that they do not bind the judge."

Then later the President said:

> "There will be a decree nisi with costs against the co-respondent. As regards the child, the husband will have the formal custody of the child but the child will remain in the care and control of the wife until further order. I have to make some statement about whether I am satisfied with the arrangements. I have no evidence about that except that she is a

A good mother. With regard to the arrangements for the child, I cannot say any more than that they are the best that can be devised in the circumstances."

Those are the whole of the facts as they have been put before this court, and the objection which has been made by the wife is that she is suffering from a sense of grievance, because she does not wish the custody to remain in the husband and did not have an opportunity of putting her contention before the court at the hearing of the petition.

No order or direction has been produced to this court to indicate in any way a practice that the issue of custody may be referred into chambers by agreement. It may well be that on many occasions the judge who is hearing a petition may decide that it is more convenient for the parties and generally more satisfactory that that question of custody should be referred into chambers. On the other hand, of course, it is entirely a matter within the jurisdiction of the judge hearing the petition, and any agreement that something other should take place is clearly an attempt to deprive the learned judge of a jurisdiction which has been vested in him.

Counsel for the wife has submitted—and, indeed, I think that it is really his only submission—that in the past it has been a general practice for the parties to agree, when they feel that they should, that the issue of custody should be referred to chambers. Put shortly, he says that, if there is going to be a change in that practice (which may or may not be a proper one), there should be an indication so that the parties should understand that it is necessary to appear. For my part, I find myself quite unable to accept that contention.

It is clear that this jurisdiction is vested in the learned judge. The direction to which we have been referred (which is No. 24 on p. 1426 of the current edition of RAYDEN ON DIVORCE (8th Edn.) which is a direction of the learned President) makes provision for machinery in the event of the learned judge not being satisfied of the arrangements made for the maintenance of the children, and not reserving to himself the matter in chambers. That is of no application at all in this case. In the first place, the learned President has expressed himself satisfied, and in the second place, although he has not reserved the matter to himself in chambers, he has dealt with the matter there and then. In the circumstances, it appears to me that this appeal is entirely without substance, although, of course, I have every regard, as any court must have, for the wife's complaint that she has not been given an opportunity of being heard. The fact remains that the opportunity was there, but she, or those advising her, chose not to take it.

We invited counsel for the wife to address us on the merits of the case. As we well understand, he found some difficulty in doing that, as he was not fully instructed in these matters. The fact remains, however, that the child the subject of this application is now four years of age. The care and control is vested in the wife, and the powers which are vested in the husband having the custody at this early age of the child are little more than a right to access (which I understand is not contested) and possibly a say, but not more than a say, in the education of the child, which does not arise at this early age.

In the circumstances, I find it difficult to understand what other order could have been made had the wife or those representing her been given every opportunity of putting her contentions on this matter before the court. On the merits as I see them, although they have not been fully argued, I have difficulty in understanding why the wife should have any objection to the order which has been made. We are told by counsel that there is some deep-seated religious objection behind this order which the wife has had no opportunity of adumbrating. It may be that she will be able to do that at a later opportunity, but at the present time it appears to me that she has everything that she could hope to have, always bearing in mind that she has been found in the petition to be the guilty

party, and as we have been told is now living in adultery. I find it extremely difficult to know what else she could hope for, and, even if she had custody of the child, I find it difficult to see what further advantage she would have in the way of control of the child. In the circumstances. I would dismiss the appeal.

UPJOHN, L.J.: I agree.

DAVIES, L.J.: I also agree. The clear effect, and indeed the admitted effect, of the argument put forward to this court by counsel for the wife is that, if the parties choose to agree between themselves that questions of custody should be referred to chambers and if in reliance on that agreement one of the parties is not represented at court, the judge is not entitled to exercise his jurisdiction to make whatever he considers to be the appropriate order at the hearing of the suit. With that proposition I entirely disagree. In my opinion, it is quite wrong.

That is really, on the technical side, the only point that counsel for the wife has in his case. As ORMEROD, L.J., has indicated, so far as the merits are concerned, this is the most barren controversy one could ever meet, and I have seldom encountered on the merits a more unmeritorious appeal. I agree that it should be dismissed.

Appeal dismissed.

Solicitors: *Rex B. Cowan & Co.* (for the wife); *Sandford, Mervyn Taylor & Co.* (for the husband).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

WARWICK RURAL DISTRICT COUNCIL *v.* MILLER-MEAD. MILLER-MEAD *v.* WARWICK RURAL DISTRICT COUNCIL.

[VACATION COURT (Widgery, J.), August 9, 1961.]

Practice—Parties—Capacity—Local authority—Proceedings for statutory nuisance instituted before authorising resolution—Ratification by resolution three days later—Validity—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8 *c.* 49), *s.* 100.

On July 21, 1961, solicitors for a local authority issued a writ in an action by the authority claiming injunctions against the defendant in respect of his alleged use of land as a caravan site in such a way as to amount to a nuisance under the Public Health Act, 1936. Three days later the council passed a resolution (the only one authorising proceedings) under s. 100 of the Act that "the council, being of opinion that summary proceedings would afford an inadequate remedy to secure compliance with abatement notices served on Jan. 3, 1961, do take proceedings in the High Court against such person or persons as it may be considered necessary for the purpose of securing the abatement or prohibition of the statutory nuisance at Seaton's Field, in the county of Warwick".

Held: the action was correctly constituted through ratification by the resolution, since at the date of the issue of the writ the council had capacity to institute the proceedings although they had not then specifically considered whether they were "of opinion that summary proceedings would afford an inadequate remedy" for the purposes of s. 100 of the Public Health Act, 1936.

QUAERE whether such an action would be well constituted if there were a really substantial interval between its institution and the passing of the resolution for the purposes of s. 100 of the Public Health Act, 1936.

A [As to prosecution and defence of legal proceedings by local authorities, see 24 HALSBURY'S LAWS (3rd Edn.) 630, para. 1149; and for cases on the subject, see 33 DIGEST 21-24, *88-108*.

For the Public Health Act, 1936, s. 100, see 19 HALSBURY'S STATUTES (2nd Edn.) 384.]

B Case referred to:

Danish Mercantile Co., Ltd. v. *Beaumont*, [1951] 1 All E.R. 925; [1951] Ch. 680; 2nd Digest Supp.

Motions.

Warwick Rural District Council were the defendants in an action brought by Mr. L. H. Miller-Mead on Mar. 27, 1961, claiming a declaration that seven notices C to abate nuisances dated Jan. 3, 1961, made under the Public Health Act, 1936, in respect of a caravan site at Seaton's Field, in the rural district of Warwick, served on Mr. Miller-Mead, were ultra vires, void and of no effect; and they were plaintiffs in an action brought against the defendant, Mr. Miller-Mead, claiming injunctions in respect of his alleged use of the site in such a way as to amount to a nuisance under the Act. On motions by the council D for the injunctions and secondly to strike out the action against them for want of prosecution and alternatively as being vexatious and an abuse of the process of the court, the defendant in the council's action took the preliminary point that the council's proceedings were not competent because they had not at the date of the issue of the writ passed such a resolution as was envisaged by s. 100 of the Public Health Act, 1936.

E *H. E. Francis, Q.C.*, and *E. W. H. Christie* for the council.
R. E. Megarry, Q.C., and *J. L. Harman* for the defendant.

WIDGERY, J.: These two actions give rise to an interesting, and, so far as I can discover, novel point, which is not without difficulty. It can be illustrated in regard to the action of *Warwick Rural District Council* v. *Miller-Mead* F trading as Coventry Cars and Caravans, as well as by reference to the other action. In the case in which Warwick Rural District Council are plaintiffs, a writ was issued on July 21, 1961, claiming on behalf of the council certain injunctions against the defendant in respect of his alleged use of land as a caravan site in such a way as to amount to a nuisance within the Public Health Act, 1936. It is provided in s. 100 of that Act that:

G "If in the case of any statutory nuisance the local authority are of opinion that summary proceedings would afford an inadequate remedy, they may in their own name take proceedings in the High Court for the . . . abatement . . . of that nuisance . . ."

It is not disputed that, if the council properly apply that section, they can bring proceedings of the kind in question in their own name. The difficulty H in the present case is that at the date of the writ the plaintiff council had passed no resolution with regard to the bringing of these proceedings and in fact no such resolution was passed until three days later, when on July 24 the council duly passed two resolutions, one to take all necessary steps to defend the action taken by Mr. Miller-Mead, and the other, that

I "the council, being of opinion that summary proceedings would afford an inadequate remedy to secure compliance with abatement notices served on Jan. 3, 1961, do take proceedings in the High Court against such person or persons as it may be considered necessary for the purpose of securing the abatement or prohibition of the statutory nuisance at Seaton's Field, in the county of Warwick."

The position here is thus that as a matter of fact at the date of the writ the council had not expressed their view on this matter by resolution, but did express the appropriate view some three days later.

My attention has been drawn to *Danish Mercantile Co., Ltd.* v. *Beaumont* (1) which deals with proceedings begun in the name of a limited company at a time when there was no authority for those proceedings to be brought and where it was held by the Court of Appeal that proceedings so begun were not necessarily a nullity for all purposes, but that the action of the solicitor or other person initiating the proceedings could be ratified by the litigant principal. It was said by counsel on behalf of the plaintiff council that I should apply that principle to the present case and regard the resolutions of July 24 as being a proper ratification of the action taken on behalf of the council by their solicitors three days previously.

Counsel for the defendant answers this argument by referring me to the well-known principle that there can be no ratification of the act of an agent unless at the date of the original act there was an existing and competent principal, i.e., competent to have done the act himself on his own behalf; and he argues that, if the council had not passed a resolution formally expressing the opinion required by s. 100 of the Act of 1936, there was in those circumstances no principal at the time of the agent's act capable of ratifying that act. More precisely, he says that, if at the date of the writ in this case there was no resolution of the council recording their opinion that summary proceedings would form an inadequate remedy, then they were at the time an incompetent plaintiff, having regard to the limitations imposed on a local authority by their constitution, and in those circumstances there could be no ratification of the agent's act.

Counsel agreed that the substantial point here is whether the fact that at the date of the writ there was no resolution recording the opinion of the council is a question which goes to the capacity of the authority to sue. I do not find the question a particularly easy one, but in my judgment the plaintiff council did not lack capacity to sue. It seems to me that on July 21 there was a local authority known as Warwick Rural District Council which, if they had applied their minds to the question, would have had a capacity on that date to institute these proceedings; and, just as there can be ratification although the authority have not considered the expediency of proceedings generally at the date of the writ, so, in my judgment, there can be ratification although the council have not at that date specifically considered whether in their opinion they should proceed under s. 100.

I would reserve for another occasion the question which might arise if there were a really substantial interval of time between the issue of the writ and the passing of a resolution in circumstances which legitimately justified the belief that the opinion of the local authority might have been different at the date of the writ from that which they held at the date of the resolution. But in this case the interval is three days only; and, in so far as I am entitled to consider the inchoate opinion of the council at the date of the writ, I am driven to the view that it would have been the same as that expressed in the resolution of July 24. Hence the preliminary point fails, and these proceedings are correctly constituted.

Determination of preliminary point accordingly.

Solicitors: *Devonshire & Co.*, agents for *Wright, Hassall & Co.*, Leamington Spa (for the council); *James & Charles Dodd* (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(1) [1951] 1 All E.R. 925; [1951] Ch. 680.

A

LONGHURST v. GUILDFORD GODALMING AND DISTRICT WATER BOARD.

[HOUSE OF LORDS (Lord Reid, Lord Tucker, Lord Birkett, Lord Hodson and Lord Guest), July 4, 5, October 5, 1961.]

B *Factory—Definition—Pumping station occupied by water board—Water from springs filtered and chlorinated in filter house then put under pressure in pump house—Whether water an "article"—Whether pump house a factory —Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 151 (1) (*b*), (6).

The respondent water board occupied an area of sixty-four acres on which were premises comprising two buildings, a filter house and a pump house. C Under the Water Act, 1945, Sch. 3, s. 31 and s. 39, it was the respondents' duty to provide in their mains a supply of wholesome water at a sufficient pressure. Water collected from springs and streams within the area flowed by gravity into the filter house where the water was contained in filter beds and there cleansed of impurities. From the filter house the water passed into a large concrete tank, situated partly under the filter house D and partly under the intervening space between the filter house and the pump house, where it was chlorinated. In the pump house, which was physically separated from the filter house, there were three engines with pumps which were used to extract the water from the tank, put it under pressure and force it along the mains either up to a reservoir whence it fell by gravity to houses in the district or through the mains direct to the houses. E The pumps were driven by belts on pulley wheels and there were guard-rails round the machines. On Feb. 1, 1958, the appellant, who was in charge of the pumping station, was found hanging over the guard-rails of one of the machines in the pump house, his right hand having been mangled by the bite of the machine's belt and pulley. In an action for damages for personal injuries the appellant submitted that the whole premises were a factory F within the meaning of s. 151 (1) of the Factories Act, 1937, and that the respondents were in breach of statutory duty under s. 13 of that Act to fence securely the machinery. By s. 151 (1) (b) "factory" means, inter alia, premises within the precincts of which persons are employed in manual labour in any process for or incidental to the altering or cleaning "of any article". By s. 151 (6), where a place within the precincts forming a G factory is solely used "for some purpose other than the processes carried on in the factory" it is deemed not to form part of the factory for the purposes of the Act. The respondents conceded that a cleaning or altering process was carried on in the filter house.

Held: there had been no breach of statutory duty because

(i) although the water in the filter beds was "an article" for the purposes H of the definition of "factory", and therefore the filter house was a factory under s. 151 (1) (b), yet

(ii) the pump house, by virtue of s. 151 (6), was not part of that factory since it was used for a different process, i.e., pumping water to consumers, from the process carried on in the filter house and (per LORD GUEST, see p. 550, letter H, to p. 551, letter A, post) the pumping of water was not I incidental to the main purpose of the factory, viz., the filtering of water, but was part of the distribution of the water to consumers.

Dictum of SCOTT, L.J., in *Cox* v. *Cutler & Sons, Ltd. and Hampton Court Gas Co.* ([1948] 2 All E.R. at p. 667) followed.

Hoare v. *Robert Green, Ltd.* ([1907] 2 K.B. 315) considered.

Thorogood v. *Van Den Berghs & Jurgens, Ltd.* ([1951] 1 All E.R. 682) applied.

Decision of the COURT OF APPEAL ([1960] 3 All E.R. 664) affirmed.

[As to the meaning of factory in the factory legislation, see 17 HALSBURY'S LAWS (3rd Edn.) 11, para. 13.

For the Factories Act, 1937, s. 151, see 9 HALSBURY'S STATUTES (2nd Edn.) 1113.]

Cases referred to:

Cox v. *Cutler & Sons, Ltd. and Hampton Court Gas Co.*, [1948] 2 All E.R. 665; [1949] L.J.R. 294; 24 Digest (Repl.) 1022, *11.*

Ferens v. *O'Brien*, (1883), 11 Q.B.D. 21; 52 L.J.M.C. 70; 47 J.P. 472; 15 Digest (Repl.) 1085, *10,735.*

Hoare v. *Green (Robert), Ltd.*, [1907] 2 K.B. 315; 76 L.J.K.B. 730; 96 L.T. 724; 71 J.P. 341; 24 Digest (Repl.) 1025, *28.*

Kaye (Dewsbury Revenue Officer) v. *Burrows and Dewsbury Assessment Committee*, [1931] All E.R. Rep. 242; [1931] A.C. 454; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 38 Digest (Repl.) 523, *287.*

Thorogood v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 24 Digest (Repl.) 1023, *13.*

Appeal.

Appeal by Nicholas Alexander Irwin Longhurst from an order of the Court of Appeal (SELLERS, PEARCE and DEVLIN, L.JJ.), dated Oct. 19, 1960, reported [1960] 3 All E.R. 664, dismissing an appeal by the appellant from the judgment of LORD PARKER, C.J., given on Nov. 27, 1959, reported [1960] 1 All E.R. 54. The facts and relevant statutory provisions are set out in the opinion of LORD GUEST, pp. 548-550, post.

G. G. Blackledge, Q.C., and *P. Perrins* for the appellant.

F. W. Beney, Q.C., and *E. W. Eveleigh, Q.C.*, for the respondents.

Their Lordships took time for consideration.

Oct. 5. The following opinions were read.

LORD REID: My Lords, the appellant can succeed only if the place where he was injured was within a factory: I agree with your Lordships that his case at common law must fail. I shall only refer briefly to the facts and adopt, if I may, the fuller statement of the facts to be given by my noble and learned friend, LORD GUEST. So far as material for this case the respondents' premises consisted of two separate buildings, one of which contained machinery and plant for filtering and chlorinating water and the other contained machinery for pumping the water to distribution mains or to a reservoir which fed other distribution mains. After treatment in the first building the water passed to an underground tank between the buildings from which it was pumped by the machinery in the second building. The appellant's hand was severely injured by being caught between a belt and pulley in the second building.

The appellant's case is that the whole premises were a factory within the meaning of s. 151 (1) of the Factories Act, 1937, (1) because the water was cleaned and altered and adapted for sale in the first building and that his injury was caused by the respondents' failure to comply with their statutory obligation (2) to fence securely the transmission machinery in the second building. The respondents' answer is twofold. First, they say that no part of their premises is a factory and secondly they say that in any event s. 151 (6) applies to exclude the second building. They also maintain that in fact the transmission machinery was securely fenced but I find it unnecessary to deal with that.

The question whether premises are a factory depends on the nature of the process which is carried on there: the definition specifies various kinds of process but all are processes dealing with "articles". The respondents say that water is not an article and therefore dealing with it cannot make their

(1) The relevant provisions of s. 151 (1) are set out in the opinion of LORD GUEST, p. 549, letter B, post.

(2) See s. 13 of the Factories Act, 1937.

A premises a factory. They say that no one has ever maintained that the Factories Act, 1937, applies to any kind of waterworks. This case therefore raises an important new point.

The word "article" has many different meanings or shades of meaning and therefore the context in which it occurs is of crucial importance. The respondents maintain that an article must be a solid article and that the word excludes B liquids and gases, or alternatively they maintain that a natural substance or at least a natural liquid or gas is not an article: no one would call water in a stream or air in a room an article and it can make no difference that it is collected, impounded or confined in some way. There may have been a time when few liquids but alcohol and no gases were made or treated by industrial processes, but that time is long past and I find it impossible to suppose that as recently as C 1937 Parliament intended to make so fundamental a distinction between solid articles and, say, petrol or coal gas as to deny the benefits of the Factories Act, 1937, to workers in premises where only liquids or gases were being treated or manufactured. Many substances take solid liquid or gaseous form according to temperature and pressure and it would be, to say the least, odd, if in this context a substance is an article when solid, ceases to be an article when made D liquid or gaseous, and becomes an article again when it solidifies. It is true that most of the descriptive words in s. 151 (1) are inapplicable to liquids or gases, but many are applicable, and the word "article" itself appears to me to be capable of meaning anything corporeal. It was suggested in argument that the article must be the liquid or gas plus its container but I do not think that that will do. The container is neither manufactured nor treated and it is E perfectly possible to sell the contents of, say, a gas cylinder or a bottle or tank, the container being returnable when empty; and is a pipe a container? The only authority to which we were referred was the opinion of SCOTT, L.J., in *Cox* v. *Cutler & Sons, Ltd. and Hampton Court Gas Co.* (3). I agree with it.

The alternative argument is to me more attractive at first sight but it would lead to difficulties. By an industrial process of a kind described in s. 151 sea F water could be treated and concentrated into strong brine, spring waters with mineral content may be treated, bottled and sold, or ordinary air may be liquefied or compressed and sold as liquid air or in cylinders as compressed air. And is milk a natural liquid in this sense? Is it an article at all, or is it an article when bottled but not when sold as it used to be by the milkman measuring it into the customer's own jug?

G I need not consider whether water is an article before it has been impounded or reduced into possession. But if other liquids are articles I see no reason why the natural origin of water should make a difference. No doubt water is generally dealt with in larger quantities than other liquids, but it could not be that a small quantity of water is an article but a large quantity is not. It therefore appears to me that the water in the filter house is an article and that by reason H of its treatment there the premises are a factory within the meaning of the definition in s. 151.

I agree, however, that s. 151 (6) excludes the pump house from the "factory" and on that ground this appeal must fail. This may seem a narrow ground of distinction but it arises from the fact that the application and protection of the Factories Act, 1937, depend not on the kind of machinery being used but on the I nature of the process being carried on where it is. The fact that the operations in both buildings are equally necessary in fulfilling the respondents' statutory duties appears to me to be irrelevant: the processes being carried on in the two buildings are quite different, in the first the water is made suitable for consumption, in the other it is sent on its way to the consumers.

In my judgment this appeal should be dismissed.

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(3) [1948] 2 All E.R. 665.

LORD TUCKER: My Lords, after considering the interesting arguments put forward by counsel on this appeal I have reached the conclusion that the judgment of LORD PARKER, C.J., was right in every respect and I feel I cannot usefully add anything to the reasons which he gave for reaching his conclusions.

The only matter with regard to which I have felt some doubt is whether the water which passes into the filter house at the respondents' pumping station for cleaning and chlorination is an "article" within the meaning of s. 151 (1) of the Factories Act, 1937, but in the result my doubts have been resolved by the opinions of my noble and learned friends LORD REID and LORD GUEST. I would accordingly dismiss the appeal.

LORD BIRKETT: My Lords, I agree that this appeal should be dismissed and the judgment of LORD PARKER, C.J., should be affirmed.

On the difficult and novel point whether water is an article within the meaning of s. 151 (1) of the Factories Act, 1937, which is said to be of importance to all water companies, I have come to the conclusion that it is, and I agree with the reasoning of my noble and learned friend LORD GUEST.

LORD HODSON: My Lords, I agree with the judgment of LORD PARKER, C.J., and I would dismiss the appeal.

On the interesting question whether or not water is an article within the meaning of s. 151 (1) of the Factories Act, 1937, I agree with the observations of my noble and learned friend on the Woolsack.

LORD GUEST: My Lords, on Feb. 1, 1958, the appellant, who was in charge of a pumping station at Hambledon, was found hanging over the guard-rails of a pumping machine: his right hand was completely mangled as if it had gone into the bite of the belt and pulley which operated the machine. It was not established precisely how his hand came to be in that position, but from other evidence it is reasonably clear that he had been in that position for some hours. He was almost unconscious when he was found and as a result of the accident his right arm had to be amputated from below the shoulder.

The respondents occupy about sixty-four acres of land from which the water is collected from springs and streams and flows by gravity to the filter house. The water is there cleansed of impurities and thence passes into a large concrete tank situated partly under the filter house and partly under the intervening space between the filter house and the pump house. On its passage from the filters to the concrete tank it is chlorinated. In the filter house there is a small Petter engine used for cleaning the filters. In the pump house, which is physically separated from the filter house, there are three engines, one large engine with a pump and two smaller engines with pumps. These pumps extract the water from the concrete tank, put it under pressure and force it along the mains. Some of the water is pumped up to a reservoir whence it falls by gravity to houses in the district and part of the water goes through the mains direct to other houses.

The pump with which this case is concerned is driven by a series of belts from a large pulley wheel on to smaller pulley wheels. At the smaller pulley wheels the belt travels in an anti-clockwise direction, so that the bite comes at the top of the pulley wheel between the belt and the pulley. It was into this bite that the appellant's hand must have been caught. Guard-rails have been erected round the machine at about a height of three feet. At the position opposite the bite formed by the belt and pulley the top guard-rail was horizontally about thirteen inches from the edge of the pulley and vertically about 6¼ inches above it.

LORD PARKER, C.J., who tried the case, found that the appellant has really no recollection how he met with his accident. The rest of the evidence does not make the matter any clearer and it is therefore pure surmise how his hand came to be caught in the bite. But in the view which I take of the case it is unnecessary to examine this aspect further.

A The appellant based his case of fault against the respondents at common law and under s. 13 of the Factories Act, 1937. His common law case that a more secure fence should have been provided round the machine was negatived by the Lord Chief Justice and the Court of Appeal and I entirely agree with the reasoning which led them to reject this aspect of the appellant's case. The evidence was to the effect that guard-rails of this type were provided in pumping stations all B over the country and it would be quite unusual to find close fencing which alone would have prevented the accident.

The appellant's case under the Factories Act requires more detailed consideration. Section 151 (1) of the Factories Act, 1937, provides as follows:

> "Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts C of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on D by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control: . . ."

The question which arises for decision is whether the pump house in which the accident happened is a "factory" within the meaning of the Act.

The appellant maintained that the whole premises were a factory by reason E of the fact that water was either "cleaned" or "altered" within the meaning of s. 151 (1) in the filter house. This raises at once the question, whether water is an "article" within the meaning of this section. The Lord Chief Justice (4), SELLERS, L.J., and PEARCE, L.J. (5), held that it was, and DEVLIN, L.J. (6) held that it was not. The respondents argued that the natural elements of which water was a typical example were not "articles". It was said that no one F would describe the sea or a lake or a river as "an article" and that in any case water flowing through the strata of the earth was not "an article". I am not disposed to agree that the natural elements could never come within the meaning of "an article". And it is unnecessary to decide whether water in its unconfined state could be described as "an article". In the present case the water when it was being treated was contained in filter beds and I see no reason why in that G state water should not be "an article". "Article" is defined in the SHORTER OXFORD ENGLISH DICTIONARY as "a commodity". It has been held that water can be the subject of larceny at common law (*Ferens* v. *O'Brien* (7)). In *Cox* v. *Cutler & Sons, Ltd. and Hampton Court Gas Co.* (8) where the subject under consideration was gas, SCOTT, L.J. (9), expressed the opinion that gas and water were articles. It is not without significance that in s. 103 (5) of the H Act of 1937 it was found necessary to exclude electrical energy from the definition of an "article", the assumption being that otherwise it might be an article. Support was said to be obtained for the respondents' arguments from *Hoare* v. *Robert Green, Ltd.* (10). In these premises young girls made up flowers into wreaths, crosses, and bouquets and the premises were held to be a workshop under the Factory and Workshop Act, 1901. LORD ALVERSTONE, C.J., said (11) I that if all that the girls had been doing was tying up bunches of flowers which had been sold in the shop the premises would not have been within the Act and I would not be disposed to disagree with this view. But DARLING, J., and PHILLIMORE, J. (12), appear to have expressed the view that a single cut flower

(4) [1960] 1 All E.R. 54.
(5) [1960] 3 All E.R. at pp. 669, 670.
(6) [1960] 3 All E.R. at p. 671.
(7) (1883), 11 Q.B.D. 21.
(8) [1948] 2 All E.R. 665.
(9) [1948] 2 All E.R. at p. 667.
(10) [1907] 2 K.B. 315.
(11) [1907] 2 K.B. at p. 319.
(12) [1907] 2 K.B. at pp. 321, 322.

could not properly be described as an " article " on the ground that an " article " means something manufactured or made. But the section applies to the " making " of an " article " and also to the " altering " and " ornamenting " of something which may have been made and thus be a manufactured " article " or may none the less be an " article " because it is in its natural state. I do not agree that a cut flower may not be an " article ". However this may be, the case is no authority for the view that the water in this case is not an article when it was being put through the filters. In my opinion the word " article " must be given its ordinary meaning in the English language, and so regarded, the water in the circumstances of this case was " an article ".

DEVLIN, L.J. (13), referred to the question whether commodities on a farm such as wheat, straw and milk are articles. I do not find it necessary to decide these matters. But it is only right to point out that the safety and health of employees in agriculture is now secured under the Agriculture (Safety, Health and Welfare Provisions) Act, 1956, so that these difficult questions would not now arise.

It was not disputed by the respondents that if water was an " article " within the meaning of s. 151 (1) of the Act of 1937 the filter house was a factory on account of the cleaning or altering process there carried on. But the respondents contended that the pump house, although it might otherwise have formed part of the factory under s. 151 (1), was excluded by sub-s. (6). Section 151 (6) is in the following terms:

> " Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

The respondents' statutory obligations in regard to the supply of water are contained in s. 31 and s. 39 of Sch. 3 to the Water Act, 1945, and their duty is to provide in their mains a supply of wholesome water at a sufficient pressure. The appellant argued that this involved that the whole process of filtering, chlorination and pumping of the water was a continuous process. The Water Act provisions are, in my view, irrelevant to the present question. It was further maintained that the premises were used for a dual purpose, namely, the filtering of water and the pumping of water and that the pump house was therefore not solely used for some purpose other than the processes carried on in the factory within the meaning of s. 151 (6). The " processes carried on in the factory " cannot refer to any process whether it be a factory process or not. It must be a process which brings the premises within the definition of a factory under s. 151 (1). The meaning of this expression has been explained in *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.* (14) by COHEN, L.J. (15), where he construed the section, rightly, if I may say so with respect, as if it read: " for some purpose other than the processes for or incidental to the main purpose of the factory ". This follows from the words used in s. 151 (1). Now, the main purpose of the factory in the present case is the filtering of water. The sole question which then arises is whether the pumping of the water is incidental to that purpose. Such storage as is merely a necessary and a transitory incident of the manufacturing process may be a factory purpose (*Kaye* (*Dewsbury Revenue Officer*) v. *Burrows and Dewsbury Assessment Committee* (16) per VISCOUNT DUNEDIN). The storage there took place prior to, in the course of and after the manufacture of the goods. It was argued by analogy that the pumping of the water was a necessary incident to the filtering, but in my opinion this was a different and new process which was being carried on. It was not necessary to the filtering of

(13) [1960] 3 All E.R. at p. 671. (14) [1951] 1 All E.R. 682; [1951] 2 K.B. 537.
(15) [1951] 1 All E.R. at p. 686; [1951] 2 K.B. at p. 545.
(16) [1931] All E.R. Rep. at p. 260; [1931] A.C. at p. 485.

A water that it should be pumped. All that was necessary was that it should run away by gravity from the filters. The pumping was necessitated by the fact that the reservoir was situated at a higher level than the pumping station. The pumping, in my opinion, was part of the distribution of the water and not incidental to its filtering.

I have therefore reached the conclusion that the pump house is not a factory, B being excluded by the terms of s. 151 (6). This is sufficient for the disposal of the case and it is unnecessary to say anything about the question whether the machine was securely fenced under s. 13 of the Act of 1937. I would dismiss the appeal.

Appeal dismissed.

C Solicitors: *Darracotts* (for the appellant); *William Charles Crocker* (for the respondents).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

D

C. H. W. (HUDDERSFIELD), LTD. *v.* INLAND REVENUE COMMISSIONERS.

E

SPENCER *v.* INLAND REVENUE COMMISSIONERS.

GARSIDE *v.* INLAND REVENUE COMMISSIONERS.

[Chancery Division (Plowman, J.), July 20, 21, 25, 26, 1961.]

Surtax—Undistributed income—Direction and apportionment—Subsidiary company—Exemption—Company becoming subsidiary company towards end F *of accounting period—Apportionment on time basis—Shareholders ceasing to be members before end of accounting period—Dividend declared after previous decision not to declare dividend—Whether distribution within reasonable time after the accounting period—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 245, *s.* 256 (4).

Towards the end of January, 1957, the four shareholders of the taxpayer G company sold one-tenth of their shares to one company and nine-tenths to another company which was not a company to which s. 245 of the Income Tax Act, 1952 (relating to surtax directions) applied. On Jan. 31, 1957, the taxpayer company ceased to trade. Its accounts for the period Apr. 1, 1956, to Jan. 31, 1957, showed a net profit of £32,103. The taxpayer company did not declare an interim dividend and on Feb. 14, 1957, resolved H to pay no dividend on the company's ordinary shares for the period ending Jan. 31, 1957. The fixed dividend on the company's preference shares was paid. Following, however, receipt of a notice from the Special Commissioners of Income Tax requiring information which might lead to a surtax direction the company resolved on Dec. 13, 1957, to pay a dividend for the period amounting to £59,130 8s. 8d. gross or £34,000 net. On July 7, 1958, I the Special Commissioners made a surtax direction on the company under s. 245 of the Income Tax Act, 1952, and apportioned its actual income for the period (less the preference dividend) on a time basis, i.e., as to 303/306ths to the original four shareholders and as to 3/306ths to the two purchasing companies. It was conceded* that, if more than half the income in the relevant accounting period could be apportioned to the original shareholders,

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* The concession is stated at p. 555, letter C, post; see also p. 559, letter B, post, where the substance of the concession is approved.

then the taxpayer company would not be outside s. 245 by reason of the fact that it was a subsidiary company (according to the ordinary meaning of the word " subsidiary ") on or a little before Jan. 31, 1957. A

Held: the surtax direction and apportionment were correct in principle for the following reasons—

(i) income could be apportioned on a time basis to members of the taxpayer company according to the time during which they were members and to their interests as existing during that time, although at the end of the accounting period they were not members and then had no interest in the income of the company (see p. 558, letter B, and p. 558, letter I, to p. 559, letter A, post). B

Fendoch Investment Trust Co. v. *Inland Revenue Comrs.* ([1943] 2 All E.R. 413; *affd* H.L., [1945] 2 All E.R. 140) applied. C

(ii) the distribution made by the taxpayer company in December, 1957, was not made within a reasonable time after Jan. 31, 1957, for the purposes of s. 245, since the reasonable time terminated on Feb. 14, 1957, when the company resolved to declare no dividend on the ordinary shares (*Lionel Sutcliffe, Ltd.* v. *Inland Revenue Comrs.* (1928), 14 Tax Cas. 171, applied); alternatively, what was a reasonable time was a question of fact, which it was for the Special Commissioners to determine, and, as there was evidence on which they could find (as they had done) that the distribution was not within a reasonable time, the court would not interfere with their findings (see p. 559, letters C to G, post). D

Appeals dismissed.

[As to the power to make surtax directions and apportionments, see 20 HALSBURY'S LAWS (3rd Edn.) 551, para. 1073, and 558, para. 1085; and for cases on the subject, see 28 DIGEST (Repl.) 358, 359, *1580-1586*, 364-374, *1598-1632*. E

For the Income Tax Act, 1952, s. 245, s. 256 (4), see 31 HALSBURY'S STATUTES (2nd Edn.) 232, 245.]

Cases referred to:

F.P.H. Finance Trust, Ltd. v. *Inland Revenue Comrs.* (*No. 2*), [1945] 1 All E.R. 492; [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 28 Tax Cas. 209; 28 Digest (Repl.) 371, *1624*. F

Fendoch Investment Trust Co. v. *Inland Revenue Comrs.*, *Alporteno Investment Trust Co.* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 413; 169 L.T. 203; *affd.* H.L., [1945] 2 All E.R. 140; sub nom. *Alporteno Investment Trust Co.* v. *Inland Revenue Comrs.*, *Fendoch Investment Trust Co.* v. *Inland Revenue Comrs.*, 114 L.J.K.B. 291; 173 L.T. 35; 27 Tax Cas. 53; 28 Digest (Repl.) 371, *1625*. G

Sutcliffe (*Lionel*), *Ltd.* v. *Inland Revenue Comrs.*, (1928), 14 Tax Cas. 171; 28 Digest (Repl.) 364, *1598*.

Cases Stated. H

The taxpayer company appealed to the Special Commissioners of Income Tax against a surtax direction and an apportionment of the income of the company made under s. 245 and s. 248 of the Income Tax Act, 1952, in respect of the period from Apr. 1, 1956, to Jan. 31, 1957, on the following grounds: (i) at the date to which the company's accounts were made up ninety per cent. of its issued share capital was held by a company to which s. 245 did not apply. The taxpayer company was therefore a subsidiary company within the meaning of s. 256 (4) and was exempted from the provisions of s. 245 by s. 256 (1); (ii) alternatively, the whole income of the taxpayer company for the period was distributed within a reasonable time. Two individual taxpayers (Mr. H. H. Spencer and Mr. G. Garside) also appealed against assessments to surtax made on them for the year 1956-57 in consequence of the direction and apportionment. The three appeals by Cases Stated were heard together. The Crown contended: (i) that by virtue of the proviso to s. 256 (4) and s. 256 (2) (c) (i) of the Income I

A Tax Act, 1952, the taxpayer company was not a subsidiary company within the meaning of s. 256 and was a company to which s. 245 applied; and (ii) that the taxpayer company had not within a reasonable time after the end of the accounting period distributed to its members a reasonable part of its actual income from all sources for the purposes of s. 245. The Special Commissioners held that the direction was competent, and that the distribution made by the B taxpayer company was not made within a reasonable time after the end of the relevant accounting period. They therefore dismissed the appeals. The taxpayers appealed by way of Cases Stated to the High Court.

Hubert H. Monroe, Q.C., and *M. P. Nolan* for the taxpayers.
Heyworth Talbot, Q.C., E. Blanshard Stamp and *A. S. Orr* for the Crown.

C **PLOWMAN, J.:** I will give judgment first in the case of *C.H.W. (Huddersfield), Ltd.* v. *Inland Revenue Comrs.* This appeal arises out of a surtax direction and apportionment made under s. 245 of the Income Tax Act, 1952, in respect of the period Apr. 1, 1956, to Jan. 31, 1957. The questions with which I am concerned are these: (i) Was the taxpayer company at the relevant time a company to which s. 245 applied? The Crown says "yes"; the taxpayer D company says "no", on the ground that it was a subsidiary of another company called Anglo-French Trust, Ltd., the purchasing company. (ii) If the Crown is right on question (i), was a distribution made by the taxpayer company in December, 1957, made within a reasonable time after Jan. 31, 1957, which was the end of the period for which the company's accounts were made up? (iii) If the answer to question (ii) is "no", was the apportionment made by the Special E Commissioners correct in principle? As will appear later, the first and third questions are very much bound up together.

On Apr. 1, 1956, which is the opening date of the relevant accounting period, the taxpayer company, which carried on business as wool merchants, had an issued share capital of £50,000 divided into preference and ordinary shares, the whole of which was held by four individual shareholders, the original share-F holders. In the latter part of January, 1957—i.e., towards the very end of the accounting period—a number of transactions took place, as a result of which, (i) two new companies took over all the trading assets of the taxpayer company; (ii) the only assets left in the taxpayer company were two sums of cash—namely, a sum of £25,000 and a sum of £279,500; (iii) the original shareholders ceased to hold any shares in the taxpayer company, their former shareholding being G represented by £60,000 worth of shares in the two new companies and £219,500 worth of bills of exchange given by those companies; (iv) the whole of the issued capital of the taxpayer company, which then consisted of a further £750 as well as the £50,000 I have already mentioned, was held as to nine-tenths by the purchasing company and as to one-tenth by a company called Standard Industrial Trust, Ltd. Thus the taxpayer company became a subsidiary in the H ordinary sense of the word of the purchasing company, a company which was not at any material time a surtax company—i.e., one to which s. 245 applied.

On Jan. 31, 1957, the taxpayer company ceased to trade, and within a very short time after that date its accounts were made up for the period Apr. 1, 1956, to Jan. 31, 1957, and for that period showed a net profit of £32,103. Those accounts were adopted by the taxpayer company in general meeting on Feb. 14, I 1957, and the company then resolved, first to confirm the payment which had been made of the dividend on the company's six per cent. redeemable preference shares; and, secondly, to pay no further dividend on the company's shares for the period ended Jan. 31, 1957.

On Aug. 27, 1957, the Special Commissioners issued a notice under s. 250 (1) of the Income Tax Act, 1952, in respect of the period Apr. 1, 1956, to Jan. 31, 1957, i.e., a notice requiring information which might lead to a surtax direction. On Dec. 13, 1957, an extraordinary general meeting of the taxpayer company was held at which it was resolved to pay a dividend on the company's ordinary

shares for the period ended Jan. 31, 1957, amounting to £59,130 8s. 8d. gross, or £34,000 net. A

On July 7, 1958, the Special Commissioners made a direction under s. 245, and apportioned the taxpayer company's actual income for the period Apr. 1, 1956, to Jan. 31, 1957, on a time basis. The position was that, during 303 of the 306 days of that period the ordinary shares of the company had been held by the original shareholders and during the remaining three days they had been held by the purchasing company and Standard Industrial Trust, Ltd. Accordingly, the balance of the taxpayer company's actual income after apportioning £1,000 to the redeemable preference shares, on which a dividend was paid, was apportioned as to 303/306ths to the original shareholders and as to 3/306ths to the two purchasing companies. The sums so apportioned were £54,282 and £537 respectively. I have to decide whether that sum of £54,282, which was not in fact received by the original shareholders, is nevertheless to be treated as their income for surtax purposes. That is one of the questions which arises on these appeals. B C

The matter turns on certain provisions in the Income Tax Act, 1952. Section 245 provides:

> "With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members." D E F

Then, s. 248 (1) provides:

> "Where a direction has been given under s. 245 of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members." G

Section 256 deals with the question of what companies are within s. 245. The relevant provisions are as follows:

> "(1) Section 245 of this Act shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested. H
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> "(2) For the purposes of this section, a company shall be deemed to be under the control of not more than five persons . . . (c) if—(i) on the assumption that the company is a company to which the said s. 245 applies . . . more than half the income of the company (including any income which has been apportioned to it, or could on either of those assumptions be apportioned to it, for the purposes of this Chapter) could be apportioned for those purposes among not more than five persons. In ascertaining under para. (c) of this subsection whether or not income could be apportioned among not more than five persons, account shall, in cases where an original apportionment and any sub-apportionment are involved, be taken only of persons to whom income could be finally apportioned as the result of the whole process of original apportionment and sub-apportionment. I
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> "(4) For the purposes of this section, a company shall be deemed to be a

A subsidiary company if by reason of the beneficial ownership of shares therein the control of the company is in the hands of a company not being a company to which s. 245 of this Act applies, or of two or more companies none of which is a company to which the said s. 245 applies: Provided that, notwithstanding anything in this subsection, a company which is deemed for the purposes of this section to be under the control of not B more than five persons shall not be deemed to be a subsidiary company unless it can be deemed to be under the control of not more than five persons only by including among the persons mentioned in para. (a), para. (b) or para. (c) of sub-s. (2) of this section a company to which the said s. 245 does not apply and which is not the nominee of any other person."

C Obviously s. 256 is an extremely involved section, but this much, I think, is common ground: that, if, in apportioning the income of a company under s. 248 (1) in accordance with the respective interests of the members, it would be open to the Special Commissioners to apportion more than half the income of the company to the original shareholders, as would be the case if it was open to them to apportion on a time basis, then the taxpayer company is not a subsidiary of the purchasing company and is a company to which s. 245 D applies. Counsel for the taxpayer company concedes that, in a case in which a direction and apportionment can properly be made, the interests of persons who were members during the relevant accounting period but who had ceased to be members before the end of that period fall to be taken into account. But he submits that an apportionment in accordance with their respective interests, as applied to the facts of the present case, where no interim dividend E was paid, means, in effect, a nil apportionment. The reason for this, as I understand it, is that, since an apportionment cannot be made before the end of the relevant period, one has to look to that point of time and no other to see who is really interested in the fund of income which comes into being at that date; and in the present case the original shareholders had no interest at all on Jan. 31, 1957.

F The reason why counsel for the taxpayer company is bound to make the concession to which I have referred is the decision of the House of Lords in *Fendoch Investment Trust Co.* v. *Inland Revenue Comrs., Alporteno Investment Trust Co.* v. *Inland Revenue Comrs.* (1). That was a case concerned with an investment company, and investment companies are subject to the special provisions contained in s. 257 to s. 264 of the Income Tax Act, 1952; but, in G my judgment, on this point those special provisions do not affect the matter. The facts of that case, in a simplified form, and so far as relevant to the present case, were that on Apr. 5, 1939, a Mrs. Murray held all the A and B shares in the appellant company—which, as I have said, was an investment company—while the trustees of a settlement held the C shares. The rights attached to the shares which Mrs. Murray held at that date were such as to enable her to H allocate the whole of the income of the company to her own shares. That position continued until Dec. 8, 1939, when the capital was reconstructed in such a way that from then until the end of the financial year all the shares became shares of the same class, of which Mrs. Murray held 15,000 and the trustees of the settlement 42,920. The whole of the income of the company for the year 1939-40 was apportioned to Mrs. Murray under s. 15 of the Finance Act, 1939, now s. 260 I of the Income Tax Act, 1952.

On appeal by the company it was argued, among other things, that, in considering for the purposes of s. 15 whether any person was able to secure that assets or income of the company would be applied for his benefit, regard must be had to the position as it existed on the last day of the relevant year of assessment, and that on Apr. 5, 1940, Mrs. Murray was not able to secure that assets or income of the company would be applied for her benefit. The Court of Appeal

(1) [1943] 2 All E.R. 413; *affd.* H.L., [1945] 2 All E.R. 140; 27 Tax Cas. 53.

and the House of Lords, however, decided that the Special Commissioners could make an apportionment against a person who at any time during the relevant year of assessment was able to secure that assets or income of the company would be applied for his benefit.

LORD SIMONDS, in dealing with the point that I am now considering, said this (2):

> "I turn however to the matters principally relied on by the company. It was contended—and this is, of course, fundamental to the argument—that under the principal Act an apportionment could only be made against a person who was a member (as defined by s. 21 (7)) on the last day of the accounting period. Section 21 (1) of the principal Act [now s. 245 of the Act of 1952] provides that the commissioners may direct that: '. . . for purposes of assessment to super tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members . . .' and para. 8 of Sch. 1 [which is now s. 248 (1)] to the Act provides that: '. . . the apportionment . . . shall be made . . . in accordance with the respective interests of the members . . .' I find nothing in these words which supports the appellants' contention or would restrict the meaning of members to persons who were members during the whole period or the last or any other day of it. The language of the section is clearly apt to include any person who was a member at any time during the period in question. But here again the appellants rely on some limiting context. It is said that it is as at the end of the period that it must be ascertained whether there has been a reasonable distribution."

Then, after referring to certain arguments which I need not read, LORD SIMONDS continued (3):

> "But it appears to me that the argument breaks down at an earlier stage. I do not find in the provisions to which reference has been made any sufficient justification for thus limiting the meaning of members. On the other hand I think that there are numerous indications which suggest that no such limitation can have been intended. Under para. 4 of Sch. 1 to the principal Act [now s. 250 of the Act of 1952] the commissioners may require any company to which s. 21 applies to furnish a statement of the names and addresses and particulars of the respective interests of all members of the company for the period for which the company's accounts are made up. This must mean all persons who have at any time during the period been members. It is not obvious for what purpose the commissioners require such particulars unless the persons concerned are possible objects of apportionment. Again, under the Finance Act, 1936, s. 20 (4), the definition of member is extended so as to include a 'loan creditor'. The object of this extension might be largely defeated if only those loan creditors could be regarded as members whose loans have not been repaid at the end of the fiscal year."

LORD SIMONDS then referred to s. 32 of the Finance Act, 1927, and continued (3):

> "Numerous other provisions and illustrations were in the course of the argument brought to your Lordships' notice in support of the respondents' submission that the members against whom an apportionment can be made include all persons who have been members at any time during the period under review. I do not think it necessary further to examine them. I have already expressed my view that this submission accords with the natural meaning of the language of the principal operative section. It is

(2) [1945] 2 All E.R. at p. 144; 27 Tax Cas. at p. 68.
(3) [1945] 2 All E.R. at p. 145; 27 Tax Cas. at p. 69.

A sufficient to add that the context does not oppose but rather supports this construction."

Counsel for the taxpayer company points out, however, what is no doubt the fact: that the question of quantum of apportionment which arose in that case is different from the question of quantum of apportionment which arises in this. The question there depended on the special provisions relating to investment companies, as appears from the last part of LORD SIMONDS' speech. He said this (4):

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> "There remains the question of quantum. This can be disposed of very shortly. The power of the commissioners is to apportion to the member (or person who is treated as a member) such part of the income 'of the company as appears to them to be appropriate'. It has in this case appeared to the commissioners to be appropriate to apportion the whole of the income to Mrs. Murray. I see no ground upon which it can be said that they have improperly exercised their statutory discretion."

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Here, the question is one not of what appears appropriate to the commissioners but of what are the respective interests of the members, including the original shareholders.

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Now at this point I should refer to the judgment of the Court of Appeal in the *Fendoch* case (5), and also to one further passage in LORD SIMONDS' speech. In the Court of Appeal, SCOTT, L.J., who delivered the judgment of the court, after pointing out that the words, "the amount thereof shall be apportioned among the members", in what is now s. 245, were very wide words, and that the paragraph which is now s. 248 (1) required the apportionment to be made in accordance with the respective interests of the members, and not the members on the register at the expiration of the period, continued as follows (6):

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> "We fail to see any reason for the view that members could escape by selling their shares before the end of the year. As counsel for the Crown said, it would have been so easy for Parliament to say that the liability was to be on 'members on the last day of the year' if that had been, or could have been its intention."

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Then a little later on he says this (7):

> "The Finance Act, 1927, s. 31 (2) [now s. 249 (1) of the Act of 1952] expressly authorised deduction from the newly added surtax charge of the amount, if any, already distributed to the member and, therefore, already ex hypothesi, included in his surtax return. It is incredible that Parliament, when making that addition to the language there used, should have thought it was only necessary to protect members on the register on the last day of the year."

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LORD SIMONDS said this (8):

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> "It is in regard to the second year of assessment that the validity of the apportionment is still challenged. Your Lordships will remember that it was in the course of this year that the last recorded change in the financial constitution of the company took place. On Dec. 8, 1939, Mrs. Murray surrendered her control of the company in the manner that I have already stated and thereafter and particularly on the last day of the fiscal year, Apr. 5, 1940, she was a minority shareholder in a company, all of whose shares carried equal voting and other rights. It is on this fact and this fact alone that the Fendoch company relies, contending that the facts which enable the commissioners to make an apportionment must exist on

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(4) [1945] 2 All E.R. at p. 145; 27 Tax Cas. at p. 69.
(5) [1943] 2 All E.R. 413; 27 Tax Cas. 53.
(6) [1943] 2 All E.R. at p. 414; 27 Tax Cas. at p. 63.
(7) [1943] 2 All E.R. at p. 415; 27 Tax Cas. at p. 63.
(8) [1945] 2 All E.R. at p. 143; 27 Tax Cas. at p. 67.

the last day of the year of assessment and that in the present case they did not exist on Apr. 5, 1940." A

A little later he went on with the passage to which I have already referred.

Now when one bears in mind that Mrs. Murray was in fact a member throughout the whole of the year April, 1939, to April, 1940, with a controlling interest until December, 1939, and a minority interest thereafter, it is in my judgment implicit in the passages that I have read, first, that an apportionment can be made to any persons who were members during any part of the relevant year; and, secondly, that such an apportionment can be made by reference to their interests as they existed, not at the end of the year, but at the time when they were members. If this is not right, the observations which I have read appear to be largely pointless. B

Counsel for the taxpayer company says, in effect: "I accept that it may be implicit in the *Fendoch* case (9) that an apportionment can be made to anyone who was a member during any part of the relevant year, and that such an apportionment can be made by reference to his interest, but one has got to judge what that interest was only after the event, and if it turns out, for example, that he received no interim dividend and parted with his shares before the end of the year, the interest which he in fact had held was nil". In my judgment, this argument is contrary to the reasoning in the *Fendoch* case (9), and places far too narrow a construction on sections which have to be construed broadly. C D

In *F.P.H. Finance Trust, Ltd.* v. *Inland Revenue Comrs.* (*No. 2*) (10) LORD RUSSELL OF KILLOWEN said this (11):

> "My Lords, in my opinion the contention of the company places far too narrow a construction upon the wide and comprehensive words which the legislature has used, and I can find no language in s. 21 [now s. 245 of the Act of 1952] to justify such a construction, but much to justify a broader interpretation. The foundation of the power given by the section to the commissioners is the fact that the company, for an unreasonable time after the end of the period for which accounts have been made up, has refrained wholly, or in unreasonable measure, from declaring dividends in general meeting, and thus distributing its profits among the persons entitled, according to their rights in dividends so declared. Nothing would have been easier than to provide that the income should be apportioned among the same persons, and in the same manner, as if the income in question had been so distributed by way of dividend. The section, however, does not do this. It first enacts that the income in question is to be treated as if, instead of being the company's income, it were the income of the members. No notional declaration of dividend is envisaged at all. The income (which is now envisaged not as company's income at all, but as income of the members) then has to be apportioned in accordance with the respective interests of the members. What justification can there be for restricting the interests which the commissioners may take into consideration, to rights in declared dividends, when no declaration of dividend, notional or otherwise, is contemplated by the section? I can find none. I can conceive many cases in which they might well so act, but I cannot assent to the view that they are compelled so to act in all cases."

E F G H

I refer to that, as I have said, in order to show that s. 245 has to be given a wide rather than a narrow construction. I

In my judgment, the reasoning of the Court of Appeal and the House of Lords in the *Fendoch* case (12) leads to the conclusion that the apportionment which the Special Commissioners made here was one which they were justified

(9) [1945] 2 All E.R. 140; 27 Tax Cas. 53.
(10) [1945] 1 All E.R. 492; 28 Tax Cas. 209.
(11) [1945] 1 All E.R. at p. 497; 28 Tax Cas. at p. 245.
(12) [1943] 2 All E.R. 413; [1945] 2 All E.R. 140; 27 Tax Cas. 53.

A in making; for, in a case where a member owns all the shares in a company and sells them all during an accounting period, the obvious way, if not, indeed, the only possible way, to give effect to apportionment in accordance with the rights of the members, in my judgment, is on a time basis, as the Special Commissioners did here.

In my judgment, this provides the answer to the first and third questions B which I mentioned at the beginning. I conclude that the taxpayer company was not a subsidiary (13) of the purchasing company on Jan. 31, 1957, and that the apportionment made by the Special Commissioners was correct in principle. I leave open the question raised by counsel for the Crown, whether it would be sufficient for his purposes to establish that the taxpayer company was not a subsidiary at any time during the period ending on Jan. 31, 1957, even if it was C a subsidiary on that date.

The only other point with which I am concerned is the question whether the distribution made by the taxpayer company in December, 1957, was made within a reasonable time after Jan. 31, 1957. Assuming, as I do, that a reasonable time was still running on Feb. 14, 1957, when the taxpayer company, in general meeting, passed the resolution to pay no further dividend for the period ending D on Jan. 31, 1957, I am of opinion that the passing of that resolution terminated that reasonable time. In my judgment, the case is analogous to *Lionel Sutcliffe, Ltd.* v. *Inland Revenue Comrs.* (14) where ROWLATT, J., held that a resolution passed by a company for voluntary liquidation terminated a reasonable time. He said (15):

> "The company has said and said in the plainest possible terms: 'We E are not going to distribute; we shall wind-up without distributing', and it seems to me that that terminates the running of the reasonable time. 'Reasonable time' is only mentioned in order that eternity shall not come upon the scene where a company does nothing. But when they come to a determination and say they are not going to distribute, it seems to me that a reasonable time has elapsed for this purpose and the reasonable time F has determined."

If, however, that is wrong and the question is a question of fact, it was, in my judgment, pre-eminently one for the Special Commissioners; and since, in my judgment, there was ample evidence on which they could find that the distribution made by the taxpayer company in December, 1957, was not made within G a reasonable time after Jan. 31, 1957, I am not prepared to interfere with that finding.

The other two appeals with which I am concerned, *Spencer* v. *Inland Revenue Comrs.* and *Garside* v. *Inland Revenue Comrs.*, are appeals by the original individual shareholders against the assessments to surtax made in consequence of the direction and apportionment made on the taxpayer company. Since I H have decided against the company on its appeal, it is common ground that these appeals must also be dismissed.

Appeals dismissed.

Solicitors: *Malkin, Cullis & Sumption* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(13) I.e., a subsidiary for the purposes of being outside s. 245 of the Income Tax Act, 1952; the taxpayer company was a subsidiary of the purchasing company on Jan. 31, 1957, in the ordinary sense of the word "subsidiary" (see p. 553, letter H, ante).

(14) 14 Tax Cas. 171. (15) 14 Tax Cas. at p. 187.

ST. MARYLEBONE PROPERTY CO., LTD. *v.* FAIRWEATHER AND ANOTHER.

A

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), July 21, 24, 25, 26, 28, 1961.]

Limitation of Action—Land—Leasehold—Possessory title acquired against lessee—Surrender of lease—Whether freeholder entitled to possession—Registered land—Limitation Act, 1939 (2 *&* 3 *Geo.* 6 *c.* 21), *s.* 16—*Land Registration Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 21), *s.* 75 (1).

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Numbers 311 and 315, West End Lane were adjoining dwelling-houses with gardens, and were in the possession of the freeholder who owned them both. The freeholder built a shed which was three-quarters on the land of No. 315 and one-quarter, including the entrance, on the land of No. 311. In 1894 the two properties were leased to separate lessees each for terms of ninety-nine years, expiring on Sept. 29, 1992. In 1920, M., then being sub-lessee of No. 311, repaired and used the shed. In 1929 M. bought the head lease of No. 311, and he continued to occupy the shed, adversely to No. 315, until 1951. In 1951, M. leased No. 311 to P. for twenty-one years (and by implication the lease included the shed as occupied by M.). In 1958 M. bought the freehold of No. 311. In 1959, the plaintiffs, as freeholders of No. 315, objected to the use of the shed by P., and M. acknowledged to them that he had no claim or rights in respect of the three-quarters of the shed built on the land of No. 315. P. maintained his right to use the shed, and the plaintiffs removed the roof tiles from the three-quarters of the shed on No. 315. In 1960, P. assigned his lease to F., who claimed to have the right to use the shed against the plaintiffs. The plaintiffs had purchased the freehold of No. 315 in 1959 and shortly afterwards the residue of the term of ninety-nine years affecting No. 315 was surrendered to them. The plaintiffs had been in possession of No. 315 as freeholders since that surrender. It was accepted that the former leaseholder of No. 315 was debarred from ejecting M. or his successors in title by reason of the Limitation Act, 1939, s. 16, and that at the end of the full term of the former lease of No. 315 (viz., Sept. 29, 1992) the freeholder could eject F. It was, however, maintained by F. that until the end of such term, the freeholder of No. 315 could not eject him from possession of the shed.

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Held: (i) (WILLMER, L.J., dissenting) the possessory title acquired by M. in 1932, which arose solely from his adverse possession for twelve years, extinguished the title of the leaseholder of No. 315 to the three-quarters of the shed, but did not transfer it to M. nor affect the right of the reversioners' of No. 315 to possession as freeholders, which right, by reason of the existence of the lease, was deferred until the expiration or determination of the lease; on the surrender of the lease of No. 315 to the plaintiffs in 1959 the lease ceased to defer their right to possession as freeholders, and they were accordingly entitled to recover possession.

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Walter v. *Yalden* ([1902] 2 K.B. 304) overruled.

Tichborne v. *Weir* ((1892), 67 L.T. 735) applied.

Taylor v. *Twinberrow* ([1930] All E.R. Rep. 342) considered.

(ii) M.'s acknowledgment to the plaintiffs could not by estoppel divest the first defendant of any proprietary right that M. had previously granted to P. (see p. 563, letter G, p. 575, letter G, and p. 579, letter E, post).

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QUAERE whether, if the leasehold title to No. 315 had been registered before the limitation period expired, s. 75 (1) of the Land Registration Act, 1925, would, by continuing in equity the residue of the leasehold term in the three-quarters of the shed for the benefit of M. and his successors in title, have enabled F. successfully to resist the plaintiffs' claim to possession (see p. 569, letters A and B, p. 575, letter B, and p. 579, letter E, post).

Appeal allowed.

A [As to rights against trespasser of persons entitled to reversion on termination of a lease, see 24 HALSBURY'S LAWS (3rd Edn.) 241, para. 451; and for cases on the subject, see 32 DIGEST 447, 448, *1157-1165*.

For the Limitation Act, 1939, s. 16, see 13 HALSBURY'S STATUTES (2nd Edn.) 1175.

For the Land Registration Act, 1925, s. 75, see 20 HALSBURY'S STATUTES B (2nd Edn.) 1008.]

Cases referred to:

Asher v. *Whitlock*, (1865), L.R. 1 Q.B. 1; 35 L.J.Q.B. 17; 13 L.T. 254; 30 J.P. 6; 32 Digest 488, *1498*.

Atkinson and Horsell's Contract, Re, [1912] 2 Ch. 1; 81 L.J.Ch. 588; 106 L.T. 548; 32 Digest 487, *1494*.

C *East Stonehouse Urban Council* v. *Willoughby Brothers*, [1902] 2 K.B. 318; 71 L.J.K.B. 873; 87 L.T. 366; 32 Digest 448, *1163*.

Ecclesiastical Comrs. for England v. *Treemer*, [1893] 1 Ch. 166; 62 L.J.Ch. 119; 68 L.T. 11; 32 Digest 448, *1162*.

Ecclesiastical Comrs. of England and Wales v. *Rowe*, (1880), 5 App. Cas. 736; 49 L.J.Q.B. 771; 43 L.T. 353; 45 J.P. 36; 32 Digest 483, *1457*.

D *Leach* v. *Jay*, (1878), 9 Ch.D. 42; 47 L.J.Ch. 876; 39 L.T. 242; 17 Digest (Repl.) 280, *879*.

Perry v. *Clissold*, [1907] A.C. 73; 76 L.J.P.C. 19; 95 L.T. 890; 38 Digest (Repl.) 929, *1198*.

Pleasant (*Lessee of Hayton*) v. *Benson*, (1811), 14 East, 234; 104 E.R. 590; 31 Digest (Repl.) 502, *6276*.

E *Rankin* v. *McMurtry*, (1889), 24 L.R.Ir. 290.

Taylor v. *Twinberrow*, [1930] All E.R. Rep. 342; [1930] 2 K.B. 16; 99 L.J.K.B. 313; 142 L.T. 648; Digest Supp.

Tichborne v. *Weir*, (1892), 67 L.T. 735; 31 Digest (Repl.) 447, *5745*.

Walter v. *Yalden*, [1902] 2 K.B. 304; 71 L.J.K.B. 693; 87 L.T. 97; 31 Digest (Repl.) 585, *7054*.

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Appeal.

This was an appeal by the plaintiffs, St. Marylebone Property Co., Ltd., from an order of His Honour JUDGE MAIS made at St. Marylebone County Court on Feb. 14, 1961, dismissing the plaintiffs' claim against the defendants, Alastair Fairweather and E. F. Millwood, and making a declaration on the counterclaim G in favour of the first defendant. The plaintiffs by their particulars of claim, delivered on Aug. 15, 1960, pleaded, so far as is material to this report, as follows —(para. 1) that they were owners of 315, West End Lane, Hampstead, London, and that at the rear of the land stood a part of a shed (being approximately three-quarters of the whole of the shed), of which part the plaintiffs were the owners and entitled to immediate possession; (para. 3) that the first defendant H wrongfully occupied the part of the shed situate on the plaintiffs' land and continued to trespass thereupon; and the plaintiffs claimed possession of the three-quarters of the shed and damages limited to £100. The first defendant, who under an assignment dated Aug. 3, 1960, was assignee of a lease, dated Sept. 17, 1951, whereby No. 311, West End Lane, which adjoined No. 315, was demised for a term of twenty-one years, by his defence and counterclaim admitted I that the shed stood at the rear of Nos. 315 and 311, alleged that the only access to the shed was by a door on land forming part of No. 311, and pleaded—(para. 3) that from the year 1920 or thereabouts the whole of the shed had been in the undisputed possession of the second defendant and his successors in title and occupied by him and them for the purposes of an upholstery business carried on by him and them in the ground floor shop and premises of No. 311, and that the shed had at all material times since 1920 been occupied and enjoyed by the second defendant and his successors in title with the ground floor shop and was included in the lease and assignment previously referred to; (para. 4) that at the

date of the second defendant's entry into possession of the shed in or about 1920 the house No. 315, West End Lane and the yard at the rear thereof were in the possession of a tenant under a lease made by the plaintiffs' predecessors in title, owners of the fee simple in respect of the said No. 315, West End Lane, granting a legal term of years expiring on Sept. 29, 1992, and the said premises remained in such possession until in or about the month of December, 1959, the said term of years was surrendered to the plaintiffs; (para. 5) that the plaintiffs' claim to possession of the shed was and would at all times until Sept. 29, 1992, be barred by s. 4 of the Limitation Act, 1939; and (para. 6) that the first defendant was in occupation of the shed under and by virtue of the assignment and lease previously referred to, but he denied that his said occupation was in any way wrongful. By way of counterclaim the first defendant repeated paras. 1 and 6 of the defence and, after pleading an alleged trespass by stripping tiles from the roof of the shed, claimed a declaration that the shed formed part of the premises demised by the lease dated Sept. 17, 1951, an injunction and damages. The plaintiffs by their reply and defence to the first defendant's counterclaim pleaded (by para. 3) that by letters dated Dec. 7, Dec. 11, Dec. 16 and Dec. 21, 1959, and Feb. 2, Feb. 8 and Feb. 12, 1960, the second defendant (through whom the first defendant claimed) acknowledged and represented to the plaintiffs that he, the second defendant, enjoyed no right or title and asserted no claim whatsoever to the portion of the shed lying immediately behind the plaintiffs' premises; (by para. 4) that if, as was denied, the second defendant acquired any title to that portion of the shed by continuous possession, the title was restored to or revived in the plaintiffs by the acknowledgment; and (by para. 5) that alternatively the first defendant was estopped by the representation in the said letters (being privy thereto) from denying the plaintiffs' right to possession of the portion of the shed. The county court judge made the declaration prayed for in the counterclaim but refused to grant an injunction or to award damages. The plaintiffs appealed against the dismissal of their claims against the first defendant.

A. L. J. Lincoln and *P. S. C. Lewis* for the plaintiffs.

Robert S. Lazarus, Q.C., and *N. Micklem* for the first defendant.

Cur. adv. vult.

July 28. The following judgments were read.

HOLROYD PEARCE, L.J.: The plaintiffs appeal from so much of the learned judge's order as dismissed their claim against the defendant Fairweather for possession of three-quarters of a shed on the plaintiffs' land, and made a declaration that the defendant Fairweather was entitled to occupy it. There were other issues in the case, some involving the second defendant, but this appeal does not raise those issues, and the second defendant is not concerned in it.

The relevant facts are these. Numbers 311 and 315, West End Lane, Hampstead, are adjoining houses with back gardens. They were originally held by one freeholder, who built a shed in the back gardens. Unfortunately three-quarters of that shed was built on the garden of No. 315, and the remaining quarter (which contains the entrance to the shed) was built on the garden of No. 311. In 1894 the two properties were leased to separate lessees for ninety-nine years. The subsequent history of No. 311 was as follows. In 1919 Millwood was a sub-lessee carrying on the business of an upholsterer. In 1920 he repaired, fitted up and used the shed whose entrance was on his land. In 1929 he bought the head lease. He occupied the shed without interruption until 1951. It is conceded that that occupation was adverse to the occupiers of No. 315, and that it was sufficient to give him, as against them, what is called by the convenient, if misleading, name of a squatter's title. In 1951 Millwood sold the business and let the premises of No. 311 to Pliszka under lease for a period of twenty-one years from Sept. 29, 1951. The judge rightly decided that by

A virtue of s. 62 of the Law of Property Act, 1925, this lease included by implication the use of the shed which Millwood was enjoying at the time of the demise. In 1958 Millwood bought the freehold of No. 311. In 1959 the plaintiffs, as freeholders of No. 315, objected to the use of the shed by Pliszka. Millwood, in order to avoid trouble, acknowledged to the plaintiffs that he had no claim or rights over the three-quarters of the shed built on the garden of No. 315. Millwood's lessee, however, maintained his right to use the shed, and continued to do so. The plaintiffs then removed the tiles from the three-quarters of the shed, on No. 315. This spirited demonstration, though relevant to the issues in the court below, has no relevance on this appeal save in so far as it is used as a foundation for an argument based on estoppel to the effect that the plaintiffs, on the faith of Millwood's disclaimer, altered their position for the worse. In 1960 the defendant Fairweather bought the business from Pliszka and took an assignment of his twenty-one year lease. He thus acquired a right to use the shed. He contends that he has such a right as against the plaintiffs although they have recently become the freeholders in possession of No. 315. The learned judge accepted this contention.

The plaintiffs' title to No. 315 arose as follows. In 1959 they bought the freehold subject to the ninety-nine year lease. A few months later the lease was surrendered to them. Thus the lease was merged in the freehold and the plaintiffs became the owners of the fee simple in possession.

It is agreed that s. 16 of the Limitation Act, 1939, barred the former leaseholder of No. 315 from ejecting Millwood or his successors. It is also agreed that the freeholders of No. 315 have not as such been affected by the statutory rights of Millwood and his successors, and that at the end of the full term of the lease, namely, in 1992, the plaintiffs can eject the defendant. It is contended, however, by the defendant that a surrender of the lease cannot deprive him of his rights acquired during it, and that the plaintiffs have no right to eject him until the lease would have terminated by effluxion of time. The defendant's authority for this proposition is *Walter* v. *Yalden* (1) decided in the Divisional Court. The learned judge in the present case correctly concluded that he was bound by the decision and reasoning of that case, and accordingly dismissed the plaintiffs' claim for possession. The plaintiffs here contend that *Walter* v. *Yalden* (1) was wrongly decided. They argue that their right as freeholders to eject the defendant arose on the surrender of the lease, which thereby merged in their estate in fee simple. In the alternative they contend that Millwood's disclaimer of any right of ownership (albeit made after he had passed his rights to his tenant) was binding on the tenant as his privy, and having been acted on by the plaintiffs to their detriment created an estoppel which prevents the defendant from now asserting any right to the three-quarters of the shed on the plaintiffs' land. I cannot accept the alternative argument. Millwood cannot by estoppel in a matter between him and the plaintiffs divest the defendant (who was not a party to that matter) of proprietary vested rights granted by Millwood. The main argument, however, has considerable force. The case has been ably and clearly argued before us on both sides.

Walter v. *Yalden* (1) decided that where a trespasser on land let on lease had acquired a title under the Statutes of Limitation, and the lessee subsequently surrendered the lease to the lessor, the lessor had no right of re-entry, and the period of limitation did not begin to run, until the expiration of the term for which the lease was granted. The Divisional Court arrived at that conclusion on the following grounds. LORD ALVERSTONE, C.J., said (2) that the lessees against whom the person in possession has

> " acquired the right to possession of the property . . . could not by assignment or underlease deprive him of that right; and it seems to me to follow, not necessarily that the person who is in possession becomes liable on the

(1) [1902] 2 K.B. 304. (2) [1902] 2 K.B. at p. 309.

covenants of the lease, or is to be treated as being in the position of the lessee, but that the surrender cannot operate so as to deprive him of the title he has got against the persons against whom he is entitled to claim possession."

Otherwise, he points out, the lessee would defeat the operation of that possession in his own favour by some transaction to which the person who had been in possession for the statutory period was not a party. The learned lord chief justice appears to have placed reliance on a passage in DARBY AND BOSANQUET'S STATUTES OF LIMITATION (2nd Edn.) at p. 494, citing an Irish case of *Rankin* v. *McMurtry* (3) to the effect that the title gained under the statute by possession is commensurate with the interest which the rightful owners have lost, and must, therefore, have the same legal character. DARLING, J., agreed. CHANNELL, J., who considered the point difficult, said that the lessee could give title to his lessor by a surrender only to the same extent that he could give it by assignment. He said (4):

"... he has no power to effect by surrender anything that he could not do by assignment to a third person ... he could not have assigned a right of entry to anybody else, and no more could he assign it to his lessor."

The decision of the Court of Appeal in *Tichborne* v. *Weir* (5) was apparently not cited to the court. It is argued by the plaintiffs that had it been cited, the Divisional Court must have come to a different conclusion. In *Tichborne* v. *Weir* (5) the tenant of a long lease from the plaintiff's predecessor borrowed on it under an equitable mortgage. The mortgagee entered into possession of the property and paid rent under the lease for many years. Thereby he obtained a statutory right under the Real Property Limitation Acts as against the tenant. He later assigned his estate and interest in the lease to the defendant. The plaintiff sought to enforce against the defendant the covenants contained in the lease. It was held that the right and title of the tenant under the lease was not transferred by the statutes, and that the defendant was not liable on the covenants. That case disposed of "the parliamentary conveyance heresy" founded on earlier dicta. LORD ESHER, M.R., said (6):

"All these reasons show that the effect of the statute is not that the right of one person is conveyed to another, but that the right is extinguished and destroyed."

BOWEN, L.J., said (6): "I think that the statute makes no transfer of any kind". He referred with approval to the statement in DART'S VENDORS AND PURCHASERS (6th Edn.), vol. 1, p. 463, to the effect that

"If the statute operated as a sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to the subsisting charges ... but this is clearly not the operation of the statute."

He also approved (6) a statement in HAYES ON CONVEYANCING, p. 269:

"We must not, however, confound the negative effect of the statute with the positive effect of a conveyance."

In *Taylor* v. *Twinberrow* (7) *Walter* v. *Yalden* (8) was discussed and distinguished in the Divisional Court. The plaintiff's predecessor, being a yearly tenant of a cottage, allowed his brother-in-law to live in it rent free, and to acquire a title by adverse possession. He then bought the freehold. His brother-in-law died, and when the plaintiff sought to evict the widow, the defendant, she claimed title by adverse possession to remain on as a yearly tenant until that tenancy was lawfully determined by proper notice. The court held that this contention was not correct. SCRUTTON, L.J., said (9):

(3) (1889), 24 L.R.Ir. 290. (4) [1902] 2 K.B. at p. 310. (5) (1892), 67 L.T. 735.
(6) (1892), 67 L.T. at p. 737. (7) [1930] All E.R. Rep. 342; [1930] 2 K.B. 16.
(8) [1902] 2 K.B. 304. (9) [1930] All E.R. Rep. at p. 344; [1930] 2 K.B. at p. 22.

A "The fallacy of this argument rests, in my opinion, on a misunderstanding of the legal effect of the expiry of the twelve years' adverse possession under s. 7 of the [Real Property Limitation Act, 1833]. It is treated as if it gave a title, whereas in effect it is merely negative to destroy the power of the then tenant, A. H. Taylor, to claim as landlord against the sub-tenant in possession. It would not destroy the right of the freeholder, if B Taylor's tenancy was determined, to eject the sub-tenant. The freeholder would not be in any way bound by the legal relations between tenant and sub-tenant after the expiry of the tenant's tenancy. That this is so appears to follow from the decision of the Court of Appeal in *Tichborne* v. *Weir* (10)."

After dealing with the facts of that case, the learned lord justice accepts as a correct summary of the result of that case a passage in DARBY AND BOSANQUET'S C STATUTES OF LIMITATIONS (2nd Edn.) at p. 493, which says:

"But the truer view is, that the operation of the statute in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him."

D SCRUTTON, L.J., disapproved of *Rankin* v. *McMurtry* (11) where it was suggested that the person taking the benefit of the statute acquires a title commensurate to the title lost. He goes on to distinguish *Walter* v. *Yalden* (12) (without commenting on its validity) on the ground that that decision showed (13) that

". . . while a surrender cannot affect the lawful title of an underlessee, whose sub-lease must be properly determined by notice in a regular manner, E because a surrender has only the same effect as an assignment . . . which would not destroy a sub-lease, there is no decision that merger resulting from the tenant's purchase of the landlord's reversion has any such effect."

He then refers (13) to the fact that after the merger in the case before him,

"The new reversioner cannot give notice to himself as the old tenant; F and as has been seen the sub-tenant has no term which requires such a notice to be given to him."

LAWRENCE, L.J. (14) appreciated the force of the argument that

". . . the principle upon which *Walter* v. *Yalden* (12) was decided applied equally to the converse case, such as the present, where the tenant has G brought about the merger by acquiring the reversion. I confess to finding it difficult to reconcile the decision of the Divisional Court in *Walter* v. *Yalden* (12) with the decision of the Court of Appeal in *Tichborne* v. *Weir* (10) which case was not cited to the Divisional Court. Be that as it may, however, *Walter* v. *Yalden* (12) is, in my opinion, distinguishable on the facts from the present case."

H He then distinguished it on two grounds. First, a lease would automatically determine, whereas in the present case the tenancy was for an indefinite period, and notice could not be given after the estates of the landlord and the tenant had merged. Secondly, it might, he said (15)

". . . plausibly be contended that until the term created by the lease had expired by effluxion of time the lessor was practically in the position of a I person deriving title under the lessee [by the surrender from the lessee], whereas in the present case A. H. Taylor never was in such a position."

This latter argument is, with respect, fallacious since A. H. Taylor, having been

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(10) (1892), 67 L.T. 735.
(11) (1889), 24 L.R. Ir. 290.
(12) [1902] 2 K.B. 304.
(13) [1930] All E.R. Rep. at p. 345; [1930] 2 K.B. at p. 24.
(14) [1930] All E.R. Rep. at p. 346; [1930] 2 K.B. at p. 27.
(15) [1930] All E.R. Rep. at p. 346; [1930] 2 K.B. at p. 28.

himself the lessee, was even more vulnerable to such an argument than was the lessor in *Walter* v. *Yalden* (16). A

With all respect, I am unable to find any ground for distinguishing in principle between *Walter* v. *Yalden* (16) and *Taylor* v. *Twinberrow* (17). Where a tenancy ends not by effluxion of time, but by the merger of the landlord's and tenant's estates, the court must, in my judgment, decide as a matter of general principle whether the landlord can at once enforce his rights against any trespasser or B squatter, even though the tenant has by the Statute of Limitations lost his right to do so, or whether his right to do so is suspended until the tenancy would have determined apart from any merger. If the latter be correct, there is an obvious mechanical difficulty in the case of periodical tenancies which continue until determined. For in such a case, when does the tenancy end? The trespasser does not obtain the tenant's rights (*Tichborne* v. *Weir* (18)) and, therefore, C cannot be given notice to quit, and the landlord cannot after the merger give himself notice to quit. Therefore, if the tenancy is to be regarded as surviving for this purpose at all, it can never be determined, and the landlord's right to eject will be permanently suspended. This difficulty impressed the Court of Appeal in *Taylor* v. *Twinberrow* (17).

If the mechanical difficulty is the only ground of distinction between the two D cases, then expediency has produced a result which principle and logic do not justify. There can, I think, be no relevant difference in principle between a lease for years and a yearly tenancy, nor did the court in *Taylor* v. *Twinberrow* (17) seek to found any distinction on any such difference in principle. In each case the lessor has carved a tenancy out of his estate. A yearly tenancy continues until determined, and in retrospect it is a letting for the number of E years during which it lasted. If the landlord's interest and tenant's interest come into the same hands, there is a merger unless some interest prevents it. If the fact that the tenant's title has been extinguished by a squatter prevents a merger, and prevents the landlord claiming immediate possession, it should have that effect in the one case as much as in the other.

It is also illogical to create a distinction on the ground that a merger through F the tenant acquiring the freehold would give the freeholder instant rights to possession against a squatter (*Taylor* v. *Twinberrow* (17)), while a merger through the freeholder acquiring the tenant's estate would give no such rights (*Walter* v. *Yalden* (16)). Thereby the landlord who had been guilty of no laches would be unable to evict forthwith a man who was a trespasser and stranger vis-à-vis the landlord, while the tenant on acquiring the landlord's interest would be able G forthwith to evict someone in defiance of the rights which the tenant had by his laches allowed him to acquire. If any such distinction is to be drawn between the two cases, the decisions should in justice be the other way round. But in truth, there is no justification for such a distinction. Whenever there is a merger of landlord's and tenant's estate, the result should be the same whether the landlord acquires the lease, or the tenant acquires the freehold. H

Title to land is pragmatic. It is true if and so long as it works. It works if it only comes up against a weaker title. But if it is challenged by a stronger title, it ceases to be a true title and must give way. COZENS-HARDY, M.R., said in *Re Atkinson and Horsell's Contract* (19):

> ". . . whenever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence I becomes absolute when once you have extinguished the right of every other person to challenge it."

Thus even a fee simple is only good as long as no better title can be shown. If, however, the stronger title does not assert itself against adverse possession by the weaker during the statutory period, it becomes extinguished, and thereby

(16) [1902] 2 K.B. 304.
(17) [1930] All E.R. Rep. 342; [1930] 2 K.B. 16.
(18) (1892), 67 L.T. 735.
(19) [1912] 2 Ch. at p. 9.

A the weaker title prevails. In such circumstances, the squatter obtains a pragmatic or defeasible fee simple.

If the title which the squatter has destroyed is the true immediate fee simple, then he has in practice acquired the best available title, and he will prevail against all. If, however, the title that he has destroyed is not the true immediate fee simple, but some lesser title, he is still vulnerable: For he can be ejected B when he is subsequently challenged by a stronger immediate title. While that stronger title is only a title in reversion, he is safe, but when the reversion comes into possession, the reversioner's right to eject him arises. Here the plaintiffs' title is stronger than the defendant's, and when they come into conflict with the defendant, the plaintiffs must prevail. The question before us is whether the plaintiffs have yet come into conflict with the defendant, or whether that conflict C is deferred until a date in 1992. It would appear on the face of it that the plaintiffs are now in conflict with the defendant. The lease which prevented the plaintiffs from immediate possession (and therefore from immediate conflict with the defendant) has been surrendered, and has by merger ceased to exist. In practice, therefore, the plaintiffs and the defendant are face to face. Is there then some theoretical curtain between them that will not be drawn back until the D intended end of the vanished lease? No other case than *Walter* v. *Yalden* (20) has been cited to this effect.

The main ground on which *Walter* v. *Yalden* (20) was decided by LORD ALVERSTONE, C.J., seems to me with all respect insufficient, viz., that the tenant cannot by surrender defeat the squatter's rights. The tenant has given the squatter nothing (*Tichborne* v. *Weir* (21)) and owes him no duty. The position is E wholly different from the case where a tenant has granted something from which he cannot derogate by surrender. Moreover the squatter's rights could be defeated by forfeiture, so there is little practical object in constraining the law in order to avoid the possibility of his rights being defeated by surrender. There is, however, more substance in the argument of CHANNELL, J., that the lessee could not assign a right of entry against the squatter, and that he cannot there- F fore effect the same thing by surrender since he cannot assign anything that he has not got. The learned judge thereby assumes that the assignee's rights must be the same as were the assignor's. But in my view he was in error on that point, as is shown by *Ecclesiastical Comrs. of England and Wales* v. *Rowe* (22). There the question was when time started to run against the lessors. There had been a fresh grant, and a surrender was thereby implied. It was held that there was thus G a moment of time when the lessors came into possession for the purpose of the statute. Yet although the squatter had in that case been in adverse possession for some years with which the lessee was bound to credit him towards the necessary twelve years, the lessors did not have to give him any such credit, and the time against the lessors started to run de novo from the date of the notional surrender. The right of action by the lessors, with time running only from the H moment when they came into possession, must therefore be an action in their own right vis-à-vis the trespasser, and not in the right derived from the lessee which would have had to concede some years of adverse possession. Thus when there has been a surrender, the lessor has his own right of possession which is an incident of his fee simple and is not derived from the lessee.

I In considering what is the effect of the surrender on the surrenderee, one must consider what effect the squatter's right under s. 16 of the Limitation Act, 1939, has had on the surrenderor, and what the surrenderor still has when he comes to surrender. The Statutes of Limitation before 1833 merely barred rights of action. They extinguished remedies, not rights. But since 1833 the effect of the statutes has been that the "title of that person to the land . . . shall be extinguished" when the time has run against him. It could be argued that the

(20) [1902] 2 K.B. 304. (21) (1892), 67 L.T. 735. (22) (1880), 5 App. Cas. 736.

statutory period has extinguished the tenant's estate entirely so that it has disappeared, and that the landlord at once becomes in conflict with the squatter. But no case supports this view, and neither side argues in favour of it. Moreover it would produce highly inconvenient and unjust results. A landlord would lose his rights by erosion of which he was wholly unaware and had either no notice, or at most purely theoretical notice. Both counsel agree that in the present case the lessee's title has been extinguished, and both agree that the estate has not. Counsel for the defendant argues that the estate is left, like Peter Pan's shadow, unattached to anyone, and remains in vacuo until it comes back to the landlord in 1992. The landlord, it is said, divested himself of it in favour of the tenant for the duration of the lease. The tenant, having lost it, cannot give it back. Therefore it will not return to the landlord until the effluxion of the lease.

Counsel for the plaintiffs argues that there is no need for so tortuous a conception. The estate and title, he maintains, were in the tenant for the duration of the lease. The title was extinguished, but the estate which can be separated from (and should not be confused with) actual physical possession is in the tenant until the surrender. He contends that the title is only extinguished as against the rest of the world, and not as against the landlord. I find this concept more reasonable than that of an abstract estate which belongs to no one until a date in 1992 although the lease has been surrendered, and yet all the while, by its absence from the landlord, prevents him from taking action against the squatter who in practice is in conflict with him. It is not unreasonable to hold that the estate remains in the tenant, valid as against the landlord until the lease is surrendered. For the estate is given to the tenant by the landlord under the lease, and remains (so far as the landlord is concerned) in the tenant while the lease remains with the burdens of the covenants on either side.

If this be right, the lessee, on the surrender, handed back the estate to the landlord, who thereupon had once again a fee simple absolute in possession. The part of the fee simple which by the will of the parties was carved out as a lease has once again by the will of the parties been restored to it. The surrender has given back the estate (as I think) to the landlord. But in any event it has given back the rights (including the right to quiet enjoyment) and obligations under the lease, and the landlord is the owner in fee simple, and as such has the right to eject a squatter. The surrender has not given back the possessory title, for that is now held by the squatter who has obtained it not by right of the lessee, but in his own right through the lessee's disqualification. But that which prevented the plaintiffs from enforcing a right to possession, viz., their lease to the lessee, has disappeared. As owners of the fee simple in possession they can eject a trespasser. If that be the true view, the inconsistencies and mechanical difficulties are removed. There is no longer any need to make in favour of periodic tenancies an illogical distinction which has no basis but expediency. Moreover, it avoids such absurdities as would on the other view arise. For instance, a landlord who accepted a surrender of a thirty-year lease which by its terms he could break at fourteen or twenty-one years, and then found a squatter on his land, would be prevented from breaking the lease, since he plainly could not break a hypothetical lease that did not exist. Thus by a transaction to which he was a stranger, the nature of his lease would have been changed. He would be deprived of his right to break unless the court could find some expedient ad hoc distinction analogous to that adopted in *Taylor* v. *Twinberrow* (23).

The choice lies between a view of the law that is practical and straightforward, and one that is impractical and prone to casuistry. There being no case that compels us to the latter, I prefer the former. In my view, therefore, *Walter* v. *Yalden* (24) was wrongly decided.

Counsel for the defendant sought to raise a point under the Land Registration

(23) [1930] All E.R. Rep. 342; [1930] 2 K.B. 16. (24) [1902] 2 K.B. 304.

A Act, 1925, which was not taken below. Section 75 (1) provides that the Limitation Acts shall apply to registered land, but where

> "... the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for ..."

B the person who has acquired title against the proprietor. The leasehold title and the lease were registered, and therefore, it is said, the lessee's former estate is now held in trust for the defendant. Had counsel for the defendant been able to establish by evidence that the leasehold title was registered before the Act came into effect (25), the point might well have had force. But on the evidence there is nothing from which one can draw that assumption, and we C felt unable to give leave to adduce fresh evidence. Section 75 (1) clearly deals with the future, not the past. Therefore the point fails. I would allow the appeal and make an order for possession in the plaintiffs' favour.

WILLMER, L.J.: It is with diffidence and hesitation that I venture to express a different view. In spite of the great assistance which I have derived from D the very full arguments of counsel on both sides, I have found this a most difficult case; and I must confess that I have not found it easy to make up my mind. But the arguments are very evenly balanced, and it is in these circumstances that I have come to the conclusion that it would not be right for us to upset a decision which has stood for nearly sixty years. Yet that is precisely what we have been invited to do, although there is no authority directly in point which E can be said to establish the proposition contended for by the plaintiffs.

I need not refer again in any great detail to the facts. The following brief summary will suffice. In 1893 Nos. 311 and 315, West End Lane, which at that time belonged to the same owners, were leased to separate lessees for a period of ninety-nine years. In 1920 the second defendant, Millwood, who was then sub-lessee of No. 311, entered into occupation of a shed at the rear of the premises, F three-quarters of which stood on land belonging to No. 315. There was no opposition, and he continued to carry on his business in the shed. A little later he purchased the head lease of No. 311. In 1951 he sold his business to one Pliszka, to whom he leased the ground floor of No. 311 for a period of twenty-one years. The learned judge, having regard to s. 62 of the Law of Property Act, 1925, concluded that the premises leased to Pliszka included the shed, the whole of G which had been in Millwood's occupation for over thirty years. It has not been argued that the learned judge was in error in this respect. Pliszka remained in occupation until August, 1960, when, with the consent of Millwood, he assigned his lease to the first defendant, Fairweather. The defendant Fairweather has continued to occupy the shed, and it is accepted that he enjoys the same rights in respect thereof as Millwood and Pliszka before him. The effect is, therefore, that H the shed, so far as it was on land belonging to No. 315, has been subject to continuous adverse occupation since 1920. It follows, as is admitted, that the lessees of No. 315 had been statute-barred since 1932, having regard to s. 1 of the Real Property Limitation Act, 1874. It also follows that under s. 34 of the Act of 1833 the title of the lessees of No. 315 had been extinguished since the same date.

Meanwhile in February, 1959, the plaintiffs acquired the freehold of No. 315 I subject to the still subsisting ninety-nine years' lease. In December of the same year the lessees of No. 315 surrendered their lease to the plaintiffs. Up to that date the position was that the plaintiffs would have had no right to possession either of No. 315 or of the shed until the expiry of the lease in 1992. The lessees, for their part, had lost their right to possession of the shed, their title having been extinguished in 1932.

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(25) Viz., it seems, before 1932 when the twelve years' period under the statutes of limitation expired.

The plaintiffs' case is that as a result of the surrender the residue of the term was merged in the freehold so that they there and then became entitled to possession of the shed. They contend that they are not precluded from asserting their right to possession of the shed by the fact of the lessees having lost theirs. As between themselves and the defendant, the position, it is said, is that the defendant is a trespasser with no rights against them. The defendant's case, on the other hand, is that so far as the shed is concerned, all that the plaintiffs acquired as the result of the surrender was such right as the lessees themselves had; and since the lessees' title thereto had been extinguished, this did not include any right of possession as against the defendant. Reliance is placed on the maxim nemo dat quod non habet. The learned judge decided in favour of the defendant, following (as he was bound to follow) the decision of the Divisional Court in *Walter* v. *Yalden* (26). The headnote to that case, which correctly sets out the effect of the decision, is as follows:

> "Where a trespasser on land let on lease has as against the lessee acquired a title under the Statutes of Limitations, and the lessee subsequently surrenders the lease to the lessor, the lessor has no right of re-entry, and the period of limitation does not begin to run, until the expiration of the term for which the lease was granted."

It has been conceded by counsel for the plaintiffs that if that case was rightly decided, it is conclusive against the plaintiffs' claim, subject to an alternative argument based on estoppel. His main effort has been directed towards persuading us that *Walter* v. *Yalden* (26) was wrongly decided, and should now be overruled. It is a decision which, as I have said, has now stood for nearly sixty years; and apart from a dictum of LAWRENCE, L.J., in *Taylor* v. *Twinberrow* (27) no case has been brought to our attention in which its correctness has been doubted. Moreover, since then the Limitation Act, 1939, has been enacted, and it might be thought that if *Walter* v. *Yalden* (26) had been considered to be wrongly decided, the opportunity would have been taken to correct the error.

In *Walter* v. *Yalden* (26), as in the present case, the property in question was subject to a lease for a term of years. There, as here, the defendant was in adverse possession for a great number of years. There, as here, the plaintiff (or rather his predecessor in title) was the freeholder, and before the expiry of the term acquired the residue thereof through a surrender by the lessee. The material facts were, therefore, indistinguishable from those of the present case. LORD ALVERSTONE, C.J., said (28):

> "It is quite plain that, if the defendant had by twenty years' possession acquired the right to the possession of the property as against the lessees, the lessees could not by assignment or underlease deprive him of that right; and it seems to me to follow, not necessarily that the person who is in possession becomes liable on the covenants of the lease, or is to be treated as being in the position of the lessee, but that the surrender cannot operate so as to deprive him of the title he has got against the persons against whom he is entitled to claim possession . . . it seems to me that the right of entry of the landlord does not arise, for the purpose of ascertaining the commencement of the period of limitation, until the expiration of the term, because otherwise the person against whom the possession was rightfully claimed by virtue of the length of holding would be enabled to defeat the operation of that possession in his own favour by some transaction to which the person who had been in possession for the statutory period was not a party."

DARLING, J., merely expressed his concurrence with the judgment of the learned lord chief justice. CHANNELL, J., who also agreed, said (29):

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(26) [1902] 2 K.B. 304.
(27) [1930] All E.R. Rep. at p. 346; [1930] 2 K.B. at p. 27.
(28) [1902] 2 K.B. at p. 309.
(29) [1902] 2 K.B. at p. 310.

A "The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment. If the lessee has created underleases, the underleases remain notwithstanding his surrender; the lessee cannot assign his term to any one else so as to put an end to those underleases. But that, I think, is only an example of what he can and cannot do; the point is that he has no power to effect by surrender B anything that he could not do by assignment to a third person; the reason being that he cannot convey to his landlord, any more than to any one else, anything that he has not got himself."

It is argued that this decision and the reasoning on which it is based are inconsistent with the ratio of this court's decision in *Tichborne* v. *Weir* (30), a decision which, so far as appears from the report, was not cited to the Divisional C Court in *Walter* v. *Yalden* (31), though a passage from DARBY AND BOSANQUET'S STATUTES OF LIMITATIONS (in which the decision is twice noted) was undoubtedly before the court. But in *Tichborne* v. *Weir* (30) the dispute did not arise until after the term had expired by effluxion of time; and there was not, as here, any question of the merger of the term in the freehold. The question which arose after the lease had expired, was whether the squatter (if I may so describe the D defendant), who had been in occupation adverse to the lessee for a great number of years, was liable on the covenants of the original lease. This court held that he was not. It had been argued, in accordance with what was popular doctrine in the nineteenth century, that the effect of s. 34 of the Real Property Limitation Act, 1833 (the predecessor of s. 16 of the Act of 1939), was virtually to convey the lessee's rights and obligations under the lease to the squatter. It was decided E that this was not so, but that the effect of the statute was simply to extinguish and destroy the right and title of the lessee. There was no transfer or conveyance to the squatter, but the lessor still had his right in contract against the lessee on the covenants in the lease. With all respect to the view expressed by LAWRENCE, L.J., in *Taylor* v. *Twinberrow* (32), I find it difficult to see how this decision is really relevant to the problem which arises here, and which arose in *Walter* v. F *Yalden* (31). No issue arose as to the lessor's right to eject the squatter, who did not seek to remain in occupation.

I have found more difficulty with *Taylor* v. *Twinberrow* (33). The facts of that case were similar to those of the present case to the extent that there was a tenancy which had merged in the freehold, in that case by purchase on the part of the tenant, and that afterwards the plaintiff, who was the successor in title of the G tenant who had purchased the freehold, sought to eject the squatter. But there the similarity ceases. The tenancy in that case was one from year to year, determinable on giving the appropriate notice, and no question arose as to any residue of a term of years. I find myself unable to agree with the reasoning of SCRUTTON, L.J., in so far as he sought to distinguish *Walter* v. *Yalden* (31) on the ground that a distinction is to be drawn between a merger resulting from a H surrender of the lease, and a merger resulting from the tenant's purchase of the landlord's reversion. But LAWRENCE, L.J., after expressing his doubt whether *Walter* v. *Yalden* (31) could be reconciled with *Tichborne* v. *Weir* (30), himself went on to distinguish *Walter* v. *Yalden* (31) on two different grounds. He said (32):

I "Be that as it may, however, *Walter* v. *Yalden* (31), is, in my opinion, distinguishable on the facts from the present case. There the lease was for a definite term on the expiration of which the lease would automatically come to an end, and no notice was required to bring about its termination, whereas in the present case the tenancy was for an indefinite period determinable only by a proper notice and such a notice could not be given after the estate

(30) (1892), 67 L.T. 735. (31) [1902] 2 K.B. 304.
(32) [1930] All E.R. Rep. at p. 346; [1930] 2 K.B. at p. 27.
(33) [1930] All E.R. Rep. 342; [1930] 2 K.B. 16.

of the landlord and the estate of the tenant had become united in the same person. Moreover in that case the merger had been brought about by an assignment of the lease of the remainder of the term, and it might plausibly be contended that until the term created by the lease had expired by efflux-ion of time the lessor was practically in the position of a person deriving title under the lessee, whereas in the present case A. H. Taylor never was in such a position. For these reasons I am of opinion that the decision in *Walter* v. *Yalden* (34) does not govern the present case."

I take that last passage to mean that the learned lord justice was treating *Walter* v. *Yalden* (34) as an illustration of the application of the maxim nemo dat quod non habet, which he thought did not apply to the case before him.

It is to be observed that in *Taylor* v. *Twinberrow* (35) the two learned lords justices were sitting as a Divisional Court. *Walter* v. *Yalden* (34) was, therefore, binding on them, and it was their duty to follow it unless they were satisfied that it was distinguishable. The fact that they did think *Walter* v. *Yalden* (34) was distinguishable is to my mind of some significance when, over thirty years later, we are invited to say that the two cases are indistinguishable—that *Taylor* v. *Twinberrow* (35) was right, and that *Walter* v. *Yalden* (34) was wrong.

Although it is not very easy to put into words, I think that there is a very real distinction to be drawn, for the purpose of considering the effect of a surrender, between a lease for a term of years and a tenancy from year to year. In the former case there is a definite and ascertained period of time during which (assuming his title has not been extinguished) the lessee has a vested right as against the lessor to uninterrupted possession. If in such circumstances he surrenders the lease, he has something tangible to surrender, viz., the right to possession for the residue of the term. But if his title has already been extinguished, so that he no longer has a right to possession, a very real question arises, as it seems to me, as to what he has to surrender. In the case of a tenant from year to year, on the other hand, there is no ascertainable period of time during which he will have a right to retain possession as against his landlord. His continued right to possession is precarious, and always subject to the appropriate notice being given. If such a tenant surrenders his tenancy (or equally if he purchases the freehold reversion from the landlord) I should have thought that the effect must be that the tenancy just comes to an end. There can no longer be any question of giving notice for the giver and receiver of such notice would be the same person. Put in another way, it is to be implied from the surrender, or from the acquisition of the landlord's freehold reversion, that the tenant, as tenant, waives his right to receive notice to determine the tenancy. Thus all that the tenant in effect gives up is his contractual right to receive notice. Now suppose that the tenant has lost his right to possession, because he has allowed a squatter to assert adverse possession against him for the statutory period. If such a tenant surrenders his tenancy, or himself purchases the landlord's freehold reversion, so that the tenancy comes to an end without the necessity for any notice being given, there seems no good reason why the landlord (or the tenant who has become the freeholder) should not immediately assert his right to possession as against the squatter. It does not seem to me that the situation is at all the same as in the case where a lessee surrenders the unexpired portion of a term of years. I find myself unable, therefore, to say that the Divisional Court in *Taylor* v. *Twinberrow* (35) were wrong in drawing the distinction which they did between that case and *Walter* v. *Yalden* (34). If the cases are, as I have come to think, distinguishable, it must be clear that the present case is governed by *Walter* v. *Yalden* (34) rather than by *Taylor* v. *Twinberrow* (35). I might perhaps add this. The plaintiffs' argument involves not only that *Walter* v. *Yalden* (34) was wrong, but also that *Taylor* v. *Twinberrow* (35), though right, was right for the wrong reasons.

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(34) [1902] 2 K.B. 304. (35) [1930] All E.R. Rep. 342; [1930] 2 K.B. 16.

A The question whether the decision in *Walter* v. *Yalden* (36) should be supported depends, as I see it, on the answers to two further questions: (i) What alteration (if any) in the right of the squatter results from the extinction of the lessee's title on the expiration of the statutory period? (ii) What right (if any) is the lessee in a position to confer on the freeholder by the surrender of the lease?

As to the first of these questions, it has been accepted that the effect of *Tich-*
B *borne* v. *Weir* (37) was to kill once and for all what has been described as "the parliamentary conveyance heresy". The extinction of the lessee's title does not operate to convey that title to the squatter. But *Tichborne* v. *Weir* (37) did not decide what right (if any) the squatter does gain as the result of the extinction of the lessee's title. It was not necessary to do so, since the squatter in that case was not claiming any rights. The lessee's lease had already expired by effluxion
C of time, and the squatter had already yielded up possession to the freeholder. In the present case, however, as it seems to me, the question arises what is the right gained by the squatter when he has for the statutory period successfully asserted his adverse possession against a lessee under a lease for a term of years. Apart from any question of forfeiture for non-performance of the covenants in the lease, the freeholder has not, during the currency of the lease, any right to
D possession. The squatter's possession is not, therefore, adverse to the freeholder. But until the twelve years have elapsed, his right of possession is defeasible at any time by the lessee. After twelve years, however, the lessee's title is extinguished, and as a result the squatter must have gained something. Prima facie, I should have thought, what he has gained is in substance the equivalent of what the lessee has lost, that is the right to retain his possession till the end of
E the term. His right to possession is now good against all the world except the freeholder; but the freeholder's right is limited by the fact that under the lease he has parted with any right to possession until the end of the term, subject always, of course, to the possibility of a forfeiture for non-payment of rent or non-performance of the covenants in the lease.

In DARBY AND BOSANQUET'S STATUTES OF LIMITATIONS (2nd Edn.) after the
F passage quoted by SCRUTTON, L.J., in *Taylor* v. *Twinberrow* (38), the learned authors continue (at p. 494):

> "Though the title extinguished by s. 34, that is, the title of the persons whose right of entry is taken away by the other sections of the Acts 3 & 4 Wm. IV c. 27 and 37 & 38 Vict. c. 57, is not directly transferred to the wrongdoer who has been in possession, yet the title gained by such possession being,
> G in some cases, limited by rights which still remain unextinguished, is clearly commensurate with the interest which the rightful owners have lost by the operation of the statute, and must, therefore, it would seem, have the same legal character, and be freehold, leasehold or copyhold accordingly. But the person who by virtue of the statute gains a title to property held on lease does not thereby become liable to perform the covenants of the lease; the
> H term is in no sense vested in him (*Tichborne* v. *Weir* (37))."

This passage was approved by LORD ALVERSTONE, C.J., in *Walter* v. *Yalden* (36), but was adversely criticised by SCRUTTON, L.J., and less directly by LAWRENCE, L.J., in *Taylor* v. *Twinberrow* (39). I do not think the criticism was justified, for I do not understand the learned authors to mean more than that the right gained by the squatter is limited by reference to that which has been
I lost by the party whose title has been extinguished. In the present case the right gained by the defendant's predecessor was in that sense commensurate with the interest which the lessees lost when their title was extinguished. I find it difficult to resist the conclusion that he has at least gained that. That would mean that the defendant and his predecessors gained, subject to the possibility of a forfeiture,

(36) [1902] 2 K.B. 304.
(37) (1892), 67 L.T. 735.
(38) [1930] All E.R. Rep. at p. 344; [1930] 2 K.B. at p. 23.
(39) [1930] All E.R. Rep. 342; [1930] 2 K.B. 16.

a right to possession good as against the freeholder for the remainder of the term. If that be right, it would at least be surprising if the defendant's right can be defeated by the act of the lessee, whose title has been extinguished, in surrendering the lease.

That brings me to the second question, viz., what right (if any) the lessee can confer on the freeholder by the surrender of the lease. Counsel for the plaintiffs, in the course of an ingenious argument, suggested that, although under the provisions of s. 34 of the Act of 1833, the lessee's title was extinguished as against the rest of the world, it nevertheless somehow survived as against the freeholder. The freeholder, he argued, is only kept out of possession by the lessee's continuing right to possession as against him; that is the only fetter on the freeholder's right to possession, and that fetter disappears on the lessee surrendering the lease. I find difficulty in seeing how this contention can prevail in face of the plain terms of the section. To my mind, the wording of the section is too clear to admit of a construction whereby any part of the lessee's title survives, even as against the freeholder. That which is extinguished is extinguished, and I think must be regarded as extinguished for all purposes. It is common ground that notwithstanding the extinction of the lessee's title, the estate continues. Who, then, has the title to it, if anybody? I am far from saying that any title passes to the squatter, for it has been decided that this is not so (*Tichborne* v. *Weir* (40)). But it does seem to me that the right to possession for the rest of the term as against the freeholder previously enjoyed by the lessee must be something which is gained by the squatter, subject always, of course, to a possible forfeiture. The only possible alternative would be to say that, on the extinction of the lessee's title, the title to the estate passed forthwith to the freeholder, who would thereupon gain an immediate right to possession. This would lead inexorably to the strangest result, for which nobody contends. It would mean that in the present case the plaintiffs' predecessors must have gained an immediate right to possession as soon as the lessee's title was extinguished in 1932. On that view the possession of the defendant's predecessors must have been adverse to the plaintiffs' predecessors ever since 1932, and the title of the latter must have been extinguished in 1944. This, as I have said, is a result for which nobody contends, and I refer to the possibility merely as a reductio ad absurdum.

I come back then to the question what right (if any) were the lessees in a position to confer on the freeholder by the surrender of the lease. I think the matter can be tested by considering what were the rights of the parties immediately before the surrender took place. Up to that moment the plaintiffs as freeholders had no right to eject the defendant's predecessors, for until the expiry of the term in 1992 they would themselves have no right to possession. Equally the lessees had no right to eject the defendant's predecessor, since they were barred by the operation of the Limitation Act, 1939. It would be strange indeed if the effect of the merger of the two interests were to create a new right which did not appertain to either of the interests merged. If, as is conceded, a lessee cannot by surrender defeat interests which he himself has created by grant, why, it may be asked, should the position be any different in relation to rights which he has allowed to accrue by permitting adverse possession by a third party for the statutory period? I do not see how the lessee, by surrendering the lease, can improve the position of the freeholder by conferring a right which he himself has not got. It seems to me that when a lease for a term of years is granted the lessor must contemplate that the lessee may, not only by grant, but also by permitting adverse possession by a third party for the statutory period, create rights which will defeat his interest until the expiration of the term. In *Pleasant* (*Lessee of Hayton*) v. *Benson* (41), BAYLEY, J., cited the following extract from COKE ON LITTLETON, p. 338b:

(40) (1892), 67 L.T. 735.

(41) (1811), 14 East. at p. 238.

A "'that having regard to the parties to the surrender, the estate is absolutely drowned, etc.: but having regard to strangers, who were not parties or privies thereunto, lost by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance.'"

B I would adopt these words, which seem to me to be wide enough to cover the case of a squatter who has acquired rights by adverse possession for the statutory period, as well as the case of one who has acquired rights contractually by way of a sub-lease. Each is a "stranger", not a party to the lease or privy thereto, who has acquired a right or interest before the surrender. I do not see why for this purpose a distinction should be drawn between rights acquired by contract and rights acquired by the operation of the Limitation Act, 1939.

C It has been urged that this view of the effect of the surrender in the present case is inconsistent with what was said by LORD SELBORNE, L.C., and concurred in by the other noble Lords, in *Ecclesiastical Comrs. of England and Wales* v. *Rowe* (42). LORD SELBORNE, L.C., there said that the result of a surrender of his lease by a lessee to the dean (which he regarded as having notionally taken place) would be that a right of action would accrue to the dean to recover possession of D the premises of which a trespasser was then in occupation. Since no allowance was there made for any period of time which had already run in favour of the trespasser and against the lessee, it is said that the effect of a surrender must be to put an end forthwith to any rights hitherto enjoyed by the trespasser. But in that case the trespasser had not been in occupation for the statutory period, and the lessee's rights had not to be extinguished. The case was, therefore, fundamentally different from the present case. I do not think that it by any means follows that the result would have been the same if, as here, the trespasser had already gained an accrued right and the lessee's title had already been extinguished. I see nothing in what was said in that case to alter my view as to the effect of the surrender which took place in the present case. It may be remarked that *Ecclesiastical Comrs.* v. *Rowe* (43) was cited to the Divisional Court in F *Walter* v. *Yalden* (44), as clearly appears from the report of the argument. It was not referred to in the judgments, presumably because the court took the same view of its effect as I have already stated. In these circumstances I am not persuaded that *Walter* v. *Yalden* (44) was wrongly decided, and it follows that on the main point argued before us I see no reason to disturb the decision of the learned county court judge.

G As to the argument based on the alleged estoppel, and as to the new contention put forward on behalf of the defendant with regard to the effect of s. 75 of the Land Registration Act, 1925, I desire to say no more than that I wholly agree with what HOLROYD PEARCE, L.J., has already said. On the main point, however, for the reasons which I have given, I am not persuaded by the argument on behalf of the appellants, and I would, therefore, dismiss the appeal.

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PEARSON, L.J., after referring to paras. 1, 3 of the particulars of claim and reading paras. 3-6 of the defence (see p. 561, letter G, et seq, ante) for the purpose of showing what was the issue arising in the appeal, and on what basis arguments had been presented, continued: Thus it is common ground (and the basis of the argument in this appeal) that the ownership of the disputed part of the shed I has been throughout in the plaintiffs' predecessors in title and the plaintiffs, and the possession of it has, ever since 1920, been in the first defendant's predecessors in title and the first defendant. The first defendant's defence is in substance based on the decision and reasoning of the King's Bench Divisional Court in *Walter* v. *Yalden* (44), and, summarised very shortly, is to this effect: the owner of the disputed part of the shed granted a long lease of it (together with

(42) (1880), 5 App. Cas. at pp. 741, 742. (43) (1880), 5 App. Cas. 736.
(44) [1902] 2 K.B. 304.

other land) for a term due to expire in 1992; the first defendant's predecessors and the first defendant have held adverse possession from 1920 onwards; on the expiration of twelve years from 1920, that is in 1932, the lessee's title was extinguished under s. 34 of the Real Property Limitation Act, 1833, and s. 1 of the Real Property Limitation Act, 1874; when he surrendered his lease to the plaintiffs in 1959 the lessee did not have (and therefore could not pass to the plaintiffs) any right to possession of the disputed part of the shed; and the lease must notionally remain in existence until the expiry date in 1992 in order to protect the right to possession acquired by the first defendant's predecessors against the lessee. Undoubtedly the decision and reasoning of the Divisional Court in *Walter* v. *Yalden* (45) support the first defendant's contention. The question is whether, when carefully examined and considered in relation to the decided cases, they can be regarded as sound in law.

In my view the relevant legal history of this case is as follows. At the beginning of 1920, the lessee of No. 315, who had a ninety-nine years' lease due to expire in the year 1992, was in possession of the disputed part of the shed. But in 1920 Millwood, acting as a trespasser, took possession of it. Thereby he acquired all the rights of a person in possession, which are considerable: *Asher* v. *Whitlock* (46); *Perry* v. *Clissold* (47); *Leach* v. *Jay* (48); *Re Atkinson and Horsell's Contract* (49). He had an effective possessory title against all the world except the persons lawfully entitled to possession, who were (i) the lessee, who had an immediate right to possession; (ii) the freeholder, who had a deferred right because he would become entitled to possession on removal of the obstacle created by the lease.

By 1932 Millwood had been in continuous adverse possession for twelve years, and consequently under s. 34 of the Real Property Limitation Act, 1833, and s. 1 of the Real Property Limitation Act, 1874, the lessee's title to the disputed part of the shed was extinguished. Millwood's title, though becoming more valuable by reason of the extinction of the lessee's title, remained in character the same as before, viz., an independent possessory title arising solely from the fact that he had possession. It was not a title transferred by or in any way derived from the lessee. That is a fundamental point in this case, and in my opinion quite clear. Nothing had happened which could change the character of Millwood's title. Someone else's title was extinguished, but Millwood remained simply the person in possession. No question is raised in this appeal as to the possible effect of the extinction of the lessee's title and the continuance of Millwood's adverse possession on the position of the freeholder. It is common ground (and assumed in this appeal) that the freeholder's title remained unimpaired and was duly transmitted to the plaintiffs. I am expressing no opinion on that aspect of the history.

The next material event was the surrender of the lease by the lessee to the plaintiffs in December, 1959. Manifestly that was the end of the lease. If there was any subsisting leasehold estate or interest or title (whether or not for this purpose there is any difference between an estate and an interest and a title), it perished then. Any obstacle created by the lease and still standing in the way of the plaintiffs' right to possession was removed. Now the plaintiffs claim that they are the owners, and by virtue of their ownership entitled to the possession of the disputed part of the shed. In my view there is no valid defence to that claim.

(A) It might at one time have been suggested that there is in such a case as this a parliamentary conveyance or transfer of the lessee's title from the lessee to the squatter. That suggestion would in any case have been difficult to reconcile with the statutory provision that on the expiration of the statutory period, the title shall be extinguished; and it is untenable by reason of the decision of the Court of Appeal in *Tichborne* v. *Weir* (50).

(45) [1902] 2 K.B. 304. (46) (1865), L.R. 1 Q.B. at pp. 5, 6.
(47) [1907] A.C. at p. 79. (48) (1878), 9 Ch.D. 42. (49) [1912] 2 Ch. at p. 9.
(50) (1892), 67 L.T. 735.

A (B) It is said that the lessee, having lost his title to possession of the disputed part of the shed in 1932, could not thereafter by surrender or in any other way transfer any such right to the plaintiffs. Nemo dat quod non habet. To my mind, that is true, but irrelevant. The plaintiffs as owners did not need to acquire from the lessee any right to possession. They have as owners their own right to possession; at one time it was deferred by the existence of the obstacle created B by the lease; now that the lease has perished, and the obstacle has been removed, the owner's right to possession is no longer deferred, and is immediate. This is another fundamental point in the case. In my opinion it is shown to be correct by a passage in the speech of LORD SELBORNE, L.C., in *Ecclesiastical Comrs. of England and Wales* v. *Rowe* (51). The question being considered was when the C dean's right of action accrued. The dean was the lessor, and Hugh Jones was the lessee, and from time to time Hugh Jones surrendered his current lease and received a new one. Sarah Moulton was in adverse possession of the land. LORD SELBORNE, L.C., said (52):

> ". . . I am of opinion that a right of action did, before 1854, accrue to the D dean, and that this right accrued not later than the earliest grant of a lease by way of renewal which was made by the dean after the commencement of the possession of Sarah Moulton . . . If so, [i.e., on a certain assumption stated] her possession commenced during the currency of the lease granted by the dean to Hugh Jones on May 2, 1820, which lease continued to subsist until June 18, 1828, when it was surrendered contemporaneously with and in E consideration of the grant of the new lease of that date. On that surrender, a right of action to recover the premises of which Sarah Moulton was then in possession accrued to the dean, and all the new leasehold interests then and on each subsequent renewal created were, in my opinion, derived from and out of the estate in possession, which then became vested in the dean."

F The material point in that passage is that the dean's cause of action accrued on the date of the surrender of the lease, because he then had his own estate in possession. If the right to possession had been derived from Hugh Jones, the dean would have been a successor in title to Hugh Jones, and the date of the accrual of the cause of action would have been the date on which Sarah Moulton took adverse possession against Hugh Jones.

G In *East Stonehouse Urban Council* v. *Willoughby Brothers* (53), CHANNELL, J., said:

> " In *Ecclesiastical Comrs. of England and Wales* v. *Rowe* (51), at the time of the surrender and re-grant of the lease, the allotment in question was in the possession of a mere ' trespasser and disseisor ', as LORD SELBORNE H said (54), and that possession could not possibly be considered to be the possession of the lessees who surrendered. Consequently, during the interval of time which the Lord Chancellor held must exist between the surrender and re-grant, the allotment was being held against the lessor by the trespasser, and the right of action against him accrued to the lessor."

That passage brings out the same point again, and it also appears in *Ecclesiastical* I *Comrs. for England* v. *Treemer* (55).

(C) It is argued that, by analogy with underleases, the first defendant's possessory right should not be prejudiced by the surrender of the lease, and for its protection the lease should be fictitiously deemed to continue, barring the owner's right to possession, until the expiry of the lease in 1992. To show the

(51) (1880), 5 App. Cas. 736.
(52) (1880), 5 App. Cas. at p. 741.
(53) [1902] 2 K.B. at p. 333.
(54) (1880), 5 App. Cas. at p. 742.
(55) [1893] 1 Ch. at pp. 175-177.

principle involved, I will go back to 1811 and read the judgment of BAYLEY, J., in *Pleasant (Lessee of Hayton)* v. *Benson* (56), in which he cited a passage from COKE ON LITTLETON. BAYLEY, J., said:

> "Hayton made Wilkes tenant from year to year, by which Wilkes acquired a legal interest in the premises, not determinable by Hayton except upon giving him six months' notice to quit. But so long as that term continued, the lessee had a right to act on it, and to grant to third persons the interest which he himself had in it. And I take it that the surrender of the lessee would not destroy any interest which a stranger claiming under him had acquired in the term in the meantime. [I stress the words 'had acquired in the term in the meantime'.] As in COKE ON LITTLETON, 338b, it is said, speaking of the surrender of tenant for life, 'that having regard to the parties to the surrender, the estate is absolutely drowned, etc.: but having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance'. And the case is afterwards put, if tenant for life grant a rentcharge, and after surrender; yet the rent remaineth; for to that purpose he cometh in under the charge. Therefore, though the estate may be effectually destroyed by the surrender, as between the surrenderor and surrenderee; yet it continues as to strangers who in the immediate time have acquired an interest in it. [I again stress the words "interest in it."] So here, while the tenancy from year to year subsisted between Wilkes and Hayton, Wilkes had a legal interest in the land, determinable only upon a regular notice to quit: then the sub-lease of a part by Wilkes to Benson is an agreement that Benson shall have that part pending that interest; and therefore without a regular notice to quit from Hayton to Wilkes, or from Wilkes to Benson, that interest will continue in the part so underlet."

In my opinion the principle is applicable to the case of a sub-lessee, and not applicable to the case of a squatter. In the case of the sub-lessee the freeholder has granted a lease for a term to the lessee, and the lessee, being fully entitled to do so (having obtained a licence from the freeholder as landlord if the covenants in the lease so require) grants a sub-lease expiring, say, one day before the expiry of the lessee's term. Then the lessee cannot by making, and the freeholder cannot by accepting, a surrender of the lease, defeat the sub-lessee's right to the term which has been lawfully granted to him. No major difficulty arises, because there is the existing sub-lease, and the rights and obligations under the sub-lease are in principle enforceable though the details may have to be regulated by statute.

It is not necessary in this case to consider in detail what is the position of the sub-lessee after a surrender of the lease. The squatter's position is fundamentally different. He has an independent possessory title, not in any way derived from the lessee nor from the owner. Neither the lessee nor the owner has any relevant duty to the squatter, nor any privity of estate or contract with him. There is no reason for not allowing the surrender to have its natural effect of putting an end to the lease completely and for all purposes, the term of years being "drowned" in the reversion. There is no need or justification for protecting the squatter by a fictitious prolongation of the lease. He is initially a wrongdoer, and is very generously treated by the Real Property Limitation Acts (now the Limitation Act, 1939). The awkward problems which would arise in regard to the

(56) (1811), 14 East, at p. 237.

A supposed fictitious prolongation of the lease have already been referred to by HOLROYD PEARCE, L.J. The general point is that as the squatter is not bound by or entitled to the benefit of any covenants or conditions, the fictitious prolongation of the lease or tenancy would have to be as radically different in its nature and incidents from the actual lease as it would have been if it had in fact continued. For instance, after the surrender of a tenancy from year to year, the B fictitious continuing tenancy could not be terminable by notice because nobody could give notice to anybody, and would have to be either a tenancy at will or a tenancy for some fixed term arbitrarily invented. Similarly the fictitious prolongation of a lease with a break clause could not have any " break " clause, and must presumably either be for the whole term or for a shortened term ending at the date of the first possible " break ". Also, as the proviso for re-entry perishes C with the lease, the fictitious prolongation would be free from liability to forfeiture. There is no need to become involved in these rather fantastic problems. The first defendant is relying for his defence to the plaintiffs' claim for possession on a supposed continuance of the lease; but in fact it did not continue, and did come to an end; and therefore the plaintiffs, as owners in fee simple entitled to D possession, are entitled to recover possession from the first defendant.

For the reasons set out previously, I am of opinion that (a) the reasoning of the Divisional Court in *Walter* v. *Yalden* (57) cannot be supported, and the decision in that case must be regarded as incorrect; (b) in *Taylor* v. *Twinberrow* (58) the reasoning on the issue in the case was entirely correct, although the grounds given for distinguishing *Walter* v. *Yalden* (57) were unconvincing; E (c) the appeal in this case should be allowed. Thus I am in agreement with the main conclusions of HOLROYD PEARCE, L.J. I also agree with what he has said in regard to the alleged estoppel and in regard to the point sought to be raised under the Land Registration Act, 1925.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Hall, Brydon* (for the plaintiffs); *Withers, Nicholl, Manisty & Co.* (for the first defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(57) [1902] 2 K.B. 304. (58) [1930] All E.R. Rep. 342; [1930] 2 K.B. 16.

A

NOTE.

Re EDWARD'S QUESTIONS.

[CHANCERY DIVISION (His Honour Percy Lamb, Q.C., Official Referee), July 10, 11, 12, 13, 14, 21, 1961.]

B

Husband and Wife—Property—Summary proceedings—Reference to official referee—Jurisdiction to determine issues—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17—*Administration of Justice Act,* 1956 (4 *&* 5 *Eliz.* 2 *c.* 46), *s.* 15 (1) (*a*)—*R.S.C., Ord.* 36A, *r.* 1.

[As to when an order can be made in summary proceedings by husband and wife in respect of property in dispute, see 19 HALSBURY'S LAWS (3rd Edn.) 900, para. 1492; and for cases on the subject, see 27 DIGEST (Repl.) 263-265, *2119-2133.*

C

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.

For the Administration of Justice Act, 1956, s. 15, see 36 HALSBURY'S STATUTES (2nd Edn.) 206.]

D

Case referred to:

Married Women's Property Act, 1882, Re, Re Humphery and Humphery, [1917] 2 K.B. 72; 86 L.J.K.B. 775; 117 L.T. 7; 27 Digest (Repl.) 263, *2124.*

Summons.

On May 6, 1959, an originating summons was taken out by the husband under the Married Women's Property Act, 1882, s. 17, against his wife, to determine all questions between them as to the title to and possession of certain property, and the wife took out a cross-summons on Nov. 3, 1959. On Feb. 14, 1961, it was ordered by the master that the questions raised by the husband's summons should be referred to and determined before an official referee. The questions raised by the wife's summons were, by agreement between the parties, also referred to the official referee for determination. The judgment of the official referee is reported only on the point as to jurisdiction.

E

F

H. E. Francis, Q.C., and *F. B. Alcock* for the applicant.

Michael Albery, Q.C., and *S. Seuffert* for the respondent.

July 21. His Honour PERCY LAMB, Q.C. (Official Referee), said that his attention had been drawn to *Re Married Women's Property Act, 1882, Re Humphery and Humphery* (1) which still appeared in the current text-books and in the ANNUAL PRACTICE (2) as authority for saying that cases under the Married Women's Property Act, 1882, s. 17, could not be referred to an official referee. In his judgment that case was no longer of any substance or effect because of the Administration of Justice Act, 1956, s. 15, and R.S.C., Ord. 36A, r. 1. The Administration of Justice Act, 1956, s. 15, provided:

G

H

> "(1) Rules of court may prescribe the cases in which jurisdiction or powers of the High Court or a judge of the High Court may be exercised by official referees . . . and . . . in particular—(a) authorise the whole of any cause or matter or any question or issue therein to be ordered to be tried before . . . such referee . . ."

I

R.S.C., Ord. 36A, r. 1, provides:

> "If, in any cause or matter in the Chancery Division . . . the court or a judge considers, upon application by any party interested, that having regard to the nature of the case it is desirable . . . in the interests of one or more of the parties, the court or judge may . . . order that the cause or matter . . . shall be tried before an official referee . . ."

(1) [1917] 2 K.B. 72. (2) ANNUAL PRACTICE (1961) at p. 2098.

A His Honour had no hesitation in saying that the note in the ANNUAL PRACTICE and like statements in the text-books no longer had any effect.

[His Honour proceeded to determine the questions raised by the originating summonses.]

Solicitors: *Haslewoods*, agents for *Bosley & Co.*, Brighton (for the applicant); B *Wilberforce Jackson & Co.*, Croydon (for the respondent).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re RYCROFT'S SETTLEMENTS. RYCROFT *v.* RYCROFT C AND OTHERS.

[CHANCERY DIVISION (Wilberforce, J.), July 12, 1961.]

Settlement—Powers of tenant for life—Leasing—Settled and unsettled property comprised in one lease—Contract to grant lease in consideration of redevelopment—Whether "agreement for a lease"—Lease to take effect after D *twelve years—Property leased in lots—Aggregate rent exceeding one-fifth of aggregate annual values—Settled Land Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 18), *s.* 42 (1) (i), *s.* 44 (3) (iii), *s.* 90 (1) (iii), *s.* 117 (1) (x).

Under a compound settlement comprising a settlement made in 1886, and a resettlement made in 1942, the plaintiff was tenant for life of Nos. 8 and 10 to 17, Clarges Street, London. The plaintiff was the absolute E owner of Nos. 6 and 7, Clarges Street. It was desired to redevelop all these properties by means of building leases. The plaintiff entered into an agreement with a limited company, conditional on the sanction of the court being obtained, which agreement provided for the company to develop the property, and that in consideration of such development there should be granted (at a future date or dates which might not be for twelve years F or so) to the company separate leases of the property in three blocks, viz., Nos. 6, 7 and 8 in one block, Nos. 10 to 13 in a second block and the remainder in the third block, at an aggregate rent of £17,500 per annum to be apportioned between the three blocks in a ratio to be agreed. The leases were to be for ninety-nine years commencing not later than Dec. 25, 1972, after the falling in of subsisting leases, the remainders of the terms of G which varied from seven to twelve years. The proposed rent of £17,500 was more than one-fifth of the aggregate annual value of the property with the buildings thereon.

Held: (i) the tenant for life had no power to grant a lease of settled property together with property of which he was absolute owner in a single lease without providing for apportionment of the rent between the settled H property and his own property (see p. 584, letter B, post), and accordingly had no power to effect the agreement in regard to Nos. 6, 7 and 8, Clarges Street.

Tolson v. *Sheard* ((1877), 5 Ch.D. 19) applied.

(ii) the tenant for life had power to contract to grant under s. 90 (1) (iii)* of the Settled Land Act, 1925, future leases that would be in conformity, I when granted, with the Act, notwithstanding the requirement of s. 42 (1)† that a lease should take effect in possession not more than twelve months after its date and the definition of "lease" in s. 117 (1) (x)‡ as including an agreement for lease (see p. 586, letter D, post).

Gas Light & Coke Co. v. *Towse* ((1887), 35 Ch.D. 519) applied.

Re Farnell's Settled Estates ((1886), 33 Ch.D. 599) distinguished.

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* The material terms of s. 90 (1) are printed at p. 584, letter E, post.

† The material terms of s. 42 (1) are printed at p. 584, letter C, post.

‡ The relevant terms of s. 117 (1) are printed in footnote (2), p. 584, post.

(iii) the agreement provided for settled land to be leased in lots within s. 44 (3)* of the Act of 1925, and since, whatever apportionment of the rent was made, the rent reserved in the lease of at least one of the properties must exceed one-fifth of the annual value of the land comprised in that lease with the buildings thereon, the tenant for life had no power to enter into that term of the agreement (see p. 586, letter I, and p. 587, letter G, post).

SEMBLE: in s. 117 (1) (x) of the Settled Land Act, 1925, the description "agreement for lease" in the definition of "lease" refers to such an agreement for a lease as in equity is equivalent to a lease (see p. 584, letter G, post).

[As to the statutory requirements for leases granted by a tenant for life, see 34 HALSBURY'S LAWS (3rd Edn.) 560, para. 975; and for cases on the subject, see 40 DIGEST (Repl.) 832, *3080-3083*.

For the Settled Land Act, 1925, s. 42 (1) (i), s. 44 (3) (iii), s. 90 (1) (iii) and s. 117 (1) (x), see 23 HALSBURY'S STATUTES (2nd Edn.) 110, 115, 196 and 247.]

Cases referred to:

Farnell's Settled Estates, Re, (1886), 33 Ch.D. 599; 40 Digest (Repl.) 832, *3083*.

Gas Light & Coke Co. v. *Towse*, (1887), 35 Ch.D. 519; 56 L.J.Ch. 889; 56 L.T. 602; 30 Digest (Repl.) 429, *723*.

Tolson v. *Sheard*, (1877), 5 Ch.D. 19; 46 L.J.Ch. 815; 36 L.T. 756; 41 J.P. 423; 30 Digest (Repl.) 428, *722*.

Adjourned Summons.

The plaintiff, Sir Richard Newton Rycroft, Bart., as tenant for life under a compound settlement created by two settlements dated Feb. 8, 1886, and Oct. 15, 1942, applied to the court by originating summons for determination of the following question (among others): whether the plaintiff as tenant for life had power under the settlements or the Settled Land Act, 1925, or any of them to enter into a valid and effective agreement for the grant of leases of certain of the trust properties so as to give effect to the terms of a conditional agreement dated July 4, 1961, and made between the plaintiff of the first part, Clarges Street Investments, Ltd. of the second part and a guarantor of the third part and so that such agreement (if it should become unconditional) should be binding on and should enure for the benefit of the settled land and be enforceable against and by every successor in title for the time being of the plaintiff. The originating summons also asked for relief by an order under s. 64 of the Settled Land Act, 1925, authorising the plaintiff to give effect to the agreement, if the first question should be answered in the negative, and for representation orders.

The facts and the terms of the agreement, so far as material, appear in the judgment.

A. J. Balcombe for the plaintiff, the tenant for life.

N. C. H. Browne-Wilkinson for the first and fourth defendants, entitled to a jointure rentcharge and tenant for life in remainder, respectively.

C. J. Slade for the second and third defendants, tenants in tail expectant on the death of the life tenant.

G. M. Godfrey for the fifth and sixth defendants, the settlement trustees.

WILBERFORCE, J.: This summons raises a question as to the powers of a tenant for life under a settlement and involves the construction of certain provisions of the Settled Land Act, 1925. The settlement in question is a compound settlement arising out of two instruments, first a settlement made on Feb. 8, 1886, and, second, a settlement or resettlement made on Oct. 15, 1942. The 1886 settlement is only effective to the extent that it creates a jointure rentcharge in favour of the first defendant which is still outstanding and payable. Apart from that, the effective settlement is now the settlement of 1942, under

* The material terms of s. 44 (3) are printed at p. 586, letter F, post.

A which the plaintiff, Sir Richard Newton Rycroft, is tenant for life in possession without impeachment for waste. The second and third defendants are his daughters and are tenants in tail expectant on the determination of his life interest; and the fourth defendant is a tenant for life in remainder. Neither of the settlements contains any special powers extending beyond the statutory powers conferred by the Settled Land Act, 1925; and therefore the only question B is whether the transaction which is proposed can be carried out under the statutory powers.

The transaction which the tenant for life wishes to carry out arises out of the fact that included in the settled property is a block of houses in Clarges Street, London, viz., Nos. 8 and 10 to 17, and it is necessary to add to that that the plaintiff himself is absolutely entitled to Nos. 6 and 7 in the same street. It is C desired that the whole of these properties should be redeveloped by means of building leases, and for that purpose the tenant for life has entered into a conditional agreement, which is exhibit R.N.R.10, with a company called Clarges Street Investments, Ltd., which intends to carry out the development, and it is provided in that agreement that an application is to be made to the court for sanction of the agreement and if such sanction is not obtained within twelve D months, then the agreement becomes void.

The agreement is in many respects a normal form of building agreement, but I must refer to certain provisions of it. In cl. 1 it is provided that the tenant, i.e., the company, shall develop the properties and that in consideration of the redevelopment there shall be granted separate leases to the tenant of three blocks of the properties. The first block includes Nos. 6 and 7, the tenant for E life's own properties, together with No. 8, which is one of the settled properties, and that is called "Block A". Then Block B contains four more of the settled properties, and Block C contains the remaining four of the settled properties. It is provided that the leases when granted are to be for a term of ninety-nine years and are to commence on a date not later than Dec. 25, 1972. They may in fact commence on an earlier date if the tenant has obtained a surrender from F the existing lessees of the existing leases.

In cl. 2 it is provided that the rent payable under the leases to be granted is to be an aggregate sum of £17,500 a year, subject to adjustment in certain respects as provided in the leases, and it is stated that this aggregate figure of £17,500 is to be apportioned between the three leases to be granted in a ratio to be agreed between the surveyors of the landlord and the tenant. Then there G are provisions covering the interim period until the existing leases all fall in; and I should mention that they are due to expire at different dates from about seven years from now up to about twelve or thirteen years. The agreement provides that the tenant is to develop the property and to complete the work not later than Dec. 31, 1973; so that it follows that it is possible that the leases to be granted will not in fact be granted before that date, i.e., twelve years H approximately from the present time (1).

There are three points in respect of which it appears to be doubtful whether such an agreement is within the statutory powers of the tenant for life. I can deal with one of them quite briefly. That relates to the provision which I have mentioned in the agreement whereby Block A is to include not only one of the settled properties but also two of the properties belonging to the tenant for life I individually in his personal capacity. It is said that such a transaction, under which a single lease is to be granted of those three properties without any provision being made for apportionment of the rents to be paid in respect of the

(1) Clause 1 of the conditional agreement, dated July 4, 1961, provided for the grant of the separate leases "each of such leases to be for the term of ninety-nine years and shall be entered into and commence on a date not later than Dec. 25, 1972, or upon such earlier date upon which [the company] may have obtained an assignment or surrender from all the existing lessees of the said properties of Blocks (A), (B) or (C) above mentioned of the properties respectively vested in such lessees".

properties, is not within the powers of the tenant for life. It seems to me manifestly clear that that contention is correct, not only as a matter of principle (because it seems to me that there must be fatal objections to a confusion of this kind between settled properties and non-settled properties) but also as a matter of authority. I was referred to *Tolson* v. *Sheard* (1) which was concerned with a very similar type of problem and where an attempt was made to grant mining leases (in that case) of estates which were subject to different settlements. It was held there by the Court of Appeal, affirming HALL, V.-C., that the trustees had no power to grant such a lease. On that ground, therefore, I should be obliged to decide that the tenant for life has not power to carry out the agreement in the form in which it is at present couched. However, it is possible that that particular portion of the agreement may be capable of being corrected; and I therefore proceed to consider the other two objections which are of a more general character.

The first of these other two objections arises in connexion with the provisions of s. 42 of the Settled Land Act, 1925. Section 42 (1) provides:

> "Save as hereinafter provided, every lease—(i) shall be by deed, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease; . . ."

It is quite plain that the leases which are contemplated by the agreement may not fulfil those qualifications, and the question is whether at the present time it is open to the tenant for life to enter into a contract or an agreement which will involve the granting of leases of the character mentioned in the section.

There are two relevant provisions which bear on the point. First s. 117 (1) (x) of the Settled Land Act, 1925, states (2) that "'lease' includes an agreement for a lease", and secondly, under the heading "Miscellaneous Provisions" s. 90 (1) of the Act, provides:

> "A tenant for life . . . (iii) may contract to make any lease, and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act . . ."

The first question which arises there is how one is to reconcile the provision in the definition section, s. 117 (1) (x), which refers to an agreement for a lease, and the provision in s. 90 (1) (iii), which refers to a contract to make a lease. It is suggested, and I think correctly, that the provision in s. 117 (1) (x), relates to such agreements for leases as in effect amount to a demise of the property, a kind of agreement for a lease which in equity is equivalent to a lease, and consequently that s. 90 (1) (iii) is dealing with a different type of agreement, namely, an executory type of agreement to make a lease which is not equivalent to a demise. I think that is right, but I am still faced with the question exactly what type of contract is permissible under s. 90 (1) (iii). It is suggested by those who wish to argue against the power of the tenant for life to enter into this agreement that the contract to make a lease which is referred to in s. 90 (1) (iii) must be a contract to make a lease in a form which is "in conformity with this Act"; in other words, that if the lease which is contemplated by the contract is not one which could be granted under s. 42 (1) (i), a contract to grant such a lease cannot be made; and, as a matter of principle in support of that argument, it is said that to construe s. 42 (1) (i) otherwise would enable the tenant for life, by making contracts to grant leases in the future, to tie the hands of the subsequent tenants for life or persons interested under the settlement and would put in his hands the power to commit the settled estates to the granting of leases at a considerable date in the future. On behalf of the tenant for life

(1) (1877), 5 Ch.D. 19.

(2) The definition section, so far as relevant, reads—"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—. . . (x) 'Lease' includes an agreement for a lease, . . ."

A it is said that there is general power under s. 90 (1) (iii) to enter into a contract to grant a lease and that the only limitation on that power is that when the lease ultimately comes to be granted, which may be at any time in the future, it must be in conformity with the Act, and if for any reason it is not in conformity with the Act at that time as, for example, that the rent payable under its terms is not the best rent obtainable, then the contract cannot be carried out and B specific performance of it cannot be obtained.

Looking at the terms of s. 90 (1) (iii), I think that the better construction of the words used is that which is in favour of the argument for the tenant for life. It seems to me that the subsection should not naturally be read so as to limit the kind of lease, to make which the tenant for life may contract, to a lease which at that time was in conformity with the Act. It seems to me that by intro- C ducing the words "in making the lease may vary the terms, with or without consideration", the section is looking forward to the time when the lease ultimately comes to be granted, and that the words "but so that the lease be in conformity with this Act" relate to that time, i.e., when the lease comes to be granted, and not to the date when the contract is made.

There is authority which is possibly helpful on this point. It consists of two D decided cases, which were decided in close proximity in time, but unfortunately the decisions lead in different directions. First of all, there is a decision of NORTH, J., in 1886, *Re Farnell's Settled Estates* (3). There he decided that the court had not power under s. 4 and s. 5 of the Settled Estates Act, 1877, to sanction (in that case) a sub-lease—but the same principle applies to a lease—of settled land for the unexpired residue of the head term, with a covenant for E the extension of the term by a further sub-lease after the renewal of the head lease. The covenant for extension of the term is, of course, similar in legal character to a contract to grant a lease and with which I am concerned. There is only a short judgment there given by NORTH, J., and he simply decides that the Act of 1877 (4) (referring, as it does, to the requirement that a lease "shall be made to take effect in possession at or within one year next after the making F thereof") did not enable a covenant for a renewal of the lease at the end of thirty-four years to be granted. I note that in that case with regard to the relevant statutes there seems to have been no provision similar to the provision in s. 90 (1) (iii) enabling contracts for the making of leases to be entered into. The only words relied on were the words which I have quoted, which refer actually to leases in terms analogous to those now existing in s. 42.

G The other case was decided two years later by KAY, J., *Gas Light & Coke Co. v. Towse* (5). There, KAY, J. was concerned with building leases which were granted under the powers contained in a private Act of 1828. What had been done there was to grant the land for a certain period together with a covenant to renew at the end of the term for a similar term at the like rent, if the lessees signified their desire for renewal. The question was whether the trustees in that H case had power to enter into the covenant for renewal. It is to be noted there that the Act in question did contain express power to contract for leases, so that the observations of KAY, J., as to the nature of such contracts are very relevant here. He held there was nothing invalid in the covenant for renewal. He refers to the power in the private Act of Parliament to contract for leases, and says (6):

I "It is almost involved in that statement that he [the trustee] should have power to contract to grant a lease at a future day. A man does not contract to grant a lease now, he contracts to grant a lease tomorrow or next week, or next year, or at some future time. Such a contract is not a reversionary lease in any sense: it is a contract at a future time to grant a lease; and provided that, when that future time comes, the lease is in all respects in

(3) (1886), 33 Ch.D. 599.
(4) 40 & 41 Vict. c. 18, s. 4 (first paragraph).
(5) (1887), 35 Ch.D. 519.
(6) (1887), 35 Ch.D. at p. 531.

conformity with the power—that is, that it reserves the best rent and contains proper covenants, and so on—there is no harm in the contract; it is a perfectly good contract ". A

He examines a number of authorities, including an authority (7) which derived from LORD ST. LEONARDS, L.C., and sums up the result in this way, where he says (8): B

" The authorities, therefore concur in establishing this proposition—that in a lease under a power a covenant to renew that lease at the expiration of the term is a good covenant, even though the first lease was for the full term authorised by the power; but that when the time for carrying that covenant into effect arrives by the expiration of the first lease, then it must be shown that the rent and covenants stipulated for are such as are the best rent and the proper covenants at that time ". C

Having regard to the fact that KAY, J., was there directly concerned with the question whether an express power to contract to grant leases authorised a transaction analogous to that which I am considering, and also to the rather more comprehensive examination of the authorities which he was able to give than NORTH, J., did in his earlier judgment in *Re Farnell's Settled Estates* (9), I D think that I should follow the principle which KAY, J., applied in the later case of *Gas Light & Coke Co.* v. *Towse* (10) and hold, consistently with that, that the present type of transaction would be authorised under the power contained in s. 90 (1) (iii) of the Act of 1925 to contract to make any lease; and I so decide.

That leaves the third point which has been raised, which is one not without difficulty. It arises under s. 44 of the Settled Land Act, 1925, which is part E of a series of sections dealing with building leases. Subsection (1) deals with the general requirement as to building leases, and sub-s. (2) enables provision to be made for payment of a nominal rent for five years. Then there comes sub-s. (3), which provides:

" Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner: Provided that . . . (iii) the rent reserved by any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed." F

The difficulty which arises here is this: According to the evidence, the total amount of the rent, i.e., the figure of £17,500, exceeds one-fifth of the full annual G value of the aggregate of the properties, and it must inevitably follow from that with mathematical certitude that, whatever kind of apportionment is made between the individual properties, the rent reserved by the lease of one property at least, and very likely of more than one, will exceed the one-fifth part of the full annual value. Therefore, whatever method of apportionment is adopted, it is impossible to comply with this particular proviso. H

Two arguments are suggested for extricating the present agreement from the requirements of s. 44 (3) (iii). First of all, it has been suggested that this is not a case where land is contracted to be leased in lots, the argument being that s. 44 (3) is dealing with a different type of development, in fact a development of vacant land by putting up a number of houses or other buildings and then I leasing them, either in groups or individually, to tenants. It is probably true that s. 44 (3) is dealing with a kind of development not very similar to that which is proposed in the present case; but I find myself unable to say, as a matter of construction of these words, that cl. 1 of this agreement is not a provision by which the land, i.e., the settled land, is contracted to be leased in lots.

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(7) *Dyas* v. *Cruise*, (1845), 2 Jo. & Lat. 460, and see SUGDEN ON POWERS (8th Edn.) at pp. 787, 788. (8) (1887), 35 Ch.D. at p. 534. (9) (1886), 33 Ch.D. 599. (10) (1887), 35 Ch.D. 519.

A It is contracted to be leased in three separate blocks of property, and it seems to me that that falls within the statutory words.

That brings me to the second argument, which is that s. 44 (3) (iii) has as its evident purpose the fair and proper distribution of the aggregate rent to the individual properties and is concerned to prevent an undue weighting of the rent against any individual property, and that is all that it does. So it is sug-
B gested that where that mathematical exercise cannot be carried out by the nature of things, the proviso cannot be applied. I find myself unable to accept that argument. It seems to me that to give effect to it would involve a very substantial reconstruction of the proviso. It would in fact involve writing into the proviso, at the beginning of it, some detailed provisions which would except from its application a case where the aggregate rent reserved does ab initio
C exceed one-fifth of the full annual value of the land. I do not think that the court should embark on such a radical reconstruction of the proviso unless it were satisfied that not to do so would produce an absurdity or injustice or render the proviso unworkable. I do not think that that result follows in this case. It seems to me that the only result which follows from applying the provisions of the proviso to the kind of case with which I am concerned here is that the
D mechanism of apportionment which is permitted by the proviso just cannot be applied to this particular case, and the consequences of that do not seem to me to be so objectionable and so absurd as to require me to re-write the proviso. In fact, it may be said that the purpose which is sought to be achieved by the proviso is all the more desirable when one has a higher rent than that which the proviso is contemplating, because it may well be that in such a case as this
E a method of apportionment might involve throwing on to an individual property an even higher rent than that which it is the policy of the proviso to prevent being thrown on individual properties. Therefore, so far from the natural construction of the section in a case such as the present leading to an absurd result, it seems to me that it is one which may well be in accordance with the policy of the proviso itself. At any rate, the only result which is obtained by applying
F the proviso to a case such as the present is that the method of apportionment of the entire amount of rent ultimately payable cannot be carried out under the powers in the section. Therefore, it must either be discarded altogether or it must be brought forward by means of some individual scheme justified on its merits and sanctioned by the court, either under the general provisions of s. 64 of this Act or, if the case so demands, the rather more special provisions which
G apply to building leases contained in s. 46 of the Act.

I therefore decide that this third objection is in any case fatal to the agreement as it stands; and, for those two reasons which I have given, upholding the first and third objections, I decide that it is not within the statutory powers of the tenants for life to enter into the proposed agreement.

Declaration on question 1 *of the originating summons limited to s.* 42 *of the*
H *Settled Land Act,* 1925; *originating summons adjourned generally* (11).

Solicitors: *Baileys, Shaw & Gillett* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(11) Thus the summons could be restored and an appointment made for hearing in chambers the application under s. 64 of the Settled Land Act, 1925, as to which see p. 582, letter F, ante.

Re HARPUR'S WILL TRUSTS. HALLER AND ANOTHER *v.* ATTORNEY-GENERAL AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Harman and Donovan, L.JJ.), June 30, July 3, 4, 1961.]

Charity—Uncertainty—Gift to institution whose main object charitable but whose other objects might or might not be charitable—Charitable Trusts (Validation) Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 58), *s.* 1 (1).

Charity—Validation by Charitable Trusts (Validation) Act, 1954—*Imperfect trust provision—Gift to institution whose main object charitable but whose other objects might or might not be charitable—Whether trust validated—Charitable Trusts (Validation) Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 58), *s.* 1 (1).

By her will dated Oct. 19, 1945, a testatrix bequeathed the residue of her personal estate on the usual trusts for conversion and investment and directed that her real estate should be retained for ten years and that the income thereof and the income of her residuary personal estate should be accumulated during that period. At the end of that period the whole estate was to be sold and, subject to the payments of legacies, the testatrix directed her trustees to pay and divide her residuary trust estate " between such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen, and other members of H.M. Forces who have been wounded or incapacitated during the recent world wars " in such manner and in such proportions as her trustees should in their uncontrolled discretion select and deem appropriate. On Aug. 12, 1946, the testatrix died. The residuary gift would be ineffective unless validated by the Charitable Trusts (Validation) Act, 1954.

Held: the testatrix' gift of her residuary estate was not a provision that declared the objects and so described them as to enable effect to be given to them or some of them as exclusively charitable purposes, but was a gift for division among institutions (see p. 593, letter I, to p. 594, letter A, post); it was not, therefore, an " imperfect trust provision " within s. 1 (1) of the Act.

Decision of CROSS, J. ([1960] 3 All E.R. 237) affirmed.

[As to charitable trusts and the requisites for creating them, see 4 HALSBURY'S LAWS (3rd Edn.) 267-272, paras. 562-564; and for cases on the subject, see 8 DIGEST (Repl.) 387-397, *804-892*.

For the Charitable Trusts (Validation) Act, 1954, s. 1, see 34 HALSBURY'S STATUTES (2nd Edn.) 68.]

Cases referred to:

Chichester Diocesan Fund and Board of Finance (Incorporated) v. *Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 8 Digest (Repl.) 395, *875*.

Davis, Re, Thomas v. *Davis*, [1923] 1 Ch. 225; 92 L.J.Ch. 322; 128 L.T. 735; 8 Digest (Repl.) 394, *869*.

Gillingham Bus Disaster Fund, Re, Bowman v. *Official Solicitor*, [1958] 1 All E.R. 37; [1958] Ch. 300; [1957] 3 W.L.R. 1069; *affd.* C.A., [1958] 2 All E.R. 749; [1959] Ch. 62; [1958] 3 W.L.R. 325; 3rd Digest Supp.

Heydon's Case, (1584), 3 Co. Rep. 7a; Moore, K.B. 128; 76 E.R. 637; 21 Digest 559, *1358*.

Houston v. *Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 8 Digest (Repl.) 396, *889*.

Morice v. *Durham (Bp.)*, (1804), 9 Ves. 399; 32 E.R. 656; *affd.*, (1805), 10 Ves. 522; 32 E.R. 947; 8 Digest (Repl.) 390, *836*.

Wykes' Will Trusts, Re, Riddington v. *Spencer*, [1961] 1 All E.R. 470; [1961] Ch. 229; [1961] 2 W.L.R. 115.

A **Appeal.**

This was an appeal by the Attorney-General from an order of CROSS, J., dated July 21, 1960, and reported [1960] 3 All E.R. 237, declaring that the residuary estate of Mary Jane Harpur was not held on valid charitable trusts for such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen and other members of H.M. Forces and B was, therefore, not effectively disposed of by the testamentary dispositions of the testatrix.

The Solicitor-General (*Sir Jocelyn Simon, Q.C.*), and *B. J. H. Clauson* for the Attorney-General.

Ian Campbell, Q.C., and *J. E. Vinelott* for the next of kin.

R. Cozens-Hardy Horne for the trustees.

C

LORD EVERSHED, M.R.: By her will dated in 1945 Mrs. Mary Jane Harpur, who died on Aug. 12, 1946, disposed of her estate, so far as relevant, as follows. She first gave a number of pecuniary legacies substantially to relations of her husband; she provided that the income of the residue of her estate should be accumulated for a period of ten years (which would therefore expire in August, D 1956), and thereafter directed that legacies should be paid to a number of named institutions, of which St. Dunstan's was one and Dr. Barnardo's Homes was another, but of all of which it could not be said that they were charitable institutions. That gift was followed by a clause that the receipts of the treasurers or honorary treasurers of the charitable and other associations should be a good discharge, a formula which reinforces what I have stated, that not all of the E associations were charitable. She then finally made this direction:

> "I direct my said executors and trusteees to pay and divide the [rest of her estate] between such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen, and other members of His Majesty's Forces who have been wounded or incapacitated during the recent world wars in such manner and in such proportions as my F said executors and trustees may in their uncontrolled discretion select and deem appropriate."

The question before the court is what effect, if any, can be given to that final provision. If no effect can be given to it, then the rest of the estate goes to the testatrix' next of kin. The class of next of kin has not yet been determined. G It would not appear from her will that she had any close relatives of her own but counsel have appeared for two who are admittedly members of the class and, therefore, representative of the whole. It has been conceded for the purposes of the argument that the class of institutions which I have read, "institutions and associations having for their main object . . ." is not one which is presently ascertainable. It is further conceded that although the H assistance and care of soldiers, sailors and airmen and other members of the forces wounded and incapacitated would be a charitable purpose, nevertheless the words used by the testatrix are not apt to confine the institutions to those which are exclusively devoted to charitable objects. It follows, therefore, inevitably that unless the Charitable Trusts (Validation) Act, 1954, can be invoked to save the provision, that provision must, according to the well-established I law, be held invalid and ineffective. The result is one which I cannot help in some degree deploring. There can be little doubt what the testatrix had principally in mind, viz., the assistance and care of soldiers, sailors and airmen wounded or incapacitated in the wars, but it is no less clear that the words she has used do not confine her benefaction exclusively to those objects. As was pointed out in the argument, had the word "main" been omitted or the epithet "charitable" been inserted before the various institutions and associations, all would have been well; but unfortunately the testatrix did neither of those things and the question now before us is limited, having regard to the concessions which I

have mentioned, to the single one: Is this gift within the scope of s. 1 of the Act of 1954? A

In the circumstances as I have stated them, I have felt the strongest inclination, I must confess, if it be possible, to conclude favourably to the Solicitor-General's argument, but in the end I have felt compelled to the view taken by CROSS, J., in the court below, though as will appear I diverge in some respects from him in the grounds leading to the conclusion. I confess also that I have found very B considerable difficulty in following the language of the Act of 1954, and still more in comprehending its true purpose and effect. Some of the sections, particularly s. 3 (1), I make no pretence of understanding, but fortunately it is unnecessary in this case for me so to do. It is sufficient for present purposes to read the long title to the Act, s. 1 (1) and (2) and s. 2 (1). There was some argument before us as to the extent to which in this case it is legitimate to draw conclusions C from the language of the long title, but having regard to the extreme difficulty in the construction of the Act, and especially of finding coherence between s. 1 and s. 2, I think it legitimate to draw such inspiration as may be found from the long title. I now read the long title and the three subsections I have named. The long title is:

> "An Act to validate under the law of England and Wales, and restrict to D charitable objects, certain instruments taking effect before Dec. 16, 1952, and providing for property to be held or applied for objects partly but not exclusively charitable . . ."

Section 1 provides:

> "(1) In this Act, 'imperfect trust provision' means any provision E declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.
>
> "(2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before Dec. 16, 1952, F shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—(a) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and (b) [it is this paragraph which, if at all, applies in the present case] as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects in G so far only as they authorise use for charitable purposes."

Section 2 (1) provides:

> "Subject to the next following subsection, this Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision, and to any covenant to make such a disposition, where H apart from this Act the disposition or covenant is invalid under the law of England and Wales, but would be valid if the objects were exclusively charitable."

This much is clear, I think, and it is important. The Act seeks to give, though only for a limited time, a specified statutory effect to what are called (and defined as) imperfect trust provisions in so far as such imperfect trust provisions would, I apart from the Act, be invalid by the ordinary law. At a first reading of s. 1 one would suppose that an imperfect trust provision would be a provision that would be so far imperfect as to be invalid or unenforceable at law. But notwithstanding the choice of the epithet "imperfect", it is I think also clear from s. 2 (1) that this would be a wrong interpretation, for s. 2 (1) shows that what is called an imperfect trust provision may none the less be not so imperfect as to be invalid. Why Parliament followed the devious course of adding s. 2 (the language of which in some respects deviates from s. 1 and tempts me to

A suspect a different authorship) to the earlier section when the result aimed at could, I should have thought, have been much more easily and simply achieved, it is not for me to say. But so it is; and the forceful argument of the Solicitor-General rests fundamentally on the interaction of the two sections. For it is said by him that the judgment appealed from has this basic defect that its necessary result is to give no effect whatever to s. 2 (1).

B The next thing to be noticed about the Act is the emphasis in the long title and throughout s. 1 on purposes or objects. It refers to provisions for the application of property for certain purposes. In the present case we are concerned on the face of it with something different—with a provision not to apply the estate for certain purposes but to distribute it among certain institutions. It is the argument of the Solicitor-General that, substantially speaking, a gift to C institutions is the same thing as a gift for purposes. It is no doubt broadly true (though there may be exceptions in the case of institutions incorporated by royal charter) that institutions, unlike natural persons, only exist for the execution of the purposes or objects ordained by their constitutions. So by way of example, a gift to an institution such as St. Dunstan's or Dr. Barnardo's Homes is in truth, says the Solicitor-General, a provision for the purposes for which D St. Dunstan's or Dr. Barnardo's Homes exist and are carried on, those institutions being merely the instruments for the execution of the purposes. It is, therefore, said that a gift such as the present is within a fair reading of s. 1 (1) and is an imperfect trust provision.

The construction suggested would be a somewhat strained use of the language and more particularly when one has in view the language of para. (b) of sub-s. (2) E to which I shall later revert. If the Solicitor-General were right in saying, as he did, that unless a gift such as the present was treated as within the comprehension of s. 1 (1), effect could not otherwise be given to s. 2 (1), I should for my part be disposed so to strain the language of the earlier section. That view of the language is supported also by this. One must, it is said, in construing any Act of Parliament look at the mischief which the Act is designed to cure. The F Solicitor-General referred to the citations in CRAIES ON STATUTE LAW (5th Edn.) at p. 91, from *Heydon's Case* (1) which enshrine that general proposition, though I observe that to do what one is enjoined to do, postulates that one knows what is the mischief which Parliament intends by its language to remedy. The occasion for the introduction of the bill which became the Charitable Trusts (Validation) Act, 1954, was the publication of the Report on Charities associated G with the name of Lord Nathan, a fact which explains (and I shall not dwell on it save to state it) the dates which I have mentioned in reading the sections, particularly the date Dec. 16, 1952. The so-called *Diplock* case (reported under the name of *Chichester Diocesan Fund and Board of Finance* (*Incorporated*) v. *Simpson* (2)) had, not so long before, brought to a head and to some public notice the incompetence of gifts expressed to be for charitable or benevolent H objects. But the earlier case, *Re Davis, Thomas* v. *Davis* (3), which had been decided in 1923 had also shown the incompetence of gifts to "charitable or public institutions in Wales". Can it then, said the Solicitor-General, be sensibly supposed that Parliament was only intending to assuage the difficulties which had been created by dispositions in the form of that in the *Diplock* case (2) and leave wholly unrelieved similar dispositions in form similar to that in *Re* I *Davis* (3)? The argument is no doubt forcible, though I would observe, first, that the relatively recent date of the *Diplock* case (2) may have caused a concentration on that class of provision, and, second, that cases like the present of gifts to institutions are not entirely parallel in their effect and the effect of the law on them with cases of gifts for charitable or other purposes. A gift for charitable purposes will never be allowed to fail through any want of greater precision or

(1) (1584), 3 Co. Rep. 7a. (2) [1944] 2 All E.R. 60; [1944] A.C. 341.
(3) [1923] 1 Ch. 225.

for remoteness. A gift for charitable or benevolent purposes must always, under the general law, fail for one simple reason, that such a gift cannot invoke the immunity enjoyed by a gift for charitable purposes exclusively. In the case of gifts to charitable institutions, since the gift is, prima facie, an absolute out-and-out gift, there will only be failure if the class of institutions named is unascertainable. In that respect a gift in favour of institutions of a particular category is like a gift to a class of individuals of a particular category; if the membership of the class is known or ascertainable, the gift is good, and good in the case of a gift to institutions whether some of the institutions are charitable institutions and some are not. It is this last-mentioned circumstance that much influenced, as I follow it, the judgment of CROSS, J., for, as he pointed out, since a gift in favour of a class of institutions, some charitable and some not charitable, which was ascertainable would be good, the gift being an absolute gift, therefore such a gift could not by any ordinary use of language be comprehended within the phrase "imperfect trust provision". He also thought that if a gift such as the present, a gift in favour of a class of institutions, fell within the scope of s. 1 of the Act, so also would fall a gift, e.g., to charitably minded citizens of London. With all respect to the learned judge, on these points I do not share his view. As regards the latter point, there seems to me to be no parallel whatever between the kind of gift with which we are concerned, and a gift to charitably minded citizens of a particular place. A gift in the latter form could not by any proper inference be treated as a gift for any particular purpose. It would not follow in the least because the beneficiaries were described as charitably minded persons that the giver intended or thought that the subject-matter would be applied for charitable purposes. As regards the former point, the Solicitor-General's answer, which I accept, is that if a gift to ascertained institutions or ascertainable institutions, some charitable and some not charitable, would fall within the scope of s. 1 as an imperfect trust provision, it would be saved from the impact of the Act by s. 2. As I have said, his case before us rested very largely, if not fundamentally, on the point that, as he submitted, only such a case could possibly be within the scope of s. 2; in other words, you would have to bring in a provision for gifts to institutions in order to find something, viz., a case where the institutions were ascertained or ascertainable, on which s. 2 (1) could, as it were, bite. If that was the only possible imperfect trust provision to be saved by the section, then, as I have said, I should be strongly disposed to hold that one should so construe the language of s. 1 as to give the necessary coherence between the two sections. But the argument in this court has satisfied me that there may well be provisions for purposes as distinct from provisions for distribution among institutions which would be imperfect trust provisions within the definition, but which, none the less, being valid, could be saved by s. 2 (1) from the impact of s. 1 (2). An illustration was given of a gift on trust to apply income during a limited period of, say, ten years for certain named purposes such as the trustees think fit, some of the purposes being charitable and some not charitable. It seems to me that such a gift would by the ordinary law be valid. It is no less clear, as I think, that a provision in that form would be an imperfect trust provision within the definition of the section. It, therefore, is, as I think, no longer true to say that failure to bring a gift of this class into the scope of s. 1 is inevitably to give no effect to s. 2.

That being so and the learned Solicitor-General being, if I am right, bereft of his most compelling argument, it is necessary now to look at the language and see whether according to its fair and ordinary sense the gift with which we are concerned, falls within s. 1 and the definition therein of an imperfect trust provision. With reluctance, as I earlier stated, I have been compelled to conclude that it cannot be said so to fall within that definition. I have already noted the emphasis, repeated and clear, on objects and purposes in the title and in the section. I refer particularly to the phrase in s. 1 (1) "*so* describing those objects

A that . . . ". It is then first necessary to say in regard to the testatrix' gift what were the objects described by that provision. I find it impossible to say more than that the objects for which her property was to be held were any objects under the sun, subject only to this one limitation, that the actual institutions by means of which the objects would be attained must have as their main object, at any rate at the date when the distribution is made, the assistance and care of soldiers, B sailors and airmen etc. More than that it is impossible to say. Nor would it follow that having discovered a particular institution having that main object, as well as other objects, that the fund once handed over would be given or applied for the main object. However unfortunate it may be, the testatrix has not said that the funds, when distributed, are to be applied by those to whom they are paid for the main object. The reference to the main object only serves to qualify C the institution as a possible recipient. I think that difficulty, moreover, is greatly enhanced when one comes to look at the language of para. (b) of s. 1 (2). It will be recalled that there is in this case the accumulation period of ten years so that this particular gift does not take effect until 1956 and is therefore within para. (b) assuming that one has first brought the provision within the previous subsection. One is then told that the provision is to have effect as if it had required the D property to be held or applied for

> " the declared objects in so far only as they [the declared objects] authorise use for charitable purposes."

The difficulty is perhaps self evident. One has first the greatest difficulty, as I think, if not impossibility, in saying what the declared objects were and then E para. (b) says that one has to treat the provision as though it required the property to be held for the declared objects so far only as such objects authorise use for charitable purposes. I can myself see no means whereby effect could be given to that. Let it be assumed that other things are in favour of the Solicitor-General's argument and that one should (and this was I think the suggestion) confine the class of recipients to such institutions having the main object which I F have stated, whose other objects were, or were at the date of distribution, charitable objects. One then presumably, having so identified the beneficiaries, hands over out-and-out specific sums. Is one by so doing giving effect to what the Act says this provision must mean, namely, that the property is to be held for the declared objects so far only as they authorise use for charitable purposes? And still further, can one say by any sensible use of language that that is within the G scope of the testatrix' intention?

In that connexion a point was raised during the argument that seems to me to be the final blow to the validity of the Solicitor-General's case. Institutions may from time to time alter their objects. No doubt institutions of the kind indicated are unlikely wholly to change their purposes; but as a matter of law it is possible. Certainly when one considers the main object which is referred H to, the time will presumably come when there will be no soldiers, sailors and airmen still surviving who were wounded or incapacitated during the two wars, the latter of which ended already sixteen years ago. It was, I thought, conceded by the Solicitor-General that if this case fell within the section, then one would have to give effect to the requirements of the section by taking from the recipient when selected some kind of undertaking for the continued application of the funds I for some specific or at least for some charitable purposes. What I have said illustrates further, as I think, the impossibility which in the end of all I have felt bound to assume of fitting in a gift in this form with the language of s. 1 and particularly of the definition of imperfect trust provision. In the end it has seemed to me inescapable, whatever the purpose that Parliament had in mind, that this Act is limited to cases where the provisions dealt with are properly and fairly described as provisions declaring the objects and more particularly so describing the objects as to enable effect to be given thereto by application for

purposes exclusively charitable. It seems to me that the gift which I have read from the testatrix' will cannot qualify within s. 1 (1). A

Therefore, although on certain aspects of the matter I have somewhat diverged from the view expressed by CROSS, J., I arrive in the end at the same conclusion.

Certain other matters were raised in the court below, e.g., the validity of certain observations made in *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor* (4) both by HARMAN, J., at first instance and in this court. In the circumstances it is unnecessary to pursue those matters further and I say nothing about them. B

HARMAN, L.J.: This can be called a tragic case, for I can feel little doubt that the testatrix meant in effect to benefit members of Her Majesty's Forces disabled in the wars of 1914 and 1939, and one can but feel regret if that intention is to be defeated. The duty of the court, however, is to give effect to the intentions of testators *as expressed in their wills*, and it is not entitled to give effect to intentions not so expressed. So to do would be to re-write the will according to the court's notion of what the testator must have meant, and not to abide by the expressed intentions. This may seem a hard doctrine, but to depart from it would be to allow guesswork to supplant the written word. The testator cannot be recalled from the shades to state what his meaning was—littera scripta manet—he must be taken to mean what he wrote. A man may, subject to the exceptions in favour of his family and to certain rules grounded on public policy, dispose of his own as he chooses, but if he deputes the choice to his representatives, he can only do so within well-defined limits; if he exceeds those, he does not displace the right of his next of kin to claim property of which he has not disposed. C D E

In this case it is admitted in this court that the words used by the testatrix in deputing her testamentary power to her executors go beyond her legal rights under the ordinary law, but it is claimed that the defects in her language are cured by an Act of 1954 styled "The Charitable Trusts (Validation) Act". The short title to this Act indicates its purpose and its long title is still more revealing (5). I will not read it again. The stated object is to reform dispositions which because they state too broadly trusts which, while obviously having as one aim that of benefiting charitable objects, fail for uncertainty in the objects. A charitable bequest can never fail for uncertainty, because the Attorney-General as parens patriae can always intervene by way of propounding a scheme for the regulation of those trusts along channels which the law of the land regards as charitable. If the objects transcend those bounds, they cannot be controlled by the Attorney-General's intervention, and being out of control are not allowed by the law. This doctrine may be said to have been first formulated by SIR WILLIAM GRANT, M.R., in *Morice* v. *Bishop of Durham* (6), and has been acted on ever since. It is admirably expressed in VISCOUNT HALDANE'S speech in *Houston* v. *Burns* (7). F G H

In the 1930's there was a celebrated litigation about the estate of one Caleb Diplock whose will contravened the rule. The words he used (8) were

> "for such charitable institution or institutions or other charitable or benevolent object or objects in England."

Those words were, I believe, to be found in a well-known precedent book. The disposition was not questioned by the next of kin till the residue, some quarter of a million pounds, had been distributed by the executors, and the result of the decision was disastrous to a great number of charitable institutions, and indeed, to the executors whose fortunes were impounded to make good their mistake. I

(4) [1958] 1 All E.R. 37; [1958] Ch. 300; *affd.* C.A., [1958] 2 All E.R. 749; [1959] Ch. 62.
(5) The long title is set out at p. 590, letter D, ante.
(6) (1804), 9 Ves. 399.
(7) [1918] A.C. at p. 342.
(8) See [1944] 2 All E.R. 60; [1944] A.C. 341.

A One of them I believe took his own life in consequence. It is generally supposed that this case was the cause of the Act in question.

When one turns to the terms of the Act it appears at once that the legislature determined not to make a clean sweep in the matter. There was already a statute on the books of the New Zealand legislature which had in plain terms done so, but Parliament here was minded to limit most precisely the effect of a statute B whose result was obviously to some extent to deprive a testator's next of kin of their existing rights. Thus it will only apply to instruments taking effect before Dec. 16, 1952. Why that particular class of testator should be relieved of the fetters which otherwise would have fallen on them is not very clear. The hope that the publication of a well-known report on charities would sound so loud in the ears of the public that all testators thereafter would abide by the law C seems to me to be a chimerical one. However that may be, only a certain class of testator was to be benefited.

The Solicitor-General's main argument was that Parliament cannot have intended to cope with only part of the problem and that the Act must, whatever its terminology, have been intended, and must be so construed, to deal not merely with cases where the objects are too widely stated but also with those D where the bequests are to institutions or a class of institution whose functions exceed the limits of the legal definition of charity.

It has been my misfortune on a previous occasion in *Re Gillingham Bus Disaster Fund* (9) to have to wrestle with the terms of this statute, and I confess to having been floored by them on that occasion and this. Whether I was right then or wrong, as BUCKLEY, J., whose argument as counsel did not then prevail E with me, but who has as judge reasserted it recently in *Re Wykes' Will Trusts, Riddington* v. *Spencer* (10) and thus affected to overrule me, does not, I think, arise for decision now. The fact remains that the terms of the statute are most difficult. LORD EVERSHED, M.R., has already read them. The definition of "imperfect trust provision" is limited to a provision declaring the objects for which property is held. "Objects" is synonymous clearly in s. 1 (1) with F "purposes" but how to extend that to "institutions" is difficult to see without entirely altering the language, having regard particularly to the next words "and so describing those objects". It is the instrument which is to describe the object for which the money is to be held, but if gifts to institutions are to be included and one does not find any description of the objects in the instrument, one has to look at the constitution of the body or institution in order G to find out whether it does come within the right limits or no. That seems to me to make a fundamental difference between a bequest which is to objects and a bequest which is to bodies or institutions. I do not find it possible myself to reconcile the words of s. 1 (1) with a gift in the kind of form which the testatrix has used here.

The matter becomes even more difficult when one looks at s. 2 (1). I am H tempted to think that the two were never meant to appear in the same statute next to one another at all. The argument is that the definition in s. 1 (1) would include certain bequests which were already valid by the law of England and s. 2 (1) took that class of bequest out of the mischief of the Act into which s. 1 had put them. It does appear almost inevitable that that is what the two sections do. It is an odd state of things if Acts of Parliament are I passed in such a form that it is necessary to amend the effect of the first section by putting in a second. The Solicitor-General's argument has been described by LORD EVERSHED and rested on the view that there was nothing for s. 2 (1) to affect at all unless one brought into s. 1 (1) gifts in favour of institutions and therefore in some way or other one must twist s. 1 (1) until one gets "institutions" into it. I do not feel impressed by that argument, because in my judgment there are gifts to objects which would be hit by s. 1 (1) although perfectly

(9) [1958] 1 All E.R. 37; [1958] Ch. 300.
(10) [1961] 1 All E.R. 470; [1961] Ch. 229.

valid and which therefore need the protection of s. 2 (1). That being so, the motive for the suggested restating of the language does not seem to me to have any particular force. Even if, however, that argument were right, I should have been unwilling to use such a spanner as would alone have bent the terms in s. 1 into comprising "institutions". Why Parliament left that side of the problem I do not know, any more than why it confined its interference to the date which it fixed on. It is an Act so difficult to construe that I can only think one must go along step by step giving each word the best meaning one can and not try to wrest it out of all semblance to itself in deference to a theory that Parliament cannot have intended to limit it as it apparently has. In my judgment, therefore, there is no justification for interfering with the language so as to widen the scope of this statute and the learned judge reached the right conclusion. I would dismiss the appeal.

DONOVAN, L.J.: I agree and there is nothing that I wish to add.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor*; *Freshfields* (for the trustees and the next of kin).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WUTA-OFEI *v.* DANQUAH.

[PRIVY COUNCIL (Lord Tucker, Lord Hodson and Lord Guest), June 26, 27, July 24, 1961.]

Privy Council—Ghana—Trespass—Land—Possession.

Trespass—Land—Possession—Evidence—Inference of possession where land not used—Title temporarily vested in state—Continuance of former possession.

In order to establish possession of land, it is not necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it; the type of conduct which indicates possession must vary with the type of land, and, where the possession sought to be maintained is against a person who never had any title to the land, the slightest amount of possession would be sufficient to maintain an action for trespass (see p. 600, letter A, post).

Dictum of PARKE, B., in *Brown* v. *Notley* ((1848), 3 Exch. at p. 222), disapproved.

Dictum of LORD HATHERLEY in *Bristow* v. *Cormican* ((1878), 3 App. Cas. at p. 657), applied.

D. acquired land in Ghana by gift made by way of oral grant in 1939 according to native custom. The land was marked out, four pillars bearing D.'s initials being placed at the four corners of the land. The land was not built on or used, and D. delegated to her mother the task of looking after the land. In 1940 certain lands, including this land, were vested by ordinance in the chief secretary in trust for the Crown free from all titles, but subject to provision for release when no longer required. In 1945 the gift to D. was confirmed by indenture duly registered. This recited that D. had entered into and had been in possession of the land ever since the gift. In 1948 the appellant started to build on the land. D. protested by letter of her solicitors in March, 1948, and in April, 1948, brought this action for trespass. In 1956 the land was released by the government and D.'s title revived.

Held: although the evidence of possession or continuance of possession after 1940 by D. was exiguous, the proper inference was that D. had continued in possession; accordingly, she was entitled to maintain the action for trespass.

Appeal dismissed.

A [As to possession required to support an action for trespass to land, see 33 HALSBURY'S LAWS (2nd Edn.) 11, para. 17; and for cases on the subject, see 43 DIGEST 379-387, *62-121*.]

Cases referred to:

Bristow v. *Cormican*, (1878), 3 App. Cas. 641; 43 Digest 382, *80*.

B *Brown* v. *Notley*, (1848), 3 Exch. 219; 18 L.J.Ex. 39; 12 L.T.O.S. 222; 154 E.R. 823; 43 Digest 393, *161*.

Appeal.

Appeal by R. B. Wuta-Ofei from an order of the West African Court of Appeal (COUSSEY, P., KORSAH, C.J., and VERITY, Ag. J.A.), dated Nov. 29, 1956, setting aside a judgment of the Supreme Court of the Gold Coast, Eastern C Judicial Division (Land Division) (VAN LARE, J.), dated Sept. 7, 1955, in which the court found for the respondent, Mabel Danquah (the plaintiff in the action). VAN LARE, J., gave judgment for a declaration of the respondent's title to the land and for recovery of possession and an injunction, subject to one qualification which is not material to this report. He further found that the respondent had suffered no pecuniary damage, but that in fact she had benefited rather D than lost through the trespass committed on her land by the appellant. The judge awarded her mesne profits from the date of his judgment. The appellant appealed to the West African Court of Appeal. That court found that the respondent obtained her possession lawfully and decided that possession so obtained could not be permitted to be disturbed at the mere will of the appellant, who had no lawful claim to title, and that the circumstance that the respondent E ascribed her right to possession to a title which was not in law then vested in her (since the title to the land had passed by virtue of an ordinance to the chief secretary in trust for Her Majesty) did not impair her right to possession as against the appellant. The Court of Appeal was of opinion, therefore, that the trial judge had erred in making a declaration of the respondent's title to ownership, but was right to have made an order for the recovery of possession and for mesne profits. F Accordingly, the appeal was allowed only in so far as the judgment of the Supreme Court related to the declaration of title. The appellant appealed to Her Majesty in Council. The facts are set out in the judgment of the Board.

G. W. F. Dold and *D. Taverne* for the appellant.

J. G. Le Quesne for the respondent.

G **LORD GUEST:** The plaintiff-respondent brought a suit on Apr. 10, 1948, in the Ga Native Court claiming to be the owner of a piece of land at Christiansborg, Accra, which she alleged was granted to her by the Stool of Osu (Christiansborg) in 1939 in accordance with native custom, the gift being later confirmed and evidenced by an indenture, dated Dec. 31, 1945, and registered in the Deeds Registry. She alleged that the defendant-appellant had trespassed H on her land by building a block wall round the land, and she claimed a declaration of title to the land, £50 damages for trespass and interim injunction against further trespass. The cause was later transferred from the Native Court to the Supreme Court. After pleadings had been ordered by VAN LARE, J., the respondent expanded her civil summons and claimed recovery of possession, mesne profits and a perpetual injunction. The appellant in his statement of defence I pleaded that the respondent had no title to the land because, five years before the respondent's alleged grant, the Osu Stool had granted the land to him and that he could not be ejected from the land. During the course of the hearing, the appellant was allowed to add a new paragraph to his defence based on Ordinance No. 44 of 1940 entitled Accra Town (Lands) Ordinance (Laws of the Gold Coast (1951), c. 87). This aspect of the defence will be more fully referred to later. After evidence before the trial judge, VAN LARE, J., on Sept. 2, 1955, gave judgment for the respondent. An appeal was taken to the West African Court of Appeal, and the court on Nov. 29, 1956, made an order setting aside the

judgment of the Supreme Court granting the respondent a declaration of title. As to the substantive relief, that is for trespass, the appeal was dismissed. The appeal to the Board is, therefore, solely related to the question of trespass on which it was submitted that the West African Court of Appeal came to a wrong decision. There is no cross-appeal and the respondent did not challenge their decision in regard to title.

The history of this piece of land is that, in March, 1939, the Osu Stool made an oral grant of the land in dispute to the respondent and duly confirmed it by instrument. But it was the oral grant according to VAN LARE, J., which was decisive, and the respondent, therefore, became owner and entitled to possession of the land as at that date. The plot was demarcated and the respondent caused pillars with her initials "M.D." on each pillar to be placed on the four corners of the plot. The site was looked after by the respondent's mother, but there is no evidence of the land being put to any use at that time. On Oct. 26, 1940, the Accra Town (Lands) Ordinance (No. 44 of 1940) (Laws of the Gold Coast (1951), c. 87), was passed, under which certain areas of land, including the land in dispute, vested in the chief secretary in trust for Her Majesty. Section 2 is in the following terms:

> "(1) The lands described and delineated in the indentures mentioned and described in Sch. 1 and Sch. 2 hereto which lands are also specified in Sch. 3 hereto shall, subject to the reservations described in Sch. 4 hereto, forthwith by virtue of this section become and be vested absolutely and indefeasibly in the chief secretary for the time being in trust for Her Majesty, free from all competing rights, titles, interests, trusts, claims, liens, demands and restrictions of all kinds whatsoever.
>
> "(2) When in the opinion of the governor there is no longer any need for any particular part of such lands to remain so vested in the chief secretary the governor may by order published in the Gazette direct that any particular part of such lands shall cease to be so vested either forthwith or from a date to be fixed by such order, and thereupon such particular part of such lands shall be held and enjoyed as though the same had never been assured by indenture to the governor of the Gold Coast or vested under the provisions of this ordinance in the chief secretary for the time being in trust for Her Majesty."

Section 5 provides as follows:

> "(1) Any person who claims that he had any right, title or interest to or in such lands or any part of them before they vested in the chief secretary under the provisions of s. 2 (1) shall lodge a claim in writing with the commissioner of lands within three months of the date of the notice mentioned in s. 4.
>
> "(2) Such claim shall specify the area and boundaries of the land claimed and the particulars and evidence of the right, title or interest claimed therein and, in the case of any person other than a person who has executed an indenture mentioned in Sch. 1 or Sch. 2 hereto, the compensation claimed in respect thereof.
>
> "(3) Such claim shall be accompanied by any deeds or other documentary evidence relating to the title to the land claimed.
>
> "(4) No claim shall be entertained unless the same is made in accordance with the provisions of this section, and any right, title or interest in respect of which no claim has been made within three months of the date of the notice mentioned in s. 4 shall be deemed to have determined."

Thereafter in terms of the ordinance the title to the land was in the chief secretary. But, notwithstanding this ordinance, the respondent had her original gift confirmed by an indenture, dated Dec. 31, 1945, and registered in the Accra Deeds Registry. Among the recitals to this deed is contained this clause:

A "Whereas the said grantee [the respondent] entered into and has been in possession of the said piece of land ever since." The next step was taken sometime in 1948, when the appellant started to build on the land. The respondent thereupon gave instructions to her solicitor to write to the appellant, which he did on Mar. 15, 1948, stating her title to the land and complaining of the appellant's trespass. Despite her protests, the appellant continued his B building, and the building has now been completed and is valued by the appellant at £7,700. In the meantime, by deed of release and covenant dated Feb. 6, 1948, between Osu Stool and the Governor of the Gold Coast Colony, the government contracted to make an order for release of land including the land in dispute. But the formal divestment order under s. 2 (2) of the ordinance was not made until May 5, 1956, when the case was before the West African Court of Appeal. C The respondent's title to the land has thus revived, but, because the divestment order was not made until after the suit had been commenced and judgment given, the respondent did not challenge the decision of the West African Court of Appeal that she is not entitled in this process to a declaration of title.

In order to maintain an action for trespass, the respondent must have been in possession at the date of the appellant's entry on the land in 1948. This is D very largely a question of fact on which the Board do not have the benefit of much evidence. Nor do they have the assistance of the courts below. The reason is that, at the stage when evidence was being led and the appeal being heard, parties and the court were concentrating on the question of title and the question of possession was not closely examined. The appellant maintained that there was not sufficient evidence to establish that the respondent E was in possession at the critical period. It was argued, first, that, assuming she was in possession before Oct. 26, 1940, the date of the ordinance, her possession was determined either under s. 2 (1) or s. 5 (4) of the ordinance. So far as s. 2 (1) is concerned, this no doubt determined her right to possession, but did not affect the factual aspect of possession. In other words, if the respondent was in actual possession of the land as at Oct. 26, 1940, the section did not F change that state of facts. So far as s. 5 (4) is concerned, their Lordships adopt the reasoning of VERITY, Acting Judge of Appeal of the West African Court of Appeal, when he held that the determination of rights under that section only affected rights which might entitle a person to a claim for compensation against the chief secretary. It is, accordingly, irrelevant to consider this subsection in an issue between competing claimants to possession of the land.

G Their Lordships now turn to the central issue in the case whether the respondent has proved that she was in possession in 1948. The appellant argued that the respondent would require to have taken some active step to reassert her possession after 1940. This was said to follow from the decision in *Brown* v. *Notley* (1). PARKE, B., said (2):

H "The question is, whether, after his interest ceased, he could be presumed to be in possession. Now, if he continued in possession after that time, he would be a wrongdoer; and therefore he must be presumed not to have continued in possession, unless an intention to the contrary be clearly shown. If he had kept his cattle on the close, or the gate locked with a key, which he kept, the case might have been different. But though I there was nothing to indicate the giving up possession, there was no evidence of any intention to remain after the term ended, so that the possession was in a neutral state. He must, therefore, be considered to have been out of possession; if not, the consequence would be, that he would be liable to an action of trespass, or to an action on the implied contract to deliver up possession at the end of the term. Unless some act be done indicating an intention to the contrary, possession ceases as soon as the interest."

(1) (1848), 3 Exch. 219. (2) (1848), 3 Exch. at p. 222.

Their Lordships do not consider that, in order to establish possession, it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances, the slightest amount of possession would be sufficient. In *Bristow* v. *Cormican* (3), LORD HATHERLEY said:

> "There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever—as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

There is no evidence that the respondent ever abandoned her possession which in virtue of her grant in 1939 she obtained. Therefore, if there is evidence after 1940 of an intention to retain possession, that would, in their Lordships' view, be sufficient to entitle her to maintain an action for trespass. It was said that her conduct was neutral. Their Lordships do not agree. It is true there is no evidence when the pillars were erected. But, if they were erected after 1940, that would be a definite act indicating possession. Even if erected before 1940, their continuance is some evidence of the respondent's state of mind as affecting possession. In the indenture of 1945, which was registered, the respondent declared that she had entered into possession of the land and been in possession ever since. The only reasonable inference from her evidence is that, up to 1948, the date of the appellant's entry on the land, she deputed her mother to look after the plot and that she was keeping watch on the land to see that no one intruded. At any rate, when she did notice the appellant's blocks on the land she took prompt action to warn the appellant off the land. The evidence is exiguous, but, in their Lordships' opinion, it is sufficient to satisfy the test and is adequate proof of the respondent's intention to continue her possession after 1940 and establishes that, when the appellant entered the land in 1948, she was in possession. She is, therefore, entitled to maintain an action for trespass. Their Lordships consider that the order of the West African Court of Appeal is well founded, but for different reasons from those advanced by VERITY, Ag. J.A.

Their Lordships will, therefore, report to the President of Ghana as their opinion that the appeal ought to be dismissed and that the appellant ought to pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *A. L. Bryden & Williams* (for the appellant); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(3) (1878), 3 App. Cas. at p. 657.

A BLAKE (VALUATION OFFICER) v. HENDON CORPORATION.

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), June 14, 15, 20, 21, 22, July 28, 1961.]

Rates—Rateable occupation—Public park—Absence of formal "dedication" to the public—Acquisition for use as public walks and pleasure grounds—Powers of sale and leasing ancillary to use.

B Acting under s. 164 of the Public Health Act, 1875, empowering local authorities to "purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds", a corporation acquired land by means of a conveyance which did not contain any covenant restricting the use of the land. After the land had been laid C out as a public park and recreation ground it was used by the public for that purpose.

Held: (i) where land was acquired under and was found to be being used by the public for purposes set out in s. 164 of the Act of 1875, without such an exclusion of the public as went beyond what was ancillary to the main purposes, the inference was that beneficial ownership of the land D had passed to the public and occupation of the land by the local authority was negatived; accordingly the land in the present case was exempt from rates and should be so entered in the valuation list (see p. 608, letter F, post).

Lambeth Overseers v. *London County Council* ([1897] A.C. 625) and *Sheffield Corpn.* v. *Tranter* ([1957] 2 All E.R. 583) followed.

E (ii) even if s. 164 of the Act of 1875 conferred a discretion on a local authority to dedicate the land as a public park but did not impose an obligation to dedicate it, the local authority's powers of selling and leasing the land (e.g., under s. 164 of the Local Government Act, 1933, or s. 76 of the Public Health Acts Amendment Act, 1907) did not preclude it from dedicating the land as a public park, for these powers were subordinate to F the main object for which the land was acquired and could be exercised only in so far as their exercise was compatible with the main object (see p. 609, letter D, and p. 610, letter H, post).

North Riding of Yorkshire County Valuation Committee v. *Redcar Corpn.* ([1942] 2 All E.R. 589) distinguished.

Observations on the meaning of the word "dedication" in relation to G land acquired for statutory purposes (see p. 607, letters C to I, post).

Appeal allowed.

[**Editorial Note.** In relation to the rating of public parks provided by or under the management of local authorities reference should be made to s. 13 of the Rating and Valuation Act, 1961, under which such parks are to be treated as if so dedicated in perpetuity.

H As to occupation for the use of the public in relation to rateability, see 32 HALSBURY'S LAWS (3rd Edn.) 21, para. 25; and for cases on the subject, see 36 DIGEST (Repl.) 351-353, *12-25*.

For the Public Health Act, 1875, s. 164, see 19 HALSBURY'S STATUTES (2nd Edn.) 77; for the Public Health Acts Amendment Act, 1907, s. 76, see ibid., 198; for the Local Government Act, 1933, s. 164, see 14 HALSBURY'S STATUTES (2nd I Edn.) 442.]

Cases referred to:

A.-G. v. *Manchester Corpn.*, [1930] All E.R. Rep. 653; [1931] 1 Ch. 254; 100 L.J.Ch. 33; 144 L.T. 112; 26 Digest (Repl.) 312, *300*.

Ayr Harbour Trustees v. *Oswald*, (1883), 8 App. Cas. 623; 11 Digest (Repl.) 103, *5*.

British Transport Commission v. *Westmorland C.C., British Transport Commission* v. *Worcestershire C.C.*, [1957] 2 All E.R. 353; [1958] A.C. 126; 121 J.P. 394; [1957] 2 W.L.R. 1032; 26 Digest (Repl.) 300, *204*.

Burnell v. *Downham Market Urban District Council*, [1952] 1 All E.R. 601; [1952] 2 Q.B. 55; 116 J.P. 168; 36 Digest (Repl.) 352, *17*. A

Hall v. *Beckenham Corpn.*, [1949] 1 All E.R. 423; [1949] 1 K.B. 716; [1949] L.J.R. 965; 113 J.P. 179; 36 Digest (Repl.) 314, *616*.

Hare v. *Putney Overseers*, (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 38 Digest (Repl.) 480, *38*.

Kingston-upon-Hull Corpn. v. *Clayton*, ante, p. 118; [1961] 3 W.L.R. 497. B

Lambeth Overseers v. *London County Council*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; sub nom. *St. Mary, Lambeth* (*Churchwardens and Overseers*) v. *London County Council*, 61 J.P. 580; 36 Digest (Repl.) 351, *13*.

Liverpool Corpn. v. *West Derby Assessment Committee*, [1908] 2 K.B. 647; 77 L.J.K.B. 1032; 99 L.T. 435; 72 J.P. 397; 36 Digest (Repl.) 353, *23*. C

North Riding of Yorkshire County Valuation Committee v. *Redcar Corpn.*, [1942] 2 All E.R. 589; [1943] K.B. 114; 112 L.J.K.B. 97; 168 L.T. 81; 106 J.P. 11; 38 Digest (Repl.) 577, *601*.

Sheffield Corpn. v. *Tranter* (*Valuation Officer*), [1957] 2 All E.R. 583; 121 J.P. 456; [1957] 1 W.L.R. 843; 3rd Digest Supp. D

Stourcliffe Estates Co., Ltd. v. *Bournemouth Corpn.*, [1910] 2 Ch. 12; 79 L.J.Ch. 455; 102 L.T. 629; 74 J.P. 289; 36 Digest (Repl.) 357, *44*.

Case Stated.

The corporation were the owners of a hereditament described as "Public open space and premises, Stonegrove Park," Hendon, assessed at £140 rateable value in the valuation list for Hendon Borough under a decision of the Lands Tribunal (ERSKINE SIMES, ESQ., Q.C.) given on Mar. 30, 1960, and reported in (1960), 7 R.R.C. 159, allowing an appeal against a decision of a local valuation court of North Middlesex Local Valuation Panel given on Nov. 28, 1958. The facts were summarised by the tribunal as follows. The park was situated in the centre of a residential area and was 7·13 acres in extent; it had been laid out with grassed areas interspersed with trees, shrubs and flower beds, a children's playground suitably equipped with swings, etc., a paddling pool, two hard tennis courts, public lavatory and open-sided shelters. On June 22, 1931, loan sanction for £7,300 had been applied for in order to purchase the land for the purpose of an open space, etc., and sanction to this loan had been granted by the Minister of Health on July 1, 1931. The sanction made it clear that the loan was for the purchase of lands for the purposes of public walks or pleasure grounds under the Public Health Act, 1875 (see s. 164). On Feb. 10, 1932, the land was acquired by the Hendon Urban District Council under two conveyances, neither of which contained any covenant restricting the use of the land. On Aug. 15, 1932, the council was created a borough and on Feb. 27, 1933, the borough council approved a lay-out plan for the park and resolved to apply for sanction for a loan of £4,210 to meet the expense of carrying out the necessary works. This loan was sanctioned, and the sanction again made it clear that it was for the purposes authorised by s. 164 of the Public Health Act, 1875. The park was opened on July 21, 1934, and had ever since been used as a public park and recreation ground. Expenses of maintaining the park exceeded receipts therefrom. The tribunal decided that the hereditament was not exempt, and the corporation appealed by way of Case Stated against the decision of the tribunal. They contended that they were not in beneficial occupation of the park; that they held the park as trustees and custodians for the public at large, by virtue of appropriation and/or dedication and maintenance as a park for the use and benefit of the public at large and as public walks and pleasure grounds under s. 164 of the Public Health Act, 1875, and the public at large were not rateable occupiers; and that, if the park should be entered in Part I of the valuation list, it should be so entered at nil value.

A *J. T. Molony, Q.C.*, and *A. C. Munro Kerr* for the corporation.
Sir Derek Walker-Smith, Q.C., and *J. R. Phillips* for the valuation officer.

Cur. adv. vult.

July 28. **DEVLIN, L.J.**, read the following judgment of the court: The question in this case is whether Stonegrove Park, a public park owned by B Hendon Corporation, should be entered in the valuation list as exempt from payment of rates. The general principle that governs this point is not in dispute. Rateability depends on beneficial occupation by some legal entity, an individual or corporation. If the corporation are merely custodians and trustees of the park for the benefit of the public, there is no beneficial occupation by them and occupation by the public is not rateable. If the corporation have the full owner- C ship of the park, beneficial as well as legal, and the public are admitted not as beneficiaries but as licensees, the park is in law occupied by the corporation, who must pay rates accordingly. A highway is the obvious example of land which cannot be said to be occupied at all unless by the public; a decision that Putney Bridge was not rateable (1) started this branch of rating law. In the cases that have followed public parks have generally been treated as high- D ways; but other premises enjoyed by the public, such as libraries and art galleries owned by local authorities, have generally been treated as places occupied by local authorities to which members of the public are admitted as licensees.

The first step taken towards the acquisition of Stonegrove Park was on June 22, 1931, by the corporation's predecessors, Hendon Urban District Council, E when they resolved to apply for loan sanction for purchase of the land as an open space. On Feb. 10, 1932, they acquired the land acting under the Public Health Act, 1875, s. 164, which empowers any urban authority to

> ". . . purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds . . ."

F The necessary work was done and on July 21, 1934, the park was officially opened by the mayoress of Hendon and it has ever since been used as a public park and recreation ground.

The leading case in this branch of the law is *Lambeth Overseers* v. *London County Council* (2). Brockwell Park was acquired by London County Council under the terms of a special Act which authorised them to buy it and hold it G as a park and lay out, maintain and preserve it as a park for the perpetual use thereof by the public for exercise and recreation. LORD HALSBURY, L.C. (3), described the London County Council as " merely custodians and trustees for the public ", who must be allowed " the free and unrestricted use of it ". LORD HERSCHELL (4) described the land as by statute dedicated to the public use. This principle was applied in *Liverpool Corpn.* v. *West Derby Assessment Com-* H *mittee* (5) where the land was acquired under the Liverpool Improvement Act, 1865, s. 14, which enabled the corporation to buy any lands

> ". . . which they may think suitable for public parks or playgrounds, and places of recreation for the inhabitants of the borough, and may from time to time, as they think fit, lay out and appropriate the same . . ."

I The principle was also applied in *Sheffield Corpn.* v. *Tranter* (*Valuation Officer*) (6) where the land was acquired under s. 164 of the Act of 1875, the section that we have to consider.

In these and other similar cases consideration was given by the courts to statutory powers which from time to time had been granted to local authorities owning and managing parks and which might be thought to enable them to

(1) *Hare* v. *Putney Overseers*, (1881), 7 Q.B.D. 223.
(2) [1897] A.C. 625.
(3) [1897] A.C. at pp. 630, 631.
(4) [1897] A.C. at p. 631.
(5) [1908] 2 K.B. 647.
(6) [1957] 2 All E.R. 583.

interfere with "the free and unrestricted use" by the public. In these cases it was contended that such powers inhibited the local authority from dedicating the park to the use of the public with the result that they remained themselves as occupiers. So far such contentions have not succeeded. In *Liverpool Corpn.* v. *West Derby Assessment Committee* (7) this court had to consider the statutory power to sell and let land acquired as suitable for public parks and subsequently not required for that purpose; and also a power under bye-laws to close the park for up to seven days in any one year and to charge admission on such days. In *Burnell* v. *Downham Market Urban District Council* (8) a similar case in which land was acquired under the Open Spaces Act, 1906, the local authority had agreed to allow private clubs in return for payment to use cricket and football pitches on certain days. SIR RAYMOND EVERSHED, M.R., giving the judgment of this court, said (9) that this was not an interference with "free and unrestricted use"; and that the tribunal was entitled to conclude as a matter of fact that the arrangements made by the corporation with the private clubs were ancillary to their management of the field as an open space. The same test was applied in *Sheffield Corpn.* v. *Tranter* (10), where the local authority let out a refreshment pavilion to a caterer at an annual rental: LORD EVERSHED, M.R., said (11) that the tribunal was justified on the facts in finding that the tenant's conduct of the refreshment pavilion was nothing more than an ancillary activity of the conduct of the park itself.

Counsel for the respondent valuation officer contends that Stonegrove Park is not exempt and he begins his argument by inviting us to recognise a fundamental distinction between the terms of s. 164 of the Public Health Act, 1875, and those of the special Act in the *Brockwell Park* case (12), which we have summarised above. In the latter case, he submits, the local authority had no alternative except to "dedicate" the land to the public. In the present case and under s. 164 they have a choice. Counsel does not suggest—the contrary is well settled—that without express statutory authority the local authority could use land acquired under s. 164 for any purpose other than that permitted by the section, i.e., as public walks or pleasure grounds. But, he submits, this purpose could be effected in one of two ways. A local authority can either dedicate the land to the public, thus making them the beneficial occupiers and reserving for themselves only the power of management and control; or they can retain the right to occupation admitting the public as licensees, as in the case of a library or public gallery. From this distinction two consequences are said to follow.

The first and less important is that exemption cannot arise until the act of dedication is established as a fact. Counsel for the valuation officer submits that there is no sufficient finding of fact in the Case Stated by the Lands Tribunal. It seems clear that the corporation intended to dedicate the land and it is their case that they in fact did so by the opening of the park on July 31, 1934. The point is not of great importance; for, if the valuation officer succeeded on it alone, the corporation could before the next valuation list put the matter right by making some formal act of dedication and thereby supplementing any legal defects there may have been in the mayoress's opening speech. For reasons which we shall give below we do not think that any formal act is necessary.

The second and more important consequence depends on a further development of the argument of counsel for the valuation officer. While s. 164 of the Act of 1875, taken by itself, gives the local authority a choice, there are, he argues, other provisions in other statutes which by their effect on s. 164 destroy the right of choice, deprive the local authority of the power to dedicate and compel them willynilly to retain the right to occupy. The chief, if not the sole, provision relied on by counsel as having this effect is s. 164 of the Local Government

(7) [1908] 2 K.B. 647. (8) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55.
(9) [1952] 1 All E.R. at p. 607; [1952] 2 Q.B. at p. 67. (10) [1957] 2 All E.R. 583.
(11) [1957] 2 All E.R. at p. 591.
(12) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625.

A Act, 1933. This permits a local authority to let any land which they may possess, with the consent of the minister, for any term; and without the consent of the minister, for a term not exceeding seven years. (It is an odd mischance that the two sections to which we have to give the closest consideration are both numbered 164: I shall refer to them respectively as s. 164 of the Act of 1875 and s. 164 of the Act of 1933.)

B Counsel for the valuation officer submits that under s. 164 of the Act of 1933 the power of a local authority to let land is quite unrestricted; Hendon Corporation could, and still can, let Stonegrove Park to anyone for any purpose, thus excluding the public from their enjoyment of the park. But they could not do that if the park were land belonging to the public who had the beneficial ownership of it. Thus the power to let under s. 164 of the Act of 1933 is, according to C this submission, inconsistent with the power to dedicate under s. 164 of the Act of 1875. Counsel argues that, following the well-known line of cases beginning with *Ayr Harbour Trustees* v. *Oswald* (13), a corporation may not so act as to disable itself from exercising in the future a power that is granted to it by Parliament. Therefore, on July 21, 1934, it would have been ultra vires for Hendon Corporation to have dedicated Stonegrove Park to the public, since, if they had D done so, they would have deprived themselves of their right to let the land for some other purpose. So they must be deemed to have chosen the other alternative open to them under s. 164 of the Act of 1875 and to have carried out the purpose of that section by retaining the right of occupation and admitting the public as licensees only.

This is not an argument which has so far appeared in any of the numerous E cases in which the rateability of parks has been considered. The first task of counsel for the valuation officer, therefore, is to distinguish the existing authorities, and for this purpose they fall into three categories.

The first is represented by the *Brockwell Park* case (14). In this case there was something which counsel calls a "statutory dedication", which he defines as a dedication which a local authority are able and bound to make, by reason F of a statutory restriction preventing them from alienating the land to any use inconsistent with the public right of access. This restriction, he says, was imposed by the special Act authorising London County Council to acquire Brockwell Park and against it the power granted by s. 164 of the Act of 1933 could not prevail. In such a case a local authority do not put it out of their power to let by making a voluntary dedication: the statute itself dedicates or G compels the local authority to dedicate.

The second category can be represented by *Sheffield Corpn.* v. *Tranter* (15). This is a case in which the park was actually acquired under s. 164 of the Act of 1875 and therefore superficially presents difficulties to the argument of counsel for the valuation officer. But the deed under which it was conveyed to the local authority stipulated that it should be used for ever as public walks and pleasure H grounds within the meaning of s. 164 of the Act of 1875. In this case also it could be argued that the necessity for dedication was imposed externally and not voluntarily embraced by the corporation. But the argument is in any event unnecessary because s. 179 (d) of the Local Government Act, 1933, provides that nothing in s. 164 of the Act of 1933 shall authorise the disposal of land by a local authority, whether by sale, lease, or exchange, in breach of any trust, I covenant or agreement binding on the authority.

A third category is represented by *Liverpool Corpn.* v. *West Derby Assessment Committee* (16). Here a park was acquired under an Act giving a general power of acquisition and not, as in the case of Brockwell Park, specifying a special property. It is not a public Act as is the Public Health Act, 1875, but counsel for the valuation officer did not rely on that; neither did he, I think, effectively

(13) (1883), 8 App. Cas. 623.
(14) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625.
(15) [1957] 2 All E.R. 583. (16) [1908] 2 K.B. 647.

distinguish its language from the language used in s. 164 of the Act of 1875. The deed under which the land was acquired did not contain any restrictive covenant. This again is therefore superficially a difficult case for counsel's argument, which indeed has something in common with the argument of Mr. Horridge rejected by LORD ALVERSTONE, C.J. (17), and by SIR GORELL BARNES, P. (18). They held that the existence of the power granted by the Act to the corporation to dispose of land not required for the purposes of the Act did not prevent the corporation from making an effective dedication. Counsel for the valuation officer distinguishes this case by pointing out that the court had not got to consider the wide power of leasing given by s. 164 of the Act of 1933; and the power to dispose of land, which it was considering, was restricted to land not required for the purpose of the statute. Before 1933 the power of a local authority to lease was similarly restricted, being contained in s. 177 of the Public Health Act, 1875, applying only to land which "they can conveniently spare" and requiring in all cases the consent of the Local Government Board. Counsel indeed relies on the judgment of the President as being in his favour because the President expressly said (18)

> ". . . that the position would be different if, upon the terms of this statute, the corporation had immediate power of disposal of the property . . ."

The power which the President there refers to is a power to utilise the ground in some way other than a park; the dictum assists counsel if, but only if, s. 164 of the Act of 1933 can be construed as giving such a power.

Finally there are two decisions which are not binding on us. The first is a decision of FINNEMORE, J., in *Hall* v. *Beckenham Corpn.* (19), where a park was acquired under s. 164 of the Act of 1875 and there were no restrictive covenants in the conveyance. FINNEMORE, J., nevertheless held that the *Brockwell Park* (20) principle applied and the local authority were not the occupiers. This decision is irreconcilable with the argument of counsel for the valuation officer and he invites us to overrule it. The other is a decision of the Divisional Court in *North Riding of Yorkshire County Valuation Committee* v. *Redcar Corpn.* (21). In this case Redcar Corporation had acquired 381 acres of foreshore under s. 164 of the Act of 1875. They laid out seven acres of it as an enclosure on which they built swimming baths, an open-air swimming pool and a boating lake. Admission fees were charged for these places which together with other parts of the foreshore developed by the corporation were described by VISCOUNT CALDECOTE, C.J. (22) as a "great place of popular entertainment"; the takings from the baths, pool and lake in 1937 amounted to £4,415. The Divisional Court held that those parts—the baths, pool and lake—were occupied by the authority and not in the beneficial occupation of the public and so were rateable. It is not suggested that in the present case Hendon Corporation have done anything like that. But, says counsel for the valuation officer, they have power to do it; and the essence of his argument is that it is the power that matters and not whether in fact it is exercised.

In this state of the authorities it is necessary for us to examine counsel's argument to see whether it is sound in principle. It is based on two propositions. The first is that s. 164 of the Act of 1875 on its true construction empowers the local authority to give effect to it in one of two ways, either by dedicating to the public the land it acquires or by retaining occupation itself. Counsel does not argue that s. 164 of the Act of 1875 taken by itself does not give power to dedicate; he could not argue that consistently with authorities binding on us, such as *Sheffield Corpn.* v. *Tranter* (23), in which it was held that acting

(17) [1908] 2 K.B. at p. 652.
(18) [1908] 2 K.B. at p. 663.
(19) [1949] 1 All E.R. 423; [1949] 1 K.B. 716.
(20) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625.
(21) [1942] 2 All E.R. 589; [1943] K.B. 114.
(22) [1942] 2 All E.R. at p. 594; [1943] K.B. at p. 129.
(23) [1957] 2 All E.R. 583.

A under s. 164 of the Act of 1875 a local authority had in fact dedicated. If that were the only power given to a local authority under s. 164 of the Act of 1875, the local authority would be compelled to dedicate as the only way of carrying out their task under the section, and the position would then be the same as under the special Act in the *Brockwell Park* case (24). Thus the existence of a choice is essential to counsel's case. His second proposition is that s. 164 of B the Act of 1933 empowers the local authority to let land which they have acquired for one purpose for another purpose destructive of the former. This proposition also is essential to the argument; if s. 164 of the Act of 1933 is construed in accordance with it, it eliminates the power to dedicate which s. 164 of the Act of 1875 would otherwise contain, and so leaves the local authority with no option except to retain full ownership and occupation. In our opinion both these C propositions are erroneous in law.

The error in the first proposition must, we think, be attributed in some measure to the misuse in this connexion of the term "dedication". In *A.-G.* v. *Manchester Corpn.* (25) MAUGHAM, J., said:

> "I am not convinced that the word 'dedication' is really an appropriate word in relation to the acts of a local authority dealing with property which D it has acquired under public or local Acts. At any rate, such a word may be misleading. When a private landowner dedicates a road which he has laid out to the public, he is dealing with his own property and is doing a public-spirited act for the benefit of the public at large. A local authority has land vested in it for the purpose of carrying out its duties as a local authority. It is not entitled, generally speaking, to give away a portion of the E property vested in it as a local authority. It is no doubt entitled, under certain sections of the Public Health Act to which I need not refer, and very often under local Acts, to make public roads, or to take over roads with the result that they become public and repairable by the inhabitants at large; but those rights are rights which are strictly defined, and when a corporation or other local authority acquires land for a particular purpose, the word F 'dedication' is quite unnecessary in such a connexion, if all that is intended is to say that the local authority prima facie cannot use the land except for the purpose for which it has been authorised to purchase it. A fortiori, if it has obtained a loan to enable it to acquire the land for a particular purpose, or expended local funds in acquiring lands for such a purpose, it is not entitled to change its mind and to apply the land for a different object G or purpose."

We respectfully agree with these observations. Of course, the public right of free and unrestricted use does not begin the moment the local authority acquire the land which they intend to "dedicate" as a public park. Work may have to be done to the land and arrangements made for its control and management H as a park. "Dedication" may not be an inapt word to describe by way of analogy the moment when, the purpose having been executed, the public enter into the enjoyment of rights similar to those which they enjoy over the highway. But it is a misleading word if it tends to suggest that when they "dedicate" a local authority are doing something voluntarily and as a matter of choice.

The purpose of s. 164 of the Act of 1875 is to provide the public with public I walks and pleasure grounds. The public are not a legal entity and cannot be vested with the legal ownership of the walks and pleasure grounds which they are to enjoy. But if they could be given the beneficial ownership, that is what they should have. In the case of buildings, such as libraries and art galleries, the needs of management may be deemed to require the local authority to retain the right of occupation. But the local authority have no right to retain out of lands intended for the enjoyment of the public a right of occupation

(24) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625.
(25) [1931] 1 Ch. at p. 267; [1930] All E.R. Rep. at p. 656.

that is not necessary for their management. In all the cases in which parks have been considered, it has been taken for granted that what the public get is, as in the case of a highway, the beneficial ownership of the land. We can see no reason why the public should be entitled to get anything less under s. 164 of the Act of 1875 than they got under the special Act in the *Brockwell Park* case (26). It seems to us to be quite immaterial that in the latter case the land was dedicated when the Act was passed and in the former it was left to the selection of the local authority. The only substantial difference in the wording is that in the special Act the park is to be " for the perpetual use thereof by the public ", while in s. 164 of the Act of 1875 no time is mentioned. But that does not mean that s. 164 contemplates a time limit; it means that it is to be so used for an indefinite period. In *Burnell* v. *Downham Market Urban District Council* (27) SIR RAYMOND EVERSHED, M.R., said (28) that " perpetual " did not mean for all eternity but for the foreseeable future. In our judgment there is no true distinction between this case and the *Brockwell Park* case (26).

Neither can the present case be satisfactorily distinguished from *Sheffield Corpn.* v. *Tranter* (29). The distinction suggested is no more than that in *Tranter's* case (29) the land was conveyed to the local authority on trust " to permit the said hereditament to be for ever used as public walks and pleasure grounds within the meaning of s. 164 of the " Act. All that this form of covenant requires is that the local authority do what the Act requires them to do. It imposes no extra burden on them but merely identifies conveniently the purpose for which the land is being acquired. We cannot see that it affects the legal position.

It follows from the reasons whereby we have rejected the first proposition that there is no need for the corporation to obtain a finding of fact in the Case that an act of dedication has taken place. It is sufficient that it should appear from the Case, as it does from this Case, that land acquired by a local authority under s. 164 of the Act of 1875 is being used by the public for the purposes set out in that section and that they have free and unrestricted use of it (qualified, it may be, by a limited exclusion for ancillary purposes) for those purposes. That is sufficient material from which to infer that beneficial ownership has passed to the public and to negative occupation by the local authority. Of course, if the exclusion of the public from free use goes beyond what is justifiable as ancillary, the land, or the parts of it subject to the exclusion, will be rateable on the ground that they are no longer beneficially occupied by the public but are being occupied by the local authority for their own purposes. That is what happened in *North Riding of Yorkshire County Valuation Committee* v. *Redcar Corpn.* (30).

If we are wrong in thinking that the first proposition of counsel for the valuation officer fails, and if there are two ways in which the corporation could discharge their duty under s. 164 of the Act of 1875, it would be necessary for the Case to contain a finding of facts sufficient to show which choice had been made; and it is doubtful whether this Case does. An opening to the public for use by them is consistent with their use of it under a licence terminable by the corporation if they had some other statutory power enabling them to do so, such as it is suggested is implicit in s. 164 of the Act of 1933. But a remediable defect in the Case Stated would give the valuation officer no lasting benefit; he would, as we have said, get that only if counsel's second proposition succeeds. We have already stated our opinion that it is unsound and we shall now briefly say why.

On the footing that s. 164 of the Act of 1875 confers a discretion on the local authority to dedicate but does not impose an obligation to do so, the proposition

(26) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625.
(27) [1952] 1 All E.R. 601; [1952] 2 Q.B. 55.
(28) [1952] 1 All E.R. at p. 605; [1952] 2 Q.B. at p. 64.
(29) [1957] 2 All E.R. 583. (30) [1942] 2 All E.R. 589; [1943] K.B. 114.

A is that the local authority cannot exercise their discretion to dedicate because, if they did so, it would interfere with the exercise of the discretionary power to let conferred by s. 164 of the Act of 1933. Why should it not be said with as much force that the local authority cannot exercise their discretionary power to let because that would interfere with their discretionary power to dedicate? The correct way of dealing with a situation in which two or more powers given B to a local authority overlap and may conflict is laid down in *British Transport Commission* v. *Westmorland C.C.* (31). The object for which the land is held must first be ascertained. All other powers are subordinate to the main power to carry out the statutory object and can be used only to the extent that their exercise is compatible with that object. In the case cited, the commission's predecessors had acquired land for the purpose of constructing and operating C a railway; they had constructed a bridge across the railway line and dedicated or purported to dedicate to the public a footpath on the bridge. The House of Lords held that the exercise of the power to dedicate was compatible with the statutory objects of the railway authority; if the use by the public of the footpath had interfered with the operation of the railway line, it would have been otherwise. Applying this to the present case, the power to let in s. 164 D of the Act of 1933 is subordinate or supplementary to the main power in s. 164 of the Act of 1875 and can therefore be validly exercised only if it is compatible with the full use by the public of Stonegrove Park as public walks and pleasure grounds. As, for example, in *Sheffield Corpn.* v. *Tranter* (32), a part of the land might be let as a refreshment pavilion, provided that the use of the pavilion is ancillary to the use of the park and a necessary amenity. Thus the principle E in *Ayr Harbour Trustees* v. *Oswald* (33) has no application; the corporation cannot ever by carrying out in full their statutory objects be held to be abandoning powers whose function is limited to assisting in the fulfilment of that object.

Of course, if s. 164 of the Act of 1933 had been worded in such terms that it specifically authorised the local authority to let a public park for use for some commercial purpose, the position would be different. The case would then F come within the dictum of SIR GORELL BARNES, P., in *Liverpool Corpn.* v. *West Derby Assessment Committee* (34), to which we have referred and on which counsel for the valuation officer relied. It would mean in effect that the corporation were given express statutory authority of their own motion to alter the statutory object for which they held the park. Counsel relies on s. 179 (d) of the Act of 1933 and submits that, by implication from that subsection, G s. 164 of the Act of 1933 must be construed as wide enough to authorise any letting that is not "in breach of any trust, covenant or agreement binding upon the authority". We cannot agree. The object of s. 179 (d) is to cut down the power of letting, not to extend it. A local authority who wanted to acquire a piece of land particularly suitable for a pleasure ground might have to covenant not to use it in a particular way otherwise legitimate and within H their powers. For example, a man selling a part only of his land might object to a refreshment pavilion on his boundary. Provided that the erection of a refreshment pavilion on that spot was not essential to the use of the land as a pleasure ground, the local authority could properly covenant not to erect one, notwithstanding that they had statutory power to do so. This illustrates the proper application of the principle in *Ayr Harbour Trustees* v. *Oswald* (33); I see *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corpn.* (35). Accordingly, in our judgment the argument based on s. 164 of the Act of 1933 fails.

Counsel for the valuation officer based a similar argument on other statutory provisions giving the local authority powers in relation to lands which they held; some of these powers are general, such as power to let or to sell lands that are not required for the statutory purpose, and others relate to parks and pleasure

(31) [1957] 2 All E.R. 353; [1958] A.C. 126. (32) [1957] 2 All E.R. 583.
(33) (1883), 8 App. Cas. 623. (34) [1908] 2 K.B. at p. 663. (35) [1910] 2 Ch. 12.

gardens in particular and deal with the provision of amenities for them, such as pavilions and recreation grounds, and the right to charge for admission thereto. Most of these powers are conveniently set out in the judgment of CASSELS, J., in the *Redcar* case (36); since then an additional power for the provision of entertainments has been given by the Local Government Act, 1948, s. 132. Counsel also relied on a dictum in the judgment of CASSELS, J., in relation to the statutory powers which he set out. CASSELS, J., holding that what the local authority were doing was on too great a scale to be described as ancillary to the use of the land as public walks and pleasure grounds, said (37) nevertheless that Redcar Corporation had statutory authority for what they were doing. If this dictum is correct, it means that the corporation had statutory authority to deny to the public the beneficial occupation of those parts of the land which were being used as places of entertainment and counsel for the valuation officer relies on this as showing that those powers which CASSELS, J., mentioned were not being treated by him as subordinate to the main power in s. 164 of the Act of 1875. The dictum was not necessary to the decision: the legality or the illegality of what the corporation were doing was not strictly relevant. Rateability depends on how the land is in fact being used, not on how it ought to be being used and, whatever their legal obligations might be, the local authority had in fact assumed the character of rateable occupiers; see on this point *Burnell* v. *Downham Market Urban District Council* (38) per SIR RAYMOND EVERSHED, M.R. I dare say that all that CASSELS, J., meant to say was that the council's activities were covered by the words of the statutes to which he referred; there was no occasion for him to consider whether a proper use was being made of powers that were literally wide enough. Looked at as a whole, the *Redcar* case (39) is inconsistent with the argument of counsel for the valuation officer at any rate in the result. What Redcar Corporation had in fact done to part of the land, they would have had power on his argument to do to the whole of the land; so the whole and not merely the parts taken for entertainment should have been rated. It was not so held; and the transcript of the argument to which we have been referred shows that counsel for the county valuation committee conceded that the *Brockwell Park* (40) principle applied except to the parts actually affected.

We are, in effect, repeating ourselves when we say that, if in any of the provisions which CASSELS, J., mentions (36) Parliament specifically authorised the use of a pleasure ground acquired under s. 164 of the Act of 1875 in a manner which was a real denial of its free and unrestricted use by the public, if the language was explicit and its meaning could not be cut down by reference to the object of s. 164 of the Act of 1875 taken by itself, it would be necessary to construe the two provisions together and maybe to hold that the object of s. 164 of the Act of 1875 had been altered and was one that was no longer consistent with beneficial occupation by the public. We were not invited to consider for this purpose all the statutory provisions enumerated by CASSELS, J. Counsel for the valuation officer selected as his best example s. 76 of the Public Health Acts Amendment Act, 1907. We have considered this section, which does relate specifically to parks and pleasure grounds; but all the powers mentioned in it appear to be capable of being exercised as ancillary powers and in our opinion there is nothing in the section that by necessary implication alters the statutory object fixed by s. 164 of the Act of 1875.

For these reasons in our judgment the appeal succeeds and Stonegrove Park should be held to be exempt. We are conscious with regret that we are differing from the judgment of the very learned and experienced member who gave the

(36) [1942] 2 All E.R. at p. 595; [1943] K.B. at p. 131.
(37) [1942] 2 All E.R. at p. 598; [1943] K.B. at p. 135.
(38) [1952] 1 All E.R. at p. 606; [1952] 2 Q.B. at p. 66.
(39) [1942] 2 All E.R. 589; [1943] K.B. 114.
(40) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625.

A decision of the Lands Tribunal and whose reasoning counsel for the valuation officer in his argument has sought to uphold. That argument was perhaps narrower than it would have been if the subject-matter were not now for us closely covered by decisions of this court. After the *Brockwell Park* case (41) the House of Lords have never considered again the rateability of a public park, but since the argument in the present case they have delivered a judgment in B *Kingston-upon-Hull Corpn.* v. *Clayton* (42), in which they held that an art gallery conveyed to the corporation

> " Upon trust to permit the same to be used and enjoyed by . . . the public generally . . . for the exhibition of works of art in perpetuity "

was rateable. The House distinguished the *Brockwell Park* case (41) and reserved C their opinion on whether the decisions in the Court of Appeal that followed and extended that case were correct. These decisions are binding on us; and, while it is not easy to distinguish de facto between a local authority's occupation of a public park and their occupation of a public gallery, it is not open to us, as it will be in the House of Lords, to re-examine the whole matter afresh; and we have not been invited to do so.

D As the law stands at present, there must inevitably be a difference for rating purposes between a public park and a public art gallery. But that at least is a difference which can be stated in a way which is intelligible to the ordinary man, even if he does not pretend to understand the reasoning behind it. It would not be a satisfactory result if some parks were to be aligned with galleries and others not; parks would then have to be divided into two categories, E not outwardly distinguishable and identifiable only by the nature of the instrument by which the park was acquired, whether it was a public or a private Act and whether the deed or conveyance did or did not include a restrictive covenant. Such a division would be particularly unsatisfactory, because all that a local authority would have to do to put a park into one category rather than the other would be to ask the vendor of the land to insert such a covenant F as in *Sheffield Corpn.* v. *Tranter* (43) requiring the corporation to do that which by statute they were required to do anyway.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *R. H. Williams* (for the corporation); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(41) *Lambeth Overseers* v. *London County Council*, [1897] A.C. 625.
(42) Ante, p. 118.
(43) [1957] 2 All E.R. 583.

CHAPPLE *v.* ELECTRICAL TRADES UNION AND OTHERS.

[CHANCERY DIVISION (Pennycuick, J.), July 25, 26, 1961.]

Practice—Particulars—Pleading—Traverse of negative allegation—Not pregnant with affirmative—Whether particulars of traverse should be ordered. Pleading—Particulars—No obligation to plead to particulars.

Paragraph 7 of a statement of claim alleged that a trade union and three other defendants, its officials, failed to conduct an election of an assistant general secretary in accordance with the relevant rule. The paragraph then gave particulars of this allegation. Paragraph 7 of the defence was in these terms: "The defendants and each of them deny each and every of the allegations contained in para. 7 . . . of the statement of claim." The plaintiff delivered a request for further and better particulars under para. 7 of the defence. The defendants resisted the application on the ground that they were not obliged to plead to particulars and that particulars could not be ordered of a traverse, even of a negative allegation whose effect might be to imply an affirmative statement.

Held: particulars would not be ordered because—

(i) a defendant need not plead to particulars and the fact that the particulars in para. 7 of the statement of claim might more appropriately have been included in the body of the paragraph did not of itself make an exception to the rule.

Pinson v. *Lloyds & National Provincial Foreign Bank, Ltd.* ([1941] 2 All E.R. 636) applied.

(ii) the traverse in para. 7 of the defence did not imply an affirmative allegation, for in order to do so a traverse should import some affirmative allegation beyond that which was in any event to be implied from a mere denial of a negative allegation.

Dictum of STABLE, J., in *Pinson* v. *Lloyds & National Provincial Foreign Bank, Ltd.* ([1941] 2 All E.R. at p. 644) applied.

Duke's Court Estates, Ltd. v. *Associated British Engineering, Ltd.* ([1948] 2 All E.R. 137) followed.

[As to ordering of further particulars, see 30 HALSBURY'S LAWS (3rd Edn.) 30, para. 63; and for cases on the subject, see DIGEST (Pleading) 191, 192, *1617-1621.*]

Cases referred to:

Duke's Court Estates, Ltd. v. *Associated British Engineering, Ltd.*, [1948] 2 All E.R. 137; [1948] Ch. 458; [1948] L.J.R. 1892; 38 Digest (Repl.) 922, *1163.*

MacLulich v. *MacLulich*, [1920] P. 439; 89 L.J.P. 242; 124 L.T. 66; Digest (Pleading) 191, *1618.*

Pinson v. *Lloyds & National Provincial Foreign Bank, Ltd.*, [1941] 2 All E.R. 636; [1941] 2 K.B. 72; 110 L.J.K.B. 657; 165 L.T. 360; 2nd Digest Supp.

Weinberger v. *Inglis*, [1918] 1 Ch. 133; 87 L.J.Ch. 148; 118 L.T. 208; Digest (Pleading) 200, *1684.*

Procedure Summons.

This was an application by the plaintiff, Frank Joseph Chapple, for further and better particulars of the defence delivered by the defendants to the action, the Electrical Trades Union, Frank Foulkes, Frank Leslie Haxell and Robert Graham McLennan. The relevant parts of the pleadings appear in the judgment.

F. M. Drake for the plaintiff.

R. Millner for the defendants.

PENNYCUICK, J.: On this application the plaintiff, Frank Joseph Chapple, seeks an order for further and better particulars of the defence. The

A action relates to the affairs of the first defendant, the Electrical Trades Union. The plaintiff is a member of the union and was a candidate for election as assistant general secretary in June, 1960. The individual defendants are, or were, or claim to be, officers of the union. By the writ in the action, the plaintiff in effect claims that the election in June, 1960, of the fourth defendant, Robert Graham McLennan, as assistant general secretary of the union is void.

B The statement of claim sets out the relevant rule of the union and the procedure at elections. Then para. 7 of the statement of claim is in the following terms:

> "In breach of the said rules the union and the second, third and fourth-named defendants acting as the full-time paid officials of the union neglected and failed to conduct the said election in accordance with the provisions of the said rule.

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Particulars:

> "(1) Failing to order the correct number of voting papers and special envelopes to be printed.
>
> "(2) Ordering the printing of more voting papers and special envelopes than were required for use in the said election.

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> "(3) Failing properly or at all to check or to cause to be checked the number of voting papers and special envelopes printed in order to ensure that there were no more than were required for use in the said election.
>
> "(4) Failing to destroy or cause to be destroyed any ballot papers and special envelopes printed surplus to those required for use in the said election.

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> "(5) Causing or permitting some person or persons unknown to the plaintiff to obtain or failing to take any or any proper or sufficient measures to prevent some person or persons unknown to the plaintiff from obtaining a number of printed ballot papers and special envelopes when they were not entitled by the rules to have the same."

F Then there follow four more sub-paragraphs which are not now relevant. Paragraph 8 provides:

> "In consequence of the said breaches of the rules the plaintiff has been deprived of his right under the rules to have the election in which he is a candidate conducted in accordance with the rules or in a fair and proper manner and the plaintiff has suffered loss and damage."

G

In the defence, which was delivered on behalf of all the defendants, para. 7 is in these terms:

> "The defendants and each of them deny each and every of the allegations contained in para. 7 and para. 8 of the statement of claim."

H Certain particulars have been delivered under para. 7 of the statement of claim relating to the affairs of three branches of the union. The present application relates to a request by the plaintiff for further and better particulars under para. 7 of the defence. That is the paragraph which I have just read, consisting of a simple traverse of the allegations contained in para. 7 and para. 8 of the statement of claim. The request for particulars is in the following terms:

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> "Under para. 7 (1) Of the number of voting papers and special envelopes ordered to be printed.
>
> "Under para. 7 (2) Of the number of voting papers and special envelopes required for use in the said election.
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> "Under para. 7 (3) Of the checks alleged to have been carried out, stating the time, date and place of and by whom the said check or checks were carried out, the nature of the said checks and the results thereof.
>
> "Under para. 7 (4) Of the number of ballot papers and of the number of

special envelopes, if any, which the defendants destroyed or caused to be destroyed.

"Under para. 7 (5) Of the measures alleged to have been taken to prevent some person or persons, not entitled to obtain ballot papers or special envelopes, from obtaining the same, with full details of such measures and by whom the same were carried out."

The request for particulars under sub-para. (5) of the particulars under para. 7 has not been pursued before me, and I need not refer to it further.

The defendants resist the application for particulars mainly on the two following grounds: (1) the defendants are not obliged to plead to particulars; (2) particulars cannot be ordered of a traverse, even of a negative allegation.

As regards the first ground, it is a well-recognised canon of pleading that the defendant need not and, indeed, ought not to plead to particulars, whether contained in or delivered with the statement of claim: see *Pinson* v. *Lloyds & National Provincial Foreign Bank, Ltd.*, per SCOTT, L.J. (1), cited in the ANNUAL PRACTICE, 1961, in the notes under Ord. 19, r. 13, at p. 466.

It is contended here on behalf of the plaintiff that the particulars included under para. 7 of the statement of claim represent the respects in which the defendants failed to conduct the election in accordance with the provisions of the rules and accordingly should appropriately, or more appropriately, have been included in the body of the paragraph itself, rather than in particulars under the paragraph. This may well be so, but a similar observation could be made in countless cases, since obviously it is often impossible to draw with precision the line between what material should be included in the body of a paragraph and what should be included in particulars under the paragraph, and the same material could appropriately be included in either. The only safe course, it seems to me, apart perhaps from exceptional cases, is to adhere to the well-established rule which I have read out. It seems to me that a defendant should not be required to plead to particulars merely because, on analysis, it turns out that the particulars could equally or more appropriately have been included in the body of the statement of claim.

This conclusion on the first ground disposes of the present application; but the difficulty might be cured by amendment of the statement of claim, and I think therefore that I ought also to deal with the second ground of objection. As to the second ground of objection, the principle is set out at p. 458 in the ANNUAL PRACTICE, 1961, in the notes under Ord. 19, r. 6. The note is in these terms:

"Traverse by defendant. A traverse by a defendant even of a negative allegation which the plaintiff must establish in order to succeed is not a matter stated of which particulars will be ordered (*Weinberger* v. *Inglis* (2)), but particulars may be ordered where the traverse involves a positive allegation (*MacLulich* v. *MacLulich* (3)). The principle may be thus stated: where a negative allegation by a plaintiff is traversed in the defence, the question whether or not the defendant can be ordered to give particulars depends on whether the traverse is a mere traverse, or whether, though negative in form, the negative is pregnant with an affirmative. If the latter is the case, particulars of such affirmative must be given; *Pinson* v. *Lloyds & National Provincial Foreign Bank, Ltd.* (4); but see *Duke's Court Estates, Ltd.* v. *Associated British Engineering, Ltd.* (5)."

It will be observed that every traverse of a negative allegation implies in some sense an affirmative: see per STABLE, J., sitting in the Court of Appeal, in *Pinson* v. *Lloyds & National Provincial Foreign Bank, Ltd.* (6) who said:

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(1) [1941] 2 All E.R. at p. 638; [1941] 2 K.B. at p. 75. (2) [1918] 1 Ch. 133.
(3) [1920] P. 439. (4) [1941] 2 All E.R. 636; [1941] 2 K.B. 72.
(5) [1948] 2 All E.R. 137; [1948] Ch. 458.
(6) [1941] 2 All E.R. at p. 644; [1941] 2 K.B. at p. 84.

A "When used in ordinary speech, a double negative must involve an affirmative proposition, but, where the double negative appears in a defence in the form of a denial of a negative allegation in the statement of claim, it does not necessarily follow, by reason of the very nature of a traverse which I have tried to indicate, that a positive or affirmative statement is contained in it. It may or may not be so."

B See also per HARMAN, J., in *Duke's Court Estates, Ltd.* v. *Associated British Engineering, Ltd.* (7) who said:

"It is true that the defence involves an implied affirmative, but it is not every double negative or implied affirmative that requires particulars to be given."

C It will be observed that in *Pinson* v. *Lloyds & National Provincial Foreign Bank, Ltd.* (8) the court reached the conclusion that the negative was pregnant with an affirmative; in *Duke's Court Estates, Ltd.* v. *Associated British Engineering, Ltd.* (9) HARMAN, J., reached the conclusion that it was not. As pointed out in those cases, a traverse is not to be regarded as pregnant with an affirmative merely on the ground that every traverse of a negative allegation implies an D affirmative; and I think that, in order to be so regarded, the traverse must import some affirmative allegation beyond that which is in any event to be implied from the mere denial of the negative allegation. The cases cited afford examples.

In the present case, the traverse in para. 7 of the defence is the simplest possible traverse of the negative allegation in para. 7, sub-paras. (1) to (4), in the statement of claim, and it seems to me impossible to read into the traverse any E affirmative allegation beyond that which is necessarily implied from the traverse of that negative allegation. It follows that no particulars should be ordered on this ground also.

It has been contended on behalf of the plaintiff that the conclusion to which I have come will place difficulties in the way of the defendants at the trial of the action; but this seems to me to be no reason for treating what is a simple F traverse as being something which it is not.

The same point was raised in *Duke's Court Estates, Ltd.* v. *Associated British Engineering, Ltd.* (10), about which HARMAN, J., said this:

"There may be, of course, consequences arising from that which may prove to be very difficult for the defendants at the trial, for, if the plaintiffs should succeed in establishing a prima facie case in respect of one of these G companies, it may well be that with the pleadings in their present state the defendants will be precluded from producing evidence to show that, though prima facie a company is outside the permitted ranks, yet for some reason or another which has not been disclosed it is within them."

Like HARMAN, J., in that case I shall say: as to that, I say nothing.

It seems to me, therefore, that no order should be made on this application.

Application dismissed.

Solicitors: *C. Grobel, Son & Co.* (for the plaintiff); *Seifert, Sedley & Co.*, agents for *Maurice A. Tarlo*, Hayes, Kent (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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(7) [1948] 2 All E.R. at p. 139; [1948] Ch. at p. 462.
(8) [1941] 2 All E.R. 636; [1941] 2 K.B. 72.
(9) [1948] 2 All E.R. 137; [1948] Ch. 458.
(10) [1948] 2 All E.R. at p. 140; [1948] Ch. at p. 464.

R. *v.* HIGGINBOTHAM.

A

[COURT OF CRIMINAL APPEAL (Glyn-Jones, Howard and Megaw, JJ.), August 15, 1961.]

Road Traffic—Dangerous driving—Sentence—Preventive detention—Circumstances which justify such a sentence—Protection of public.

Criminal Law—Practice—Sentence—Hospital order—Restriction on discharge—Inquiry as to facilities for legal custody—Mental Health Act, 1959 (7 *&* 8 *Eliz.* 2 *c.* 72), *s.* 60, *s.* 65.

B

The appellant, who had been convicted in December, 1960, and was subject to a hospital order and an order restricting his discharge, made under s. 60 and s. 65 of the Mental Health Act, 1959, walked out of the hospital, took a motor car and, being pursued by the police, drove it dangerously. He pleaded guilty in June, 1961, at Hampshire Quarter Sessions to two counts, namely (i) taking and driving away a motor vehicle without the consent of its owner contrary to s. 217 (1)* of the Road Traffic Act, 1960, and (ii) dangerous driving contrary to s. 2 (1)† of the Act of 1960. Between 1931 and 1960 he had had seventeen previous convictions, including many for stealing or taking motor cars, and had served various terms of imprisonment, the longest being six years' preventive detention imposed in 1949, under which sentence he spent four years in a Broadmoor institution. He had not, however, any previous convictions for dangerous driving. A prison medical officer, who had given evidence on the occasion of the appellant's conviction in December, 1960, said that although then he had been of opinion that some form of psychopathic treatment might benefit the appellant, he had now changed his mind and would no longer recommend hospital treatment. Quarter sessions sentenced the appellant on count (i) to twelve months' imprisonment (the maximum sentence) and on count (ii) to eight years' preventive detention, the terms to run concurrently. The maximum sentence for dangerous driving (count (ii)) was two years' imprisonment. On appeal against sentence on the ground that it was excessive and that preventive detention was inappropriate,

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Held: the appellant's record showed that the public were not safe from his criminal acts unless he were in a place where he would be kept in safe custody, and the sentence of preventive detention was appropriate, the balance of the term beyond which was purely punitive being imposed for the protection of the public (see p. 618, letter I, post).

G

R. v. *Smith* ([1961] 2 All E.R. 743) considered.

Observations on the need for inquiry before making a hospital order coupled with an order restricting discharge, whether the mental hospital had facilities for keeping patients in safe custody (see p. 620, letter F, post).

Appeal dismissed.

[**Editorial Note.** In regard to the exercise of discretion under s. 60 of the Mental Health Act, 1959, the present decision should be considered with *R.* v. *Morris* ([1961] 2 All E.R. 672).

H

As to dangerous driving, see 33 HALSBURY'S LAWS (3rd Edn.) 622, para. 1048, especially notes (p) and (q); as to the penalties for dangerous driving, see ibid., 624, para. 1053, note (g).

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* Section 217 (1), so far as material, reads: "A person who takes and drives away a motor vehicle without having either the consent of the owner thereof or other lawful authority shall . . . be liable—(a) on conviction on indictment . . . to imprisonment for a term not exceeding twelve months . . ."

† Section 2 (1), so far as material, reads: "If a person drives a motor vehicle on a road . . . in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable—(a) on conviction on indictment, to . . . imprisonment for a term not exceeding two years . . ."

A As to the general principles applicable when sentencing to preventive detention, see 10 HALSBURY'S LAWS (3rd Edn.) 512, para. 931 and SUPPLEMENT; and for cases on the subject, see 14 DIGEST (Repl.) 586, 587, *5837*, *5838*, *5841*, *5845* and 3rd DIGEST Supp.

As regards the making of hospital orders and orders restricting discharge, see 29 HALSBURY'S LAWS (3rd Edn.) 524, para. 985, and 527, para. 990.

B For the Road Traffic Act, 1960, s. 2 (1) and s. 217 (1), see 40 HALSBURY'S STATUTES (2nd Edn.) 712, 898.

For the Mental Health Act, 1959, s. 60 and s. 65, see 39 HALSBURY'S STATUTES (2nd Edn.) 1013, 1019.]

Case referred to:

C *R.* v. *Smith*, [1961] 2 All E.R. 743; [1961] 1 W.L.R. 1046.

Appeal.

This was an appeal by John Higginbotham against sentence. He had pleaded guilty at Hampshire Quarter Sessions on June 19, 1961, to two counts, namely, (i) taking and driving away a motor vehicle without the consent of its owner contrary to s. 217 (1) of the Road Traffic Act, 1960; and (ii) dangerous driving D contrary to s. 2 (1) of the Road Traffic Act, 1960. He was sentenced by the chairman to twelve months' imprisonment in respect of count (i) and eight years' preventive detention in respect of count (ii), the sentences to run concurrently. He was also disqualified for holding a driving licence for life. The facts appear in the judgment of the court.

N. R. Blaker for the appellant.

E The Crown was not represented.

GLYN-JONES, J., delivered the following judgment of the court: This appellant pleaded guilty at Hampshire Quarter Sessions to having on May 13 this year taken and driven away in the town of Basingstoke a motor car which did not belong to him without the consent of the owner or other lawful authority. F He also pleaded guilty to a count which charged him on the same day with having driven a motor vehicle in a manner dangerous to the public at Camberley. He was sentenced to twelve months' imprisonment, the maximum on the count for taking and driving away the motor car without the consent of the owner, and he was sentenced to eight years' preventive detention to be served concurrently with the sentence of twelve months' imprisonment on the count for G dangerous driving. He was also disqualified for holding a licence to drive a motor car for the rest of his life. He now appeals against his sentence by leave of the single judge.

His case is this. The maximum punishment for taking and driving away a motor car is twelve months (1). The maximum punishment for dangerous driving is two years (2). He says that the maximum sentence for the two H offences would have been three years in all if consecutive sentences had been imposed, that it is an unjust and excessive sentence that he should be given eight years' preventive detention, and that the effect is that he is being punished again and again for his record. His counsel adds this argument. The appellant has a bad record, to which I shall have to refer in greater detail, but the offences of which he has been convicted in the past do not include the offence of driving I a motor car dangerously or indeed any other form of bad driving. Counsel says that it is inappropriate that a sentence of preventive detention should be imposed for an offence which has been committed for the first time.

The appellant has an extremely bad record. He is forty-two years of age, and between 1931 and 1960 he has been convicted seventeen times. His offences include many cases of stealing motor cars, many cases of taking and driving away of motor cars, but not those alone. There are other offences as, for example,

(1) I.e., under s. 217 (1) (a) of the Road Traffic Act, 1960, see footnote *, p. 616, ante.
(2) I.e., under s. 2 (1) (a) of the Act of 1960, see footnote †, p. 616, ante.

garage-breaking, housebreaking and the like which he has committed and for which he has been punished in the past. Before 1941 he had been put on probation, sent to an approved school or reform school, sent to borstal and had had various short terms of imprisonment. Coming to the year 1945 he was then sentenced to two years' imprisonment for stealing jewellery from an hotel bedroom and receiving property knowing it to have been stolen. In December, 1946, at Manchester Assizes he was sentenced to three years' penal servitude for housebreaking and larceny, two cases having been taken into consideration. It is obvious that he cannot have been more than a very short time out of prison after serving the sentence of two years before he committed the offences for which he received three years' penal servitude. He could not have been released from prison before the end of 1948, and yet by Apr. 29, 1949, he had again reached Manchester Assizes, and on this occasion he was convicted again of housebreaking and larceny and attempting to steal a motor car, fourteen other cases were taken into consideration, and he received a sentence of six years' preventive detention from which he was not released until the summer of 1955. On Dec. 20, 1955, at Lancashire County Quarter Sessions for attempted housebreaking and housebreaking and larceny, two cases considered, he received two terms of four years and four years' imprisonment concurrent. Again, he had not long been out of prison when once more on Oct. 13, 1958, for stealing in a dwelling-house (two cases) and other cases considered, he received two sentences of three years and three years' imprisonment concurrent and again he could not have been released from prison before October, 1960, yet by Dec. 28, 1960, he was before Hampshire Quarter Sessions for garage-breaking and stealing a padlock and taking and driving away a motor vehicle without consent, two cases. So that by that time this appellant had plainly shown that he was either quite unable or quite unwilling to refrain from crime, and the type of crime that he committed seems to have been the type which suited him or suited his desires or convenience according to the particular circumstances of the particular case. When he did appear in December before Hampshire Quarter Sessions a hospital order was made under s. 60 of the Mental Health Act, 1959, (3) coupled with an order restricting the freedom of the hospital to discharge him without the permission of the Secretary of State under s. 65, (4).

What in fact happened on May 13, 1961, was that he walked out of the hospital in which he had been received under that order, and in the evening of that day he took a motor car because, according to him, he needed to get back to the hospital, which was at Park Prewett, by 8.30 p.m., and he did not think that he had time to do so. Why, in those circumstances, he was found in Camberley on the A.30 main road is not explained. Certainly it was not en route for Park Prewett, but he, having taken this motor car, was seen and chased by the police, and the dangerous driving he committed was driving by him in the course of fleeing from the police who no doubt had a desire to apprehend him for the crime that he had committed. As the learned chairman of Hampshire Quarter Sessions said, it was only by the mercy of providence that a terrible disaster on one of the main arterial roads of this country was avoided, and, indeed, driving in the way in which he was driving he might well have caused a terrible accident in which people might have been killed or gravely injured. As it was, he collided with a bus, turning over the car he was driving, and so badly damaged it that it could not be repaired.

It seems to us that this appellant has amply demonstrated the fact that the public are not safe from his depredations in crime unless he is in a place of safety, a place where he can be kept in safe custody. In other words, we think that this is a proper case for a sentence of preventive detention.

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(3) See 39 HALSBURY'S STATUTES (2nd Edn.) 1013.
(4) See 39 HALSBURY'S STATUTES (2nd Edn.) 1019.

A In *R.* v. *Smith* (5), the court dealt with a case in which a man who had committed a whole series of motoring offences and had persistently driven again and again while disqualified from driving, was sentenced at Middlesex Sessions to a term of preventive detention. It was submitted to this court on that occasion that preventive detention was a punishment never appropriate to a motoring offence. The court expressly said that that argument was not to be accepted. B The court said (6):

> ". . . preventive detention is not excluded as a possible sentence in an appropriate case but the occasions on which such a sentence is likely to be passed are exceedingly rare."

In the opinion of this court, an appropriate case has arisen, and in the circumstances of this case the sentence of preventive detention was appropriate and the C court does not propose to interfere with it.

This appellant cannot get out of his head the idea that a sentence of preventive detention is imposed on him as a punishment not so much for the offence which he has just committed, which is the occasion for the award, but for the offences which he has previously committed and for which he has already been punished D and, taking that view of the sentence of preventive detention it is understandable that he should feel aggrieved by it. He doubtless feels that having been punished once he ought not to be punished again. It is, I think, desirable that we should say that while in a sentence of preventive detention there is and must be a punitive element, the sentence normally is for a term which exceeds that which would be appropriate as a punishment even taking the past record of the E offender into consideration, and the balance of a term of preventive detention beyond that part which is purely punitive is not imposed by way of punishment of the offender at all; it is imposed for the protection of the public against the depredations of the man who has demonstrated by his record that he cannot be trusted with his liberty without losing it. Whether he cannot help committing crime or does not want to stop committing crime, the public needs protection. F It follows that in most cases the term of preventive detention awarded must necessarily exceed that which would be appropriate as a punishment if the punitive element alone were considered. So much for the fact that preventive detention is imposed in this case notwithstanding that the maximum punishments qua punishments for these offences would not exceed three years.

Another matter must be mentioned. When this appellant was sentenced to a G term of six years' preventive detention, the medical authorities, I suppose the prison doctor, and I dare say he called into consultation a psychiatrist, came to the conclusion that he was mentally unstable. He was transferred to the hospital at Broadmoor as what was then called a Broadmoor patient. There he remained until the expiration of his sentence of preventive detention. On the next occasion, as I have already indicated, when he committed crime, he was sentenced to H imprisonment in the ordinary way—that was in 1955—and again sent to imprisonment in 1958 and, as far as we can see from his record, those sentences were served as normal sentences of imprisonment. But when he came before Hampshire Quarter Sessions in December, 1960, the evidence of two doctors was received. One must have given oral evidence. The other may have given a written report, and their evidence was to the effect that this appellant was I suffering from mental illness or psychopathic disorder or sub-normality or severe sub-normality as the case may be. The court has not had the evidence given on that occasion but presumably and probably what was said to the court was that this appellant was suffering from psychopathic disorder. The prison medical officer who gave evidence by (7) a report which he seems to have made on this occasion with which we are now dealing said that although in December,

(5) [1961] 2 All E.R. 743. (6) [1961] 2 All E.R. at p. 745.

(7) The prison doctor was not called, but his report was before the chairman of quarter sessions.

1960, he had been of opinion that some form of psychopathic treatment might benefit the offender, he had now changed his mind, and he expressed the view that he could no longer recommend or advise hospital treatment in this case. But in December, 1960, faced with the evidence of those two doctors, Hampshire Quarter Sessions was uncertain as to what was the right way, having regard to the necessity for protecting the public, in which to deal with this offender, and the court came to the conclusion that a hospital order (8) should be made together with a restriction order under s. 65 of the Mental Health Act, 1959, the effect of which is to deprive the patient and his relations of the right to apply for his discharge and, if necessary, to carry the case to a mental health tribunal and to place in the Secretary of State the sole discretion to say when the patient, as he then became, should be released. That is the only effect of a restriction order and the only effect material for this case. There are other matters which are dealt with in the statute to which I need not refer.

The Mental Health Act, 1959, is a comparatively recent statute, and no doubt as time goes on we shall all learn more of the way in which the statute operates, but one thing seems to be quite clear, which is this: when a hospital order is made, the person in respect of whom the order is made is received into the hospital not as a criminal but as a patient. In this case the doctor at the hospital to which he was sent, the Park Prewett Hospital, near Basingstoke, examined him and, treating him as a patient, came to the conclusion that there was very little sign of mental illness about him. If the doctor is right, this man is not mentally unstable; he is just wicked, and the doctor, having come to the conclusion that there was no evidence of mental instability justifying his being kept in safe custody, left him at large to go about the hospital as he thought fit and to work in the grounds outside with no physical obstacle to his walking out of the gate of the hospital at any time he liked. In due course, that is exactly what he did, he walked out of the hospital and committed the crime for which he was rightly given, as we have found, eight years' preventive detention. It may be useful if we say that it is unsafe for courts to assume that the making of a hospital order coupled with a restrictive order under s. 65 is sufficient by itself to ensure that the convicted person in respect of whom such orders are made will be kept in safe custody. As far as we can see, the only way in which that result can be achieved is for the court to ascertain first before making the order which mental hospital can receive the man, and that of course the court must do, and further than that to find out whether or not the mental hospital is one in which facilities exist for keeping patients in safe custody so that they will not have the opportunity to walk out and commit crime. There are such institutions, and if it be discovered that there is no vacancy in any institution in which the convicted person can be kept in safe custody, one must point out that the powers of the court to make a hospital order are permissive, not mandatory, and if the court thinks it necessary for the protection of the public that the accused man should be incarcerated, then the court should use its ordinary penal jurisdiction and order, if it thinks that a man needs medical treatment, that arrangements should be made in some place where he can be kept in safe custody and the kind of thing that happened in this case avoided.

Appeal dismissed.

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(8) I.e., under s. 60 of the Mental Health Act, 1959.

A

ANNAMUNTHODO v. OILFIELDS WORKERS' TRADE UNION.

[PRIVY COUNCIL (Lord Denning, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva), June 28, 29, July 16, 1961.]

Privy Council—West Indies—Trinidad—Trade union—Domestic tribunal—Natural justice—Member charged with breach of union's rules none of which B *gave power of expulsion—Expulsion at adjourned hearing at which he was not present under another rule dealing with conduct prejudicial to interests of union—No charge of breach of such rule—Appeal by member against expulsion dismissed—No complaint of failure of natural justice—Whether expulsion valid—Whether member could seek redress in the courts.*

Trade Union—Domestic tribunal—Natural justice—Adjudication on member's C *conduct—Appeal by member to annual conference of delegates—Whether member could thereafter seek redress in the courts.*

The appellant was an ordinary member of the respondent union, and, as such, had agreed to obey and was subject to the union's rules. He was charged in writing with four specific offences each under a named different rule. None of these four rules gave power to expel him in the circum- D stances, but each provided its penalties. He attended the initial hearing of the charges before the general council of the union and denied them. The hearing was adjourned, but he did not attend the adjourned hearing owing to a previous engagement. He was subsequently notified in writing that he had been convicted of all the charges and had been expelled under yet another rule, to which no reference had been made in the charges. This E rule provided that "the general council may fine any member who is proved to the satisfaction of the . . . council to have been guilty of conduct prejudicial to the interests of the union . . . and/or suspend or expel such a member from the union. Any member so fined, suspended or expelled shall have the right of appeal to the annual conference of delegates whose decision shall be final and binding". The appellant appealed to the annual con- F ference of delegates, who dismissed his appeal. He then brought an action for his expulsion to be set aside.

Held: the appellant's expulsion from the respondent union was invalid and should be set aside, because—

(i) the rule under which he was expelled created a separate and distinct offence with which he had not been charged.

G (ii) even if that rule did not create a separate offence but merely imposed severer penalties when the conduct was prejudicial to the interests of the union, the rule should not have been invoked without giving the appellant notice of it; moreover, as the appellant was not present at the adjourned hearing, to proceed under it without adjourning to give him notice was contrary to natural justice.

H (iii) by appealing to the annual conference of delegates he had not thereby forfeited his right to redress in the courts.

Appeal allowed.

[As to powers of the court to give relief against expulsion from a trade union, see 32 HALSBURY'S LAWS (2nd Edn.) 481, para. 770; and for cases on the subject, see 43 DIGEST 98-101, *1032-1047*.]

I Cases referred to:

White v. *Kuzych*, [1951] 2 All E.R. 435; [1951] A.C. 585; 2nd Digest Supp.

Wolstenholme v. *Amalgamated Musicians' Union*, [1920] 2 Ch. 388; 89 L.J.Ch. 388; 123 L.T. 741; 43 Digest 100, *1042*.

Appeal.

Appeal by special leave in forma pauperis by Walter Annamunthodo from a decree of the West Indies Federal Supreme Court (RENNIE, ARCHER and WYLIE, JJ.), dated Jan. 25, 1960, affirming an order of the Supreme Court of Trinidad

and Tobago (PHILLIPS, J.), dated June 25, 1959. The facts are set out in the judgment of the Board. A

R. Millner for the appellant.
Robert S. Lazarus, Q.C., and *W. D. Collard* for the respondent union.

LORD DENNING: The appellant has worked in the oil industry in Trinidad ever since the year 1944. In 1952, he joined the Oilfields Workers' Trade Union, the respondents, and he remained thereafter an ordinary member of the union. He never became an officer. The rules of that union require that every member shall give a pledge that he will obey the rules and regulations of the union, and it may be presumed that the appellant gave that pledge. At any rate he does not dispute that he is subject to the rules. Prior to the events hereinafter mentioned, he had never been charged with any offence against the rules. On May 15, 1957, the general secretary of the respondent union notified the appellant that he was required to appear before the general council of the union on Sunday, June 9, 1957, to answer four charges of offences against the rules. The appellant attended the hearing on that day and denied the charges. The hearing was adjourned until Sunday, June 16, 1957, but the appellant did not attend on that day as he had a previous engagement. On June 17, 1957, the general secretary informed him that he had been convicted on all the charges laid against him, and that the general council had, as a result, seen fit to expel him. He appealed to the annual conference of delegates, but they, on Mar. 30, 1958, upheld the expulsion. Thereupon the appellant sought relief in the courts. On May 17, 1958, he brought this action against the respondent union, claiming that his purported expulsion was ultra vires and void, an injunction to restrain the respondent union and its servants or agents from excluding him, and damages for breach of contract. On June 25, 1959, the Supreme Court of Trinidad and Tobago (PHILLIPS, J.) dismissed his claim. He appealed to the Federal Supreme Court (RENNIE, ARCHER and WYLIE, JJ.), who, on Jan. 25, 1960, dismissed his appeal. He now appeals, by special leave, in forma pauperis, to Her Majesty in Council. B C D E F

Stripped of their legal form, the charges against the appellant were in substance that, during the lunch-hours on Aug. 15 and 17, 1956, he had attended meetings in the works, at which non-members were present, during which he had alleged that the president-general of the respondent union had embezzled $25,000 of the union's funds; that, during those meetings, he had levelled charges of theft and corruption against the officers of the respondent union; and that he had repeatedly made those statements in public. Their Lordships notice that the president-general and officers of the respondent union did not take action for slander against the appellant, but proceeded instead to formulate charges against him under the union rules. The rules which they invoked were as follows:— G

> "25. *Irregular Discussion of Union's Business.* It shall be irregular for any officer or member of the union to discuss the business of the union in public or with persons who are not members of the union and any officer *or member* so charged and found guilty shall forfeit his office or be suspended from membership or be fined any sum not exceeding $5.00 or expelled. Any other member found guilty of such breach shall be fined two dollars ($2.00) for the first offence, for the second offence he shall be suspended from membership for three months, and for a third similar offence he shall be expelled." H I

Their Lordships have put the words "or member" in italics, because PHILLIPS, J., thought they enabled the general council to expel the appellant. But the Federal Supreme Court thought (1) those words must have been inserted in error, for they could not be reconciled with the second part of the rule. They

(1) See (1960), 2 W.I.R. at p. 76.

A should, therefore, be ignored and treated as if deleted. Their Lordships agree with this view which was, indeed, not disputed before them; so the appellant could not be expelled under this rule.

> "26. *Plotting of Members.* (1) Any officer or member who is charged with plotting against fellow officers or members shall on conviction, if an officer forfeit his office, or be suspended or fined any sum not exceeding B $5.00 or be expelled; and if a member be fined $2.00 for the first offence; for a second offence he shall be suspended from membership for three months or may be expelled from the union."

Their Lordships notice that the appellant was an ordinary member and this was his first offence, so he could not be expelled under this rule.

C

> "27. *Respect to Officers.* All officers and members are required to show due respect to the officers of the union who have been duly elected. Anyone charged and found guilty of disrespectful conduct in this connexion, if he be an officer shall, for the offence, either forfeit his office or be suspended from office. If he be an ordinary member he shall for the first offence be fined the sum of $1.00. Anyone found guilty for a second offence may be expelled."

D Their Lordships again notice that the appellant was an ordinary member and this was his first offence. So he could not be expelled under this rule.

> "32. *Complaints and Appeals* . . . (5) All charges made by any member or officer against another must be in writing and if any charge, on investigation, is proved to be made through malice and without foundation, the E member or officer preferring such charge shall be liable to suspension or expulsion or be fined any sum not exceeding $5.00 as the case deserves."

Their Lordships think that the general council misconceived this rule. It is intended to deal with charges brought before the general council or executive committee of the respondent union and says that, if they are unfounded and malicious, it is an offence. In short, something in the nature of "malicious F prosecution". The appellant had brought no such charge. He should not, therefore, have been convicted under r. 32, and was not liable to expulsion under it. PHILLIPS, J., so held, and it was not disputed before the Federal Supreme Court nor before their Lordships. There was a slight reference before their Lordships to r. 32 (9), but it was never mentioned in the courts of the West Indies and it is not open to the respondent union now to rely on it. In any G case, it has no relevance.

Now those rules 25, 26, 27 and 32 were the only rules which the general secretary invoked in his letter charging the appellant with a breach of the rules. They were specified in the greatest particularity. The letter followed the familiar form of an indictment:

> "*Charge 1*
>
> H *Statement of Offence:* Plotting. Contrary to r. 26 . . .
>
> Particulars . . .
>
> "*Charge 2*
>
> Irregular discussion of union business contrary to r. 25.
>
> *Statement of Offence:* . . .
>
> *Particulars* . . .
>
> I "*Charge 3*
>
> *Offence:* Breach of r. 32, Complaints and Appeals . . .
>
> *Particulars* . . .
>
> "*Charge 4*
>
> *Statement of Offence:* Disrespectful conduct contrary to r. 27 . . .
>
> *Particulars* . . ."

Their Lordships have already observed that, under none of those rules, was there any power to expel the appellant. Yet, when it came to sentencing him,

the general council did expel him; and for this purpose they invoked another rule, namely, r. 11 (7). He had not been charged with a breach of it, but, nevertheless, they claimed a right to expel him under it. The letter informing him of it dated June 17, 1957, was in these words:

> "This is to inform you that you have been convicted on all the charges laid against you by the general secretary of the Oilfields Workers' Trade Union. The general council has as a result seen fit to expel you under the provisions of r. 11, s. 7, on the ground that your general conduct has been prejudicial to the best interest of the union."

Now r. 11 (7) is in these words:

> "The general council may fine any member who is proved to the satisfaction of the said council, to have been guilty of conduct prejudicial to the interests of the union any sum not exceeding $5.00 and/or may suspend or expel such member from the union. Any member so fined, suspended or expelled shall have the right of appeal to the annual conference of delegates whose decision shall be final and binding . . ."

The first question is: Did r. 11 (7) create a *separate and distinct offence* of "conduct prejudicial to the interests of the union"?—for in that case it ought to have been separately charged—or did r. 11 (7) merely empower the general council to impose *more severe penalties* for the various *other offences* specified in the rules, provided that the conduct of which he was convicted under them was prejudicial to the interests of the union?—for in that case r. 11 (7), so it was said, need not be separately charged, but only the other offences. PHILLIPS, J., in the Supreme Court and ARCHER and RENNIE, JJ., in the Federal Supreme Court (2) thought that r. 11 (7) only empowered the general council to impose *more severe penalties*, and sought support for this view from some observations of EVE, J., in *Wolstenholme* v. *Amalgamated Musicians' Union* (3). But WYLIE, J., thought it created a *separate and distinct offence*, and their Lordships agree with him. As he said (4),

> "it stands entirely on its own, authorising expulsion of a member who is proved to the satisfaction of the general council 'to have been guilty of conduct prejudicial to the interests of the union'."

In the opinion of their Lordships, it should not have been invoked for the purpose of expelling the appellant unless he was given notice of the charge under it and had a fair opportunity of meeting it. But, even if r. 11 (7) only empowered *more severe penalties*, nevertheless those severe penalties could only be imposed when the conduct was prejudicial to the interests of the respondent union; and their Lordships think that, even on that view, the rule should not have been invoked without giving the appellant notice of it. Counsel for the respondent union sought to treat the specific formulation of *charges* as immaterial. The substance of the matter lay, he said, in the *facts* alleged in the letter as to the meetings which the appellant had attended and the allegations he had made. Their Lordships cannot accede to this view. If a domestic tribunal formulates specific charges, which lead only to a fine, it cannot without notice resort to other charges, which lead to far more severe penalties.

The second question is this: Is the appellant debarred from complaining of r. 11 (7) being invoked because he did not appear at the adjourned hearing? He had attended the first hearing on June 9, 1957, when the evidence was taken; but he did not attend at the adjourned hearing on June 16, 1957, giving as his reason that he had made a previous engagement to be the judge at a "Mock Trial" sponsored by a Girls' Group. That seems a poor excuse. And it was said that, if he had appeared at the adjourned hearing, he could have been given notice in writing then and there of the intention to proceed under r. 11 (7) and

(2) (1960), 2 W.I.R. at p. 77. (3) [1920] 2 Ch. at pp. 400, 401.
(4) (1960), 2 W.I.R. at p. 78.

A thus expelled without any violation of natural justice. This argument appealed to WYLIE, J., who thought (5) that, as he had been given an opportunity of appearing at the adjourned hearing and had not appeared, that was enough to satisfy natural justice. Their Lordships realise the force of this reasoning but they cannot agree with it. The appellant must be taken to have known that, at the adjourned hearing, the general council might proceed to award the full B penalty prescribed for the offences then charged against him—which was only a small fine—but he could not be expected to know that he might be dealt with for a separate and distinct offence which involved expulsion. When the general council at the adjourned hearing desired to proceed under r. 11 (7), and found that he was not present, they ought to have adjourned the hearing once again so as to give him notice of the fresh charge; and they would have had to do it in C writing (6) under r. 32 (5). By failing to do so, they failed to observe the requirements of natural justice.

The third question is whether the appellant has lost his right to complain by appealing to the annual conference of delegates. As soon as he knew of his expulsion by the general council, he gave notice of appeal under r. 11 (7). He had the opportunity to put before the annual conference of delegates all his D objections to his expulsion. He does not complain of any failure of natural justice by that body. And they affirmed his expulsion. So can he now complain? This reasoning was accepted by ARCHER and WYLIE, JJ. They held (7) that, by appealing, he had lost his right to complain of r. 11 (7) being invoked. Indeed, he himself invoked r. 11 (7) so as to appeal under it. So how can he now repudiate it? Their Lordships recognise the force of this reasoning, but E they cannot agree with it. Even if the order of expulsion were capable of being affirmed or disaffirmed, their Lordships cannot regard an appeal as an act of affirmance. On the contrary, it is a disaffirmance—a complaint against the order of expulsion. If he had not appealed, it might have been said that he should have done so, that he should have exhausted all internal means of redress, before having recourse to the courts. Such a plea was upheld in the special F circumstances that prevailed in *White* v. *Kuzych* (8). It was, therefore, quite proper for him to appeal to the annual conference before coming to the courts, even though he was not bound to do so. But, having appealed and failed, he does not by so doing forfeit his right to redress in the courts. If the original order was invalid, for want of observance of the rules of natural justice, he can still complain of it, notwithstanding his appeal.

G Counsel for the respondent union did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to H be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside.

In the result, their Lordships think the decision of the general council on June 16, 1957, was vitiated by reason that it convicted the appellant of an offence against the rules with which he had never been charged. He is entitled, I therefore, to have it set aside. But he gave no evidence that he had suffered any damage from it.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be allowed, and that it should be declared that the purported expulsion of the appellant from the respondent union by resolution of its general council on or about June 16, 1957, was invalid and that an order should be made to set

(5) (1960), 2 W.I.R. at p. 78. (6) Rule 32 (5) is set out at p. 623, letter D, ante.
(7) (1960), 2 W.I.R. at pp. 77, 78. (8) [1951] 2 All E.R. 435; [1951] A.C. 585.

it aside. The respondent union must pay the costs of the appeal before their Lordships (so far as costs are allowed to an appellant in forma pauperis) and also his costs in the courts below. A

Appeal allowed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Pothecary & Barratt* (for the respondent union).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*] B

PHONOGRAPHIC EQUIPMENT (1958), LTD. AND ANOTHER *v.* MUSLU. C

[Court of Appeal (Lord Evershed, M.R., Harman and Donovan, L.JJ.), July 24, 25, 28, 1961.]

Hire-Purchase—Penalty—Depreciation—Agreement to pay depreciation on termination of agreement by either party—Amount of depreciation substantially greater on determination in early months—No depreciation payable, in the particular case, during last six months for which agreement would run. D

A hire-purchase agreement made between the appellant (hirer) and the respondents (owners) in a form which was a common form, applicable to many different goods, provided for the hire-purchase of a juke box at a total payment of £814 18s., made up as follows:—initial payment, £90; twenty-three monthly hire rentals of £30 3s. 3d., viz., £693 14s. 9d.; and one monthly hire rental of £31 3s. 3d. The owners were entitled to terminate the agreement and recover the goods for any breach of the agreement, and the hirer also was entitled to terminate the agreement on giving notice and returning the goods. Clause 6 provided that in the event of determination by either party the hirer should pay all arrears of rent, the cost of any necessary repairs and "by way of agreed depreciation of the goods a sum equal to . . . fifty per cent. of the total hire-purchase price payable under this agreement (including initial payment and hire charges) plus . . . a further five per cent. of such total hire-purchase price for each month which has elapsed between the date of the agreement and the receipt of the goods by the owners up to seventy-five per cent. of the said total price, less . . . the total of the sum already paid and the moneys due to the owners for hire rentals at the date of the receipt of the goods by them." The effect of cl. 6 was that if the agreement were terminated in any one (except the first) of the first eight months of its life the owners would be entitled in money and money's worth to an amount substantially greater than the total hire-purchase price, viz., £814 18s., but that after the sixth month the amount payable for depreciation dropped by £30 a month and at and after the eighteenth month no depreciation was payable. Thus if the agreement were terminated in the sixth month, the owners would be entitled to £1,006 3s. 6d., made up as follows: initial payment, £90; six monthly hire rentals, £150 16s. 3d.; depreciation, £370 7s. 3d.; value of goods returned (say) £395. There was evidence that the top price for a juke box second-hand was about £425. The hirer paid the initial payment and three monthly instalments and then fell into arrears and the owners gave notice to terminate the agreement. The hirer returned the juke box. The owners caused the juke box to be repaired and re-sold it for £375. No claim was made by them for the costs of repairs. In an action by the owners claiming, inter alia, a sum for depreciation calculated in accordance with cl. 6 of the agreement, E F G H I

Held: the hirer had not established that the sum claimed for depreciation was a penalty because, taking the contract as a whole and having regard

A to the fact that the depreciation began to abate after the sixth month and vanished at the eighteenth month, cl. 6 was an attempt to pre-estimate the loss from depreciation (see p. 631, letter H, post); moreover (a) although the agreement might be terminated by the owners for any breach, whether trivial or substantial, yet that consideration also only had full substance during the first six months and none after the eighteenth, and it was to be B assumed that the owners on entering into the agreement, wished it to continue and not to be prematurely terminated, and (b) the depreciation clause applied whether the owners or the hirer terminated the agreement.

Dictum of LORD DUNEDIN in *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.* ([1915] A.C. at p. 86) applied.

Appeal dismissed.

C [**Editorial Note.** If a hire-purchase agreement is terminated by the hirer, not by the hire-purchase vendor for the hirer's breach, question of penalty does not arise in relation to a depreciation clause; see *Campbell Discount Co., Ltd.* v. *Bridge* ([1961] 2 All E.R. 97). For an instance of recovery of damages for breach of contract rather than depreciation on breach by the hirer, see *Yeoman Credit, Ltd.* v. *Waragowski*, ante, p. 145.

D As to what constitutes a penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298, para. 488; and for cases on the subject, see 17 DIGEST (Repl.) 148-165, *487-610*.

As to the rights on determination of a hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 550, para. 891.]

E Cases referred to:

Campbell Discount Co., Ltd. v. *Bridge*, [1961] 2 All E.R. 97; [1961] 1 Q.B. 445; [1961] 2 W.L.R. 596.

Cooden Engineering Co., Ltd. v. *Stanford*, [1952] 2 All E.R. 915; [1953] 1 Q.B. 86; 17 Digest (Repl.) 154, *523*.

Dunlop Pnuematic Tyre Co., Ltd. v. *New Garage & Motor Co., Ltd.* [1915], F A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 17 Digest (Repl.) 149, *491*.

Appeal.

This was an appeal by Hassan Muslu from a judgment of His Honour JUDGE ANDREW given in Marylebone County Court, and dated Feb. 9, 1961, whereby he ordered the appellant, who was the defendant in the action, to pay £390 10s. to the respondents, Phonographic Equipment (1958), Ltd., and Lombank, Ltd. G The second-named company was added as plaintiffs in the action originally brought by Phonographic Equipment (1958), Ltd., alone, they being assignees of the rights of Lombank, Ltd., but in view of the question whether notice of the assignment had been duly given Lombank, Ltd. were added as plaintiffs before the county court and on the appeal Phonographic Equipment (1958), H Ltd. were not represented and took no part in the proceedings. The facts appear in the judgment of DONOVAN, L.J.

L. J. Verney for the appellant, the hire-purchaser.

P. Solomon for the respondents, Lombank, Ltd.

Cur. adv. vult.

I July 28. The following judgments were read.

LORD EVERSHED, M.R.: In this case I must confess to have felt very great difficulty in the course of the argument, but having had the advantage of reading the judgment which has been prepared by DONOVAN, L.J., and which I will ask him to read, I concur in it and do not desire myself to add anything.

DONOVAN, L.J.: This is an appeal from a judgment of His Honour JUDGE ANDREW, sitting at Marylebone County Court, whereby he ordered the appellant, who was the defendant in the action, to pay a sum of £390 10s. to

the respondents, Phonographic Equipment (1958), Ltd. and Lombank, Ltd. (hereinafter called Phonographic Equipment and Lombank, respectively). A

The matter arose out of a hire-purchase agreement entered into between the appellant, a café proprietor, and Lombank, on Aug. 22, 1959. The subject-matter of the agreement was " phonograph monoral manual ", better known as a juke box. The cash price of the machine was £725. The sum payable under the hire-purchase agreement, if it ran its course, was £814 18s. The appellant was to pay this as follows: B

	£	s.	d.
Initial payment	90	0	0
Twenty-three monthly hire rentals of £30 3s. 3d. each	693	14	9
One monthly hire rental of	31	3	3
	814	18	0

C

He did in fact pay the initial sum of £90 and also the first three monthly hire rentals of £30 3s. 3d. Then he fell into arrears, and on Jan. 29, 1960, Lombank gave the appellant written notice to terminate the agreement, and on Mar. 3, Lombank assigned their rights under the agreement to Phonographic Equipment. D Some question having arisen whether notice of this assignment had been effectively given to the appellant, Lombank were added as plaintiffs in the action. After the notice to terminate the agreement, further sums amounting to some £70 were paid by the appellant, but on Mar. 28, 1960, Phonographic Equipment took possession of the machine. In June, 1960, they brought their action claiming the sum of £390 10s. under the agreement, made up as follows: E

	£	s.	d.
(a) Arrears of rental for December, 1959, and January, February and March, 1960	120	13	0
(b) Depreciation	310	0	9
	430	13	9
Less odd payments made by the appellant	40	3	9
	390	10	0

F

The claim for arrears of rental after the date when notice to terminate the agreement was given (Jan. 29, 1960) failed. This, however, made no difference to the total of the claim. This comes about because in calculating the amount due for depreciation, credit has to be given under the agreement for all payments made or due in respect of hire rental; so that the effect of rejecting the claim for such arrears of rental was simply to increase the amount due for depreciation by the same sum. The appellant, besides resisting the claim for arrears of rental after notice to terminate the agreement was given, also opposed the claim for depreciation, alleging that the sum claimed was a penalty. In this he failed, and on this point alone he now appeals. G H

It is necessary to refer to certain clauses of the agreement which, as usual, is in almost microscopic print. Under cl. 2 the appellant agreed as follows: to pay the hire rentals punctually and interest at twelve per cent. on overdue payments; to keep the machine in good order and to carry out all repairs at his own expense through a firm approved by Lombank: to repay to Lombank on demand all costs and charges incurred by them in connexion with the repair and preservation of the machine and himself to insure it: and to permit Lombank to inspect the machine at any reasonable time. There are several more detailed obligations undertaken by the appellant under cl. 2, but those I have mentioned will suffice. By cl. 3 the appellant had the right to terminate the agreement by giving written notice to Lombank and returning the machine in good order. I

A By cl. 4 Lombank had the right to terminate the agreement and recover the goods on a number of grounds, the chief of which was " any breach of this agreement ". In the event of the determination of the agreement by either party cl. 6 provided that the appellant should pay (a) all arrears of rent, (b) the cost of all repairs necessary to put the machine in good order, and (c):

B " by way of agreed depreciation of the goods a sum equal to . . . fifty per cent. of the total hire-purchase price payable under this agreement (including initial payment and hire charges) plus . . . a further five per cent. of such total hire-purchase price for each month which has elapsed between the date of the agreement and the receipt of the goods by the owners up to seventy-five per cent. of the said total price, less . . . the total of the sum C already paid and the moneys due to the owners for hire rentals at the date of the receipt of the goods by them."

It is this provision for " depreciation " which is said to amount to a penalty. Its arithmetical effect in the present case if the agreement were terminated in the sixth month would be as follows:

D

	£	s.	d.
Seventy-five per cent. of total hire-purchase price of £814 18s. ..	611	3	6
Less total amount paid or payable by the appellant (i.e., initial payment of £90 and five instalments of £30 3s. 3d.) ..	240	16	3
	370	7	3

E

The machine was sold by Phonographic Equipment, after they had carried out the necessary repairs, for £375 on October 17, 1960 (i.e., some seven months after retaking it). They had sent the machine previously to a possible buyer on approval, asking £400 for it. He returned it as unsatisfactory. The evidence before the judge was to the effect that the top price for a second-hand machine F in good condition would be about £425.

Before coming to the rival contentions these further facts should be stated. (i) After Lombank had given notice to terminate the agreement on Jan. 29, 1960, Phonographic Equipment, who were the dealers in this matter, made an arrangement with the appellant to share with him equally the takings of this juke box, and to credit their half against the hire rentals due from the appellant. In G this way some £50 further rent was paid. They also accepted from him four sums of £5 up to Mar. 10, 1960. On Mar. 28 the appellant threatened to put the machine outside on the pavement unless it was removed. He intended to enter into an agreement with another company. Phonographic Equipment removed it that day. (ii) No claim has been made against the appellant for interest H on overdue payments. (iii) He did not insure the machine as the agreement provided. This was paid by Phonographic Equipment who have not reclaimed it from the appellant. (iv) The costs of repairing the machine after it was retaken was £42, exclusive of any labour charge. This also is the appellant's liability under the agreement but no claim has been made for it.

Counsel for the appellant in an attractive and persuasive argument supported I his contention that the claim for depreciation was a claim for a penalty, by a schedule which he put in showing the effect of the claim if the agreement were determined in any one of the first eight months of its life. The schedule shows that on that hypothesis Lombank would receive in every month except the first, money and money's worth greater in amount than the total sum receivable had the agreement run its course. Thus, if the agreement were determined in the sixth month, Lombank would receive altogether £1,006 3s. 6d. made up as follows:

	£	s.	d.
Initial payment	90	0	0
Instalments paid or recoverable	150	16	3
Depreciation	370	7	3
Value of machine when retaken and put in good order (say)	395	0	0
	1,006	3	6

The depreciation is worked out according to the formula prescribed in cl. 6 (c) of the agreement. The total figure of £1,006 compares with the figure of £814 being the total sum payable under the agreement if there were no breach: and counsel argues forcibly that these figures demonstrate that the so-called "depreciation" is in reality a penalty. He points out also that the owners may terminate the agreement for "any breach": and that some of these breaches might be trivial in character. For example, the appellant might for a few days only be in breach of cl. 2 (g) in repaying to the owners on demand any costs and charges incurred by them in connexion with the repair of the machine. The owners could then terminate the agreement, and the effect of the clause dealing with depreciation would be to magnify their compensation far beyond any damage that they had suffered.

A further point emphasised for the appellant was this; it is said that besides being liable to pay depreciation, he is also liable to pay for all repairs and he gets no allowance for this in the calculation of depreciation. The respondents dispute this and say that credit for any sum paid for repairs must be given under the words "less . . . the total of the sum already paid and the moneys due to the owners for hire rentals . . ." This may well be right though the claim is certainly ambiguous in this respect. But, as I have said, no attempt has been made to make the appellant pay the cost of repairs, and he has not done so.

Counsel for Lombank contended that the schedule put in by counsel for the appellant was only part of the picture. It is true that a breach of the agreement in its early months may bring about the result that more will be received by the owners, due to this depreciation clause, than if there had been no breach.

After the sixth month, however, the amount payable for depreciation drops by £30 a month, because while the gross figure for depreciation remains constant at seventy-five per cent. of £814, i.e., £611, it is progressively reduced by £30 a month thereafter, being the rental paid or payable. The result is that by the eighteenth month no depreciation is payable at all. Further, if the value of the machine at the end of eighteen months were, say, £200, the owners would recover altogether, on determination of the agreement in that month, no more than £830, being initial payment and hire rentals received (£630) plus the value of the machine. The weighting of the depreciation charge in the early months of the agreement is justified, says counsel for the respondents, because the moment a new machine is sold, some £400 of depreciation is suffered at once, and the machine is also exposed to use by persons not over-solicitous for its careful handling. Here, indeed, according to the evidence, the damage which had to be repaired on the retaking of the machine included the repair of a motor, the repair of a coin mechanism which was badly damaged, and the putting right of other internal mechanism which also was badly damaged. It is contended for the respondents that the progressive reduction of the charge for depreciation from the seventh month onwards, until it vanishes altogether at the eighteenth, shows that there was here a genuine attempt to estimate damage, even if in the early months the estimate was over-generous to the owners. Counsel for the respondents also asked that the initial payment, and the hire rentals, actually paid by the appellant, should not be reckoned in the total of what the respondents get in the event of determination of the agreement: but that these should be regarded simply as payments for hire. I would reject

A that argument. It still remains the case that the total sum payable under the agreement for hire-purchase, if there be no breach, remains substantially less than the total receivable by the owners in the event of a breach in the early months.

In the well-known leading case on this topic, *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.* (1), LORD DUNEDIN said that the essence B of a penalty is a payment of money stipulated as in terrorem of the offending party: the essence of liquidated damages is a genuine covenanted pre-estimate of damage. He added that the question is one of construction of the particular contract judged of as at the time it was made. In this task of construction certain tests might assist. Thus—and here I quote (2):

C "It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach . . . There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage' . . ."

D We were also referred, inter alia, to the decision of this court in *Cooden Engineering Co., Ltd.* v. *Stanford* (3). The difficulty in the present case is the familiar one of applying established principles to particular facts. One encounters at the outset the difficulty that this hire-purchase agreement is not one devised to meet the particular circumstances of this particular hiring. It is an omnibus form of E agreement designed to cover a variety of goods and a variety of hire-purchasers. No doubt as a practical matter this is unavoidable: but it does have the effect of making it very difficult, if not impossible, to assert that the depreciation clause was a genuine pre-estimate of damage should the appellant break the contract, and a juke box instead of some other article be retaken. The point is in no way conclusive, for as a practical matter of business in this field, the F owner no doubt has to make some general estimate based on general considerations.

The county court judge found that the depreciation claim was not a claim for a penalty. He came to this conclusion by working out what the respondents were entitled to receive on the breach of this agreement; but in his figures, for a reason which he does not state, he omitted entirely the initial payment of G £90 and the hire rental payments actually made. Thus he arrived at a total receivable of only £765 10s. which he compared with the hire-purchase price of £814. In my opinion the omission to take into account the payments actually made was wrong, on whatever reason it proceeded. Nevertheless I think that the judge's conclusions ought to be supported, for these reasons. The contract has to be regarded as a whole, and when that is done it is seen that the alleged H penalty begins to abate after the sixth month and disappears at the eighteenth. To my mind this looks more like an attempt to pre-estimate the loss from depreciation than the fixing of a penalty to operate in terrorem of the hirer. I do not lose sight of the undoubted fact that a breach in the early months of the hiring may produce more to the owner than if the agreement ran its course, but this depends on the value of the machine when retaken and put in good order, I and it may well be that though the second-hand market in juke boxes seems in the present case to have been comparatively stable, nevertheless as at the date of the contract the owners may well have thought that tastes in this particular field can easily alter for no discernible reason. In any event it is an odd "penalty" which progressively decreases and then vanishes.

With regard to the point made for the appellant that the payment for depreciation is the same whatever the breach, and that some breaches would produce

(1) [1915] A.C. at p. 86. (2) [1915] A.C. at p. 87.
(3) [1952] 2 All E.R. 915; [1953] 1 Q.B. 86.

trivial damage only, this is true, but the point has its full substance only in the first six months of the agreement and none after eighteen months. One ought to assume, in my opinion, that the owners, entering into this agreement, wish it to continue and not to come to a premature end, with the consequence that a second-hand juke box is back on their hands. The picture of the owners seizing on some trivial breach in the early months of the agreement as an excuse for terminating it is, therefore, a little unreal, although on a matter of construction the argument is legitimate. I do not find it of great weight, however, since such conduct on the part of the owners might lead to relief of a different kind being given to the hire-purchaser; a matter which I do not think it necessary to pursue.

Though not directly relevant to the question of construction of the contract, nevertheless on the question whether some genuine attempt was made to pre-estimate damage or whether on the contrary some provision was inserted in terrorem of the hire-purchaser, it is, I think, useful to bear in mind that no claim for interest has been made, and that no claim has been made for reimbursement of the cost of insurance or repairs. For what it is worth, this is not the picture of some extortionate owner.

The case is not an easy one but in the end I have reached the conclusion, looking at all relevant factors, that the appellant does not establish his case that the claim for depreciation under cl. 6 (c) of the agreement is a claim for a penalty. I would, therefore, dismiss the appeal.

HARMAN, L.J.: I am of the same opinion. It seems to me that it may be a relevant circumstance, in addition to those mentioned by DONOVAN, L.J., that the so-called compensation is the same whether the owner or the hirer terminates the agreement. If the latter event happens, there can be no question of compensation (see *Campbell Discount Co., Ltd.* v. *Bridge* (4)). The court, in my judgment, should be slow to interfere with bargains entered into freely and without pressure. I am not satisfied that this bargain can be properly described as harsh and unconscionable, and unless it passes that test, I am of opinion that the court should allow it to stand. I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors: *Greenwood, Milne & Lyall* (for the appellant, the hire-purchaser); *Kaufman & Seigal* (for the respondents, Lombank, Ltd.).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(4) [1961] 2 All E.R. 97; [1961] 1 Q.B. 445.

A

R. v. PARKS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Slade and Veale, JJ.), October 4, 1961.]

Criminal Law—Appeal—Evidence—Fresh evidence—Principles on which the Court of Criminal Appeal will act in exercising its discretion whether to allow fresh evidence to be called—Criminal Appeal Act, 1907 (7 *Edw.* 7 *c.* 23), *s.* 9.

B

The principles on which the Court of Criminal Appeal will exercise its discretion in considering whether to allow fresh evidence to be called on appeal under s. 9 of the Criminal Appeal Act, 1907*, are as follows: (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) it must be credible evidence in the sense of being well capable of belief, and (iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial (see p. 634, letter G, post).

C

D

Appeal allowed.

[As to the powers of the Court of Criminal Appeal to examine witnesses and hear fresh evidence, see 10 HALSBURY'S LAWS (3rd Edn.) 532, para. 978; and for cases on the subject, see 14 DIGEST (Repl.) 624, 625, *6257, 6258, 6260-6269, 6281-6282, 6290-6294, 6299*; 628, 629, *6349-6363*.

For the Criminal Appeal Act, 1907, s. 9, see 5 HALSBURY'S STATUTES (2nd Edn.) 932.]

E

Appeal.

This was an appeal by Sydney Alfred Parks against his conviction on Apr. 18, 1961, at the County of London Sessions before the chairman and a jury of an indecent assault on Kathleen Margaret Milton. He was sentenced to eighteen months' imprisonment. On Aug. 16, 1961, the court (GLYN-JONES, HOWARD and MEGAW, JJ.) granted leave to appeal against conviction. The main reason for granting leave to appeal was for the court to consider certain statements obtained since the trial from various witnesses. The facts appear in the judgment of the court. The authority and cases enumerated below were cited in argument†.

F

G

J. L. Clay for the appellant.

W. M. F. Hudson for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: On Jan. 17, 1961, a Mrs. Milton was walking home at about a quarter to six when she reached a place called Diamond Court, which is in fact an alleyway through a bombed site. It was a lonely spot and ill lit. Suddenly someone sprang on her from behind and pushed her to the ground. She was then indecently assaulted. She claimed that in the struggle she had succeeded in scratching or clawing the right side of the assailant's face with her nails, and she claimed that she was in a position to identify her assailant as a man whom she variously described as having gingery hair or fairish hair. On Jan. 18, her husband was

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I

* Section 9, so far as material, reads: "For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice . . . (b) . . . order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial . . . and (c) if they think fit receive the evidence, if tendered, of any witness . . . who is a competent but not compellable witness . . ."

† I.e., ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (34th Edn.), para. 899; *R.* v. *Robinson*, [1917] 2 K.B. 108; 12 Cr. App. Rep. 226; *R.* v. *Hamilton*, (1917), 13 Cr. App. Rep. 32; *R.* v. *Hullett*, (1922), 17 Cr. App. Rep. 8; *R.* v. *Greenberg*, (1923), 17 Cr. App. Rep. at p. 108; *Braddock* v. *Tillotsons Newspapers, Ltd.*, [1949] 2 All E.R. 306; *R.* v. *Thomas*, [1959] 3 All E.R. 522n.; 43 Cr. App. Rep. 210.

with her when they saw a man whom she felt certain was her assailant riding a bicycle, and on Jan. 19 the police interviewed the appellant, who, in fact, lived quite close to the scene of the assault. According to the police, he had then, on Jan. 19, scratches on the left side of his face which they felt were consistent with tearing by nails. The appellant's case was that he had some small scratches probably due to shaving but that he had not been a party to the assault at all, indeed he had left work at 5.30 p.m. and had walked home and was in by six o'clock and thereafter that same evening he went off to visit his fiancée. He also said that, on the day after the assault, Jan. 18, though he had a push bicycle he had not been on that push bicycle at all but had been using a motor cycle. He called a number of witnesses testifying to his having had no scratches on Jan. 17, and to the fact that, on Jan. 18, he had been with his motor cycle and not with a push bicycle, and the matter was left in the end to the jury on the basis that there was no corroboration at all. I mention that because it seemed to this court, though it is unnecessary to decide this, that the case might have been left to the jury on the basis that there was material capable of corroboration. It might have been put in this way, that the jury might well think that the complainant was wrong in saying that it was the right side of his face, as, if it was clawing with the right hand, it would have affected the left side, and, though the scratching was denied, if the police evidence were to be believed there was material on which the jury could say there was some corroboration. It is only right to say that the jury did not think very much of the appellant's witnesses, and apparently accepted Mrs. Milton's identification and convicted the appellant in ten minutes. In his grounds of appeal, various criticisms are made of the summing-up by the learned chairman. The court feels that it is unnecessary to go through those complaints. The court is quite satisfied that any criticism that could be made is purely trivial, and that there is nothing in the grounds of criticism which would cause this court to quash the conviction. The reason, however, for granting leave to appeal was so that the court could consider whether certain statements which had been obtained since the trial from various witnesses should be given in evidence in this court. It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles on which this court acts must be kept within narrow confines, otherwise in every case this court would be asked in effect to carry out a new trial. As the court understands it, the power under s. 9 of the Criminal Appeal Act, 1907, is wide (1). It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

Looking at the matter in this way, the first question that arises is whether this court should allow evidence to be given in the present case that the complainant, Mrs. Milton, had in fact some seven convictions for dishonesty. Those convictions had been when she was living under a different name, and no possible criticism can be made of the police for not informing the defence at the time of the trial of those convictions. Accordingly, it is quite clear that the first principle to which I have referred was fulfilled, that is, that this was a matter which was not known and could not reasonably be known to the defence at the time of the trial.

(1) See footnote * p. 633, ante.

A The second question is whether it was relevant. Whether it was relevant or not depends on the exact issue which was before the jury. No one has suggested, at the trial or in this court, that the complainant, honest or dishonest, was not grievously assaulted. That much is quite clear, and her convictions for dishonesty in the past are utterly irrelevant to that. The only issue before the jury was whether her alleged identification of the appellant was one which they could B safely accept. The court has felt very great doubt whether these convictions were really relevant to that issue. No one has suggested that she knew of the appellant before, that she had any grievance against him or against his family, or that she had any dishonest motive for identifying him. Accordingly, it might well be said that her dishonesty in the past and, incidentally, her last conviction was in 1954, was utterly irrelevant to the question of identifica- C tion. It can, however, be put rather differently, namely, that the complainant admittedly did not have any great opportunity of identifying her assailant. Her answers were not always quite consistent on the point, and it can be put, and indeed counsel for the appellant has put it, in this way, that, albeit she may at one time have thought quite honestly that the appellant was her assailant, yet, being a dishonest person, she was not so prone to be frank with the court and D would not retreat from her allegation that the appellant was her assailant even if she were satisfied in her own mind that he was not. It is emphasised that this was a case of no corroboration, of a young man with a perfectly good character on the one side, and the complainant who, as it turns out, has seven convictions for dishonesty on the other side, and who was referred to by the chairman in the course of his summing-up as an honest and truthful witness. The court has had E considerable doubt on this matter, but they have come to the conclusion that, in the present case, these convictions were just relevant and, if they were just relevant, then they might have had an effect on the minds of any jury properly directing their minds to the matter. Accordingly, the court allowed the complainant to be called, and she quite frankly admitted those convictions.

In regard to the evidence that was sought to be called apart from her, except F in one respect it went to alleged conversations before and after the trial between the complainant and other people. It was sought to prove that the complainant had told various people that she was not sure of her identification, and in one case that she had described her assailant as having dark wavy hair; in other words, a description quite inconsistent with that which she gave at the trial. The second class of evidence concerned only one man, Mr. Stimson. His G evidence was clearly not available at the trial, and it was clearly relevant. It was to this effect, that he was a baker's roundsman, that, on an evening in January, 1961, he had been delivering bread near the scene of the assault, that he had heard a woman scream and that, almost immediately afterwards, a man had run past him whom he said had dark hair, black or brown, and was about fifty years of age. That evidence, as I have said, would clearly be relevant evidence. H Having seen Mr. Stimson give his evidence before us, we feel unable to say that it is not credible evidence in the sense of being evidence open for a jury to believe, and the only question then is whether, if that evidence had been given together with the other evidence at the trial, and in the light of the character of the complainant, the jury might have had a reasonable doubt in the matter.

It is well known that these questions of identification are difficult. They I can lead to a miscarriage of justice, and the court, though with great hesitation, has come to the conclusion that it would be unsafe to allow this conviction to stand, and that, if the evidence to which I have referred had been given at the trial, it is impossible to say that the jury might not have had a reasonable doubt in the matter.

I should add that, taking the view this court does, it is, perhaps, unnecessary and inadvisable to say anything in regard to the other evidence that was called, in particular with regard to the evidence which was taken de bene esse by this

court in the case of a Mrs. Hammond, who was speaking of conversations which had occurred after and not before the trial. A

Accordingly, the court has come to the conclusion that this conviction must be quashed.

Appeal allowed. Conviction quashed.

Solicitors: *Victor Mishcon & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown). B

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

Re COOPER'S SETTLEMENT. COOPER *v.* COOPER. C

[CHANCERY DIVISION (Buckley, J.), October 5, 1961.]

Trust and Trustee—Variation of trusts by the court—Investment—Extension of power of investment—Discretion—Special circumstances to be shown to justify departure from scope enacted by Trustee Investments Act, 1961—*Two-thirds of trust fund invested in investment trust company and one-third in authorised trustee investments—Approval sought for proposed arrangement giving trustees power to invest the whole trust fund in industrial equities—Remuneration of director trustees—Whether special circumstances established—Trustee Investments Act,* 1961 (9 *&* 10 *Eliz.* 2 *c.* 62), *s.* 15—*Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 53), *s.* 1. D

Under a settlement trust property was divided into three settled shares held on trust for the benefit of the settlor's three sons and their issue. Under those trusts each son took a life interest in his settled share with a power of appointment amongst his issue. At the date of the settlement the settled property consisted of shares and income bonds in a private investment trust company. The trustees were authorised to retain the trust property in its then state of investment for so long as they should think fit. The investment clause of the settlement empowered the trustees, with the consent of the settlor, or after his death with certain other consents, to convert the trust property and to invest the proceeds in the investments authorised in the investment clause which was of a fairly restricted scope. An application was made to the court under s. 1 of the Variation of Trusts Act, 1958*, for its approval of an arrangement proposing that each settled share should be divided in certain proportions between the tenant for life of the share and the persons expectantly interested in remainder, the latter part of each settled share being retained on certain trusts in relation to which it was proposed to give the trustees wide powers of investment which would enable them, if they thought fit, to invest the whole retained fund in industrial equities. At the date of the application two-thirds of the trust fund consisted of shares in the investment trust company and one-third consisted of gilt-edged securities, short-term loans and cash in the bank; the investment trust company had become a public company, about one-third of its capital being held by the trust, and two of the trustees were directors. The arrangement proposed that the director-trustees should be entitled to retain remuneration as directors. E F G H I

Held: (i) the Trustee Investments Act, 1961, indicated the extent to which, in ordinary cases, Parliament intended that trustees should be free to invest otherwise than in gilt-edged securities, and, notwithstanding s. 15† of that Act, when applicants sought under s. 1 of the Variation of

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* The relevant terms of s. 1 (1) are "Where property . . . is held on trusts arising . . . under any . . . settlement . . . the court may if it thinks fit by order approve . . . any arrangement . . . varying or revoking all or any of the trusts . . ."

† Section 15 is set out at p. 639, letter G, post.

A Trusts Act, 1958, relaxation of trustee investment powers, the court should be satisfied that there were special circumstances in which trustees should be given wider powers of investment than those which the Trustee Investments Act, 1961, indicated to be normally appropriate (see p. 639, letter D, post).

(ii) in this case there were no special circumstances which would justify B the court in authorising a departure from the scope of investment powers generally conferred by the Trustee Investments Act, 1961, particularly as the investment trust company itself afforded a measure of protection against risk of fluctuation of particular industrial shares (see p. 639, letter I, to p. 640, letter A, post) and owing to there being some investment in gilt-edged securities it would be for some time possible, in accordance with C the Act of 1961, to re-invest in equities (see p. 639, letter A, post).

(iii) the court would approve the main part of the arrangement, including the retention of remuneration by director-trustees, but would not approve the proposed extension of trustee investment powers.

[As to investment of trust funds, see 33 HALSBURY'S LAWS (2nd Edn.) 232, D para. 415 et seq; and for cases on the subject, see 43 DIGEST 941-943, *3781-3806*.

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.

For the Trustee Investments Act, 1961, s. 15, see HALSBURY'S STATUTES (2nd Edn.), INTERIM SERVICE, p. 763.]

Adjourned Summons.

E This was an application by originating summons dated June 7, 1961, by Sir William Herbert Cooper, Richard Philip Cooper and Francis Ashmole Cooper who were beneficially interested under the trusts of a settlement dated Oct. 24, 1928, made between Sir Richard Ashmole Cooper and Harold Tansley Witt, Percy Rupert Clarke and Leonard Graveney Wyles. The application was for, among other matters, an order under s. 1 of the Variation of Trusts Act, 1958, F approving an arrangement on behalf of the infant defendant and all other persons who were or might become entitled to an interest under the trusts of the settlement. The defendants were Richard Powell Cooper, Elizabeth Sally Ann Cooper, Jacqueline Margaret Cooper, Diana Frances Cooper, an infant, all of whom were beneficially interested in the trust funds subject to the trusts of the settlement; Charles Marshall Carr, Frank George Stupples, Esmond G Patrick Roney who were trustees of the settlement; Christine Elizabeth Cooper, Eileen Frances Slade, Rosemary Anne Van't Hoff, Violet Mabel Forbes, Gordon Kenward Barker, Kathleen Mary Fulton all of whom might claim to have some interest in the trust funds under the trusts of the settlement. The facts appear in the judgment.

H *J. A. Brightman, Q.C.*, and *F. B. Marsh* for the plaintiffs.

J. Maurice Price for the first, second, third and fourth defendants.

S. W. Templeman for the fifth to the thirteenth defendants.

BUCKLEY, J.: This is an application under the Variation of Trusts Act, 1958, to vary the trusts of a settlement made by Sir Richard Ashmole Cooper I on Oct. 24, 1928. Under the settlement the trust property is divided into three settled shares held on trust for the benefit of the settlor's three sons and their issue. Under those trusts each son takes a life interest in his settled share with a power of appointment among his issue and in default of appointment, subject to the life interest, the son's children who attain twenty-one years or being female attain that age or marry take his share in equal shares. In the event of any son dying without any issue who attain a vested interest, his settled share goes over to his brothers who survive him, absolutely, or the children of a brother who should not survive take by substitution.

At the date of the settlement the settled property consisted of 48,996 ordinary shares of £5 each in a private investment trust company and sixty six per cent. income bonds of £1,000 each in the same company. The trustees were authorised to retain the trust property in its then state of investment for so long as they should think fit. They were empowered at any time, with the consent of the settlor during his life or, after his death, with the consent of the settlor's three sons or the majority or the survivors or survivor of them, and after the death of the last survivor of the sons, at the trustees' discretion, to convert the trust property and to invest the proceeds of any such conversion in investments authorised by the investment clause in the settlement which, although not strictly confined to trustee investments, was of a quite restricted scope.

The scheme which has been propounded is for a division of each settled share in certain proportions between the tenant for life of that share and the persons expectantly interested in remainder, the latter part of each settled share being retained on certain trusts which I do not propose to state in detail. That part of the scheme—it is not necessary for me to go into it in any great detail—is clearly for the benefit of the persons who are interested in remainder, who include the infant defendant, Diana Frances Cooper, and also the possible unborn children of the settlor's three sons. I do not propose to say any more about that aspect of the scheme.

The trust fund still consists to a large extent of shares in the investment trust company to which I have referred which has now become a public company and the trustees hold approximately one-third of the issued capital of the company. That holding represents two-thirds of the trust fund, the remaining one-third being invested in gilt-edged securities, or in short-term loans, or being cash in the bank. Of the trustees, two are directors of the investment trust company and part of the scheme is that they shall be authorised to retain any remuneration they have received, or may hereafter receive, and that other trustees who become directors may be so authorised and shall not be bound to account to the trust for the remuneration. All parties before me have submitted that this arrangement would be beneficial to the trust having regard to the large stake which the trust has in the company, the desirability of the trustees being represented on the board and the desirability of the board itself being composed of persons who the trustees, and those who are interested under the trust, consider to be well qualified to manage the affairs of the company. That part of the scheme also I am prepared to accept as being for the benefit of all who are interested, or who may become interested, under the trust.

There is also another part of the scheme which I need not go into in detail but shortly stated it is this. Under the terms of the settlement a question of construction arises whether bonuses distributed by the company in the form of paid up shares or in similar form fall to be treated as income or capital. The scheme is so framed as to determine that question in favour of capital. That is clearly for the advantage of those who are interested in capital.

The scheme also proposes that the part of each settled share which is to be retained in the trust shall henceforth be retained on trusts of such a kind that the trustees shall have a wide power of investment which would enable them to invest the whole of the retained funds, if they thought fit, in industrial equities. This is the only part of the scheme which I really need discuss in any detail in this judgment. As I have said, the trust property originally consisted exclusively of shares in the investment trust company and still consists of such shares, and bonds, to the extent of approximately two-thirds. It has been urged before me that, in these circumstances, it is desirable for the trustees to have a wide investment power; it is suggested that otherwise they may be put into an embarrassing position in considering whether they should or should not realise shares in the investment trust company because if they did realise any of those shares they would be bound, as matters stand, to invest some part of the proceeds

A in gilt-edged securities, having regard to the provisions of the Trustee Investments Act, 1961. That is not absolutely accurate because some part of the trust funds at present consists of gilt-edged securities and for a time, at any rate, moneys which require to be invested could be invested in equities until a balance is achieved between what in the Trustee Investments Act, 1961, is referred to as the "narrower-range part" and the "wider-range part". But it is a fact that B after a time, on any substantial realisation of shares in the investment trust company, some part of the proceeds would have to be invested in the narrower-range investments prescribed by that Act.

Until the Trustee Investments Act, 1961, became law, as it did on Aug. 3, 1961, this court very frequently extended trustees' powers of investment so as to make it practicable—I do not say proper but practicable—for trustees to invest the C whole of their funds in industrial equity investments. In enacting the Trustee Investments Act, 1961, the legislature, in my judgment, has indicated the extent to which, in ordinary cases, Parliament thinks it right that trustees should be free to invest otherwise than in gilt-edged investments. In my judgment, the enactment of that Act must have a direct and important bearing on the exercise by this court of its discretion in varying trusts under the Variation of Trusts D Act, 1958, in relation to powers of investment. It seems to me that from this time this court will have to be satisfied, whenever applicants under s. 1 of the Variation of Trusts Act, 1958, ask for a relaxation of trustees' powers of investment, that there are special grounds which make it right that trustees should have wider powers of investment than the legislature has indicated in the Trustee Investments Act, 1961, as the normally appropriate powers.

E I have to consider whether in the present case there are special circumstances which would make it right for me in the exercise of my discretion under s. 1 of the Variation of Trusts Act, 1958, to depart from that general rule indicated by the legislature in the Trustee Investments Act, 1961. The circumstances relied on in the present case are, first, that the settlor by his settlement authorised the trustees to retain the whole of the settled property in non-trustee investments F of a particular kind, that is, the trustees were authorised to retain the trust fund indefinitely in its original state of investment. It is also urged that the fund was originally all invested in a company which was itself an investment trust company having wide powers of investment, and some reliance is placed on the fact that the fund is of a very large amount. My attention is drawn to s. 15 of the Trustee Investments Act, 1961, which provides that

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> "The enlargement of the investment powers of trustees by this Act shall not lessen any power of a court to confer wider powers of investment on trustees, or affect the extent to which any such power is to be exercised."

It is clear in that section that the jurisdiction of the court under s. 1 of the Variation of Trusts Act, 1958, is unaffected by the Trustee Investments Act, H 1961. The jurisdiction still exists but it is discretionary and it seems to me that the way in which the court will henceforth exercise its discretion must be affected to a large extent by what the legislature has seen fit to enact in the Trustee Investments Act, 1961.

In the present case the trustees hold a large part of their fund in the form of shares in an investment trust company. The fact that it is an investment I trust company and not an industrial or commercial company dealing in some commodity other than investments seems to me to be rather against this being a special case. An investment trust company is itself a means of spreading the risks of investment for its shareholders. I do not think this case can be equated to one in which the trustees hold shares which they are authorised to retain in some industrial or commercial concern where it might be very important at some particular moment to get out of the business and to get their money out of the company and into something less risky. As long as any part of the trust fund is retained in the form of shares in the investment trust company the

trustees will have the advantage of the protection of the company itself in the way of preserving the value and flexibility of the underlying assets. A

If they realise any substantial part of their holding in the investment trust company, it is true that, unless I accede to this part of the scheme, they will have to put some part of the trust fund into what are called in the Trustee Investments Act, 1961, " narrower-range " investments and there seems to be an implication that that is necessarily a disadvantage to the beneficiaries, because I am urged to relieve the trustees of that obligation. I do not feel that, in the circumstances of this case, I ought to take that view. Where the fund is a large one, such as this is, there may sometimes be force in the argument that the trustees may reasonably be allowed a greater degree of latitude in investment than where the fund is very small, but, having regard to the fact that the shares which the trustees at present hold in the investment trust company are of the nature which I have indicated, I do not feel that the trustees are likely to be put into a position in which there will be a really embarrassing decision for them to make. For these reasons I do not think that this is a case in which I ought to approve that part of the arrangement which deals with the investment clause. The trustees will no longer be confined to their original investment clause because they will have the advantage of the relaxation permitted by the Trustee Investments Act, 1961. I think that it is reasonable that they and those interested under the trust should be content with that degree of relaxation and that the matter should rest there. B C D

I ought to add that an argument was presented to me that I ought to regard the extension of the investment clause as part of the scheme as a whole, as part of the offer which the tenants for life are prepared to make for the benefit of the remaindermen, and that I ought to treat this case as being distinct in that respect from a case in which the only relief sought by the applicants is the variation of the investment clauses. I do not feel inclined to accept that argument. There is no reality, so far as I can see, in the idea that the inclusion of the investment clause is in any way an essential of this scheme or that it was part of the terms of the bargain reached by the parties. I feel no doubt that if I say that I am not prepared to vary the investment clause the rest of the scheme will go through with that part of the scheme excluded. The application to extend the powers of investment is really separate from and ancillary to the rest of what is sought on this application and does not form an essential or integral part of the scheme. E F

In the circumstances, I am prepared, on behalf of the infant defendant and on behalf of any future children of any of the plaintiffs, to approve the arrangement with the inclusion of the clause about remuneration of directors but excluding that dealing with the investment clause. G

Order accordingly.

Solicitors: *Roney & Co.* (for the plaintiffs and the first, second, third, fourth, fifth, sixth and seventh defendants); *Stollard & Limbrey* (for the eighth, ninth and tenth defendants); *Reynolds, Porter & Taylor Jelf*, agents for *Heath & Blenkinsop*, Warwick (for the eleventh, twelfth and thirteenth defendants). H

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

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COMMISSIONERS OF CUSTOMS AND EXCISE v. CURE & DEELEY, LTD.

[QUEEN'S BENCH DIVISION (Sachs, J.), June 27, 28, 29, 30, July 3, 4, 21, 1961.]

Purchase Tax—Regulations—Validity—Power of Commissioners of Customs and Excise to make regulation which "appears to them necessary" to enable them to discharge their functions—Whether commissioners sole judges of what was necessary—Ouster of court's jurisdiction—Finance (No. 2) Act, 1940 (3 *&* 4 *Geo.* 6 *c.* 48), *s.* 33—*Purchase Tax Regulations,* 1945 (*S.R. & O.* 1945 *No.* 517), *reg.* 12.

B

Customs—Commissioners of Customs and Excise—Acts and exercise of powers—Demand authorised by proper officer but made by officer not authorised—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 44), *s.* 4 (1).

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By s. 33 (1) of the Finance (No. 2) Act, 1940, the Commissioners of Customs and Excise were empowered to make regulations providing for any matter for which provision "appears to them necessary" for the purpose of "giving effect to" the statutory provisions relating to purchase tax "and of enabling them to discharge their functions thereunder." The commissioners made the Purchase Tax Regulations, 1945, reg. 12* of which provided that if any person failed to furnish a return as required by the regulations the commissioners might "determine the amount of the tax appearing to them to be due . . . and demand payment thereof, which amount shall be deemed to be the proper tax . . . and shall be paid within seven days of such demand unless within that time" some other amount was shown to their satisfaction to be the proper tax, which amount was required to be paid immediately. On Aug. 10, 1956, an assistant secretary to the commissioners, who, by virtue of s. 4 (1)† of the Customs and Excise Act, 1952, and a general authority in writing thereunder, was a person authorised to make determinations and demands under reg. 12, approved a determination and letter of demand relating to the defendants. He signed a document stating that returns made by the defendants were incomplete and stating the commissioners' determination of amounts appearing to them to be due, and he handed the letter of demand to the chief executive officer for the recovery of purchase tax, who was not a person so authorised. In accordance with office routine, this officer signed the letter of demand, which was despatched to the defendants. In an action by the commissioners for the recovery of the sum specified in the letter of demand,

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Held: (i) regulation 12 of the Purchase Tax Regulations, 1945, was ultra vires for the following reasons—

(a) the words "appears to them necessary" when used in a section of a statute conferring power on a competent authority did not necessarily make the authority sole judge of what its powers were as well as sole judge of the way in which it would exercise such powers as the statute conferred (see p. 657, letter G, post); in the present case the commissioners were empowered to make regulations to enable them to discharge their "functions" under the enactments relating to purchase tax, and their functions did not include either taking on themselves the powers of a judge to decide issues of fact and law as between the Crown and the subject or to render the subject liable to such tax as the commissioners believed to be due, as distinct from the liability imposed by the charging enactments themselves (see p. 659, letters B and C, post).

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Dicta of LORD GREENE, M.R., in *Carltona, Ltd.* v. *Works Comrs.* ([1943] 2 All E.R. at p. 564) and *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* ([1943] 2 All E.R. at p. 547) applied.

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* The text of reg. 12 is set out at p. 647, letter F, post.

† The text of s. 4 (1), so far as material, is set out at p. 659, letter I, post.

(b) the power to make purchase tax regulations construed in the light of the nature, objects and scheme of the legislation did not authorise a regulation to be made excluding the subject from access to the courts and defeating pending proceedings, but the power purported to be conferred by reg. 12, was capable of being so exercised (see p. 659, letters D to G, post).

Dicta of VISCOUNT SIMONDS in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* ([1959] 3 All E.R. at p. 6) and of SCRUTTON, J., in *Re Boaler* ([1915] 1 K.B. at p. 36) applied.

(ii) the letter of demand was not a lawful demand (within s. 4 (1) of the Customs and Excise Act, 1952) for the purposes of reg. 12 of the Purchase Tax Regulations, 1945, because, though the demand was authorised by a person empowered to make demands on behalf of the commissioners, it was made by a person not so empowered (see p. 660, letter H, post).

[As to the control of the court over subordinate legislation, see 31 HALSBURY'S LAWS (2nd Edn.) 468, para. 575; and for cases on the validity of acts done by competent authorities under wide discretionary powers, see 17 DIGEST (Repl.) 421, 422, *24-29*, 433, *77*, 441, *119*, 445, 446, *131-133*, 477, *274*, 478, *276*.

As to ouster of the court's jurisdiction, see 9 HALSBURY'S LAWS (3rd Edn.) 352, para. 825.

As to subordinate legislation relating to purchase tax, see 33 HALSBURY'S LAWS (3rd Edn.) 221, para. 380.

As to persons authorised to act for the Commissioners of Customs and Excise, see 33 HALSBURY'S LAWS (3rd Edn.) 21, para. 33.

For the Finance (No. 2) Act, 1940, s. 30, s. 31, s. 33, see 21 HALSBURY'S STATUTES (2nd Edn.) 1252-1255; and for the Customs and Excise Act, 1952, s. 4 (1), see 32 HALSBURY'S STATUTES (2nd Edn.) 712.

For the Purchase Tax Regulations, 1945, reg. 12, see 19 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 150.]

Cases referred to:

A.-G. v. *Wilts United Dairies*, (1922), 91 L.J.K.B. 897; 127 L.T. 822; 25 Digest 132, *519*.

A.-G. for Canada v. *Hallet & Carey, Ltd.*, [1952] A.C. 427; 8 Digest (Repl.) 696, *62*.

Bennett & White (Calgary), Ltd. v. *Sugar City Municipal District*, [1951] A.C. 786; 38 Digest (Repl.) 547, *422*.

Boaler, Re, (Vexatious Actions Act, 1896, Re), [1915] 1 K.B. 21; 83 L.J.K.B. 1629; 111 L.T. 497; 42 Digest 605, *55*.

Carltona, Ltd. v. *Works Comrs.*, [1943] 2 All E.R. 560; 17 Digest (Repl.) 441, *119*.

Chester v. *Bateson*, [1920] 1 K.B. 829; 89 L.J.K.B. 387; 122 L.T. 684; 84 J.P. 65; 17 Digest (Repl.) 433, *77*.

City of Plymouth (City Centre) Declaratory Order, Re; Robinson v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851; [1947] K.B. 702; [1947] L.J.R. 1285; 177 L.T. 375; 111 J.P. 378; 2nd Digest Supp.

Demetriades v. *Glasgow Corpn.*, [1951] 1 All E.R. 457; 115 J.P. 171; 17 Digest (Repl.) 445, *131*.

Francis v. *Yiewsley and West Drayton U.D.C.*, [1957] 1 All E.R. 825; [1957] 2 Q.B. 136; [1957] 2 W.L.R. 627; *affd.* C.A., [1957] 3 All E.R. 529; [1958] 1 Q.B. 478; 122 J.P. 31; [1957] 3 W.L.R. 919; 3rd Digest Supp.

Lee v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; [1952] 2 Q.B. 329; 3rd Digest Supp.

Liversidge v. *Anderson*, [1941] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; 17 Digest (Repl.) 422, *27*.

Miles v. *Bough*, (1842), 3 Q.B. 845; 3 Gal. & Dav. 119; 3 Ry. & Can. Cas. 668; 12 L.J.Q.B. 74; 114 E.R. 732; *subsequent proceedings*, (1844), 3 Ry. & Can. Cas. 687; (1845), 3 Dow. & L. 105; 13 Digest (Repl.) 212, *333*.

A *Nakkuda Ali* v. *Jayaratne* (*M. F. de S.*), [1951] A.C. 66; 8 Digest (Repl.) 802, *562*.

Newcastle Breweries, Ltd. v. *R.*, [1920] 1 K.B. 854; 89 L.J.K.B. 392; 123 L.T. 58; 84 J.P. 125; 17 Digest (Repl.) 448, *142*.

Paul (*R. & W.*), *Ltd.* v. *Wheat Commission*, [1936] 2 All E.R. 1243; [1937] A.C. 139; 105 L.J.K.B. 563; 155 L.T. 305; 2 Digest (Repl.) 148, *1140*.

B *Point of Ayr Collieries, Ltd.* v. *Lloyd-George*, [1943] 2 All E.R. 546; 17 Digest (Repl.) 480, *278*.

Progressive Supply Co., Ltd. v. *Dalton*, [1942] 2 All E.R. 646; [1943] Ch. 54; 112 L.J.Ch. 44; 168 L.T. 21; 17 Digest (Repl.) 477, *274*.

Pyx Granite Co., Ltd. v. *Ministry of Housing and Local Government*, [1959] 3 All E.R. 1; [1960] A.C. 260; 123 J.P. 429; [1959] 3 W.L.R. 346; 3rd Digest Supp.

C *R.* v. *Comptroller-General of Patents, Ex p. Bayer Products, Ltd.*, [1941] 2 All E.R. 677; [1941] 2 K.B. 306; 111 L.J.K.B. 117; 165 L.T. 278; 58 R.P.C. 251; 17 Digest (Repl.) 478, *276*.

Robinson v. *Sunderland Corpn.*, [1899] 1 Q.B. 751; 68 L.J.Q.B. 330; 80 L.T. 262; 63 J.P. 341; 38 Digest (Repl.) 163, *44*.

D *Ross-Clunis* v. *Papadopoullos*, [1958] 2 All E.R. 23; [1958] 1 W.L.R. 546; 3rd Digest Supp.

Thorneloe & Clarkson, Ltd. v. *Board of Trade*, [1950] 2 All E.R. 245; 2nd Digest Supp.

Preliminary Issues.

In an action brought by the Commissioners of Customs and Excise by specially E indorsed writ dated Dec. 20, 1956, for the recovery of £2,639 8s. 9d. purchase tax the two questions, set out hereinafter, were directed, by order made by Master JACOB for Master LAWRENCE on Jan. 11, 1961, to be tried before the other questions in the proceedings. The defendants, Cure & Deeley, Ltd., were manufacturers for sale to wholesalers of metal articles comprising some two hundred different lines, some (but not all) of which were chargeable to purchase F tax. For each of the five quarters in the period Oct. 1, 1952 to Dec. 31, 1953, the defendants made a return on form P.T. 11*, which required a manufacturer to state the total amount of purchase tax for which he was accountable for the particular quarter, and paid the amounts returned to the commissioners. The amounts returned for four of the five periods were:—Oct. 1, 1952 to Dec. 31, 1952, £235 2s. 1d.; Jan. 1, 1953 to Mar. 31, 1953, £189 1s.; July 1, 1953 to G Sept. 30, 1953, £101 9s. 5d.; Oct. 1, 1952 to Dec. 31, 1953, £437 6s. 8d. By their statement of claim the commissioners alleged that those returns were incomplete and that the defendants were accountable for a greater amount of tax than the amount stated. The commissioners further alleged that on Aug. 10, 1956, in pursuance of reg. 12 of the Purchase Tax Regulations, 1945, they determined the amounts of purchase tax appearing to them to be due and that H by letter dated Aug. 16, 1956, duly posted to and received by the defendants, the commissioners gave notice of the amounts so determined and demanded payment of the balance remaining after giving credit for the sums paid. This determination and demand were effected as follows. On Aug. 10, 1956, Mr. Piper, the commissioners' chief executive officer responsible for purchase tax recovery, considered two unsigned documents and found them to be in order. I One of these documents stated that the return for each of the four specified quarters was incomplete and that the commissioners had determined, pursuant to reg. 12† of the Purchase Tax Regulations, 1945, the proper amounts appearing to them to be due as follows:—Oct. 1, 1952 to Dec. 31, 1952, £530 18s. 9d.; Jan. 1, 1953 to Mar. 31, 1953, £723 1s. 8d.; July 1, 1953 to Sept. 30, 1953, £1,515 19s. 9d.; Oct. 1, 1953 to Dec. 31, 1953, £832 7s. 9d. The other document

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* For the relevant entries required by form P.T. 11, see p. 648, letter C, post.

† The text of reg. 12 is set out at p. 647, letter F, post.

was a letter addressed to the defendants informing them of the determination and demanding payment of £2,639 8s. 9d., viz., the aggregate of the amounts mentioned in the determination after crediting the sums paid, within seven days unless within that time it was shown to the satisfaction of the commissioners that some other amount was the proper tax due, which other amount was required immediately to be paid. Mr. Piper took the two documents to Mr. Seed, who was an assistant secretary to the commissioners and who as such was by virtue of s. 4 (1)* of the Customs and Excise Act, 1952, and a general authority in writing dated Nov. 19, 1952, a person authorised to make determinations and demands under reg. 12; Mr. Piper was not a person so authorised. Mr. Seed, having satisfied himself that the two documents were in order, signed the determination and handed both documents back to Mr. Piper, who, in accordance with the office routine, signed the letter of demand which on Aug. 16, was despatched to the defendants. The defendants did not comply with the demand. On Feb. 17, 1957, by order of Master LAWRENCE made under R.S.C., Ord. 14, the commissioners were empowered to sign judgment for £606 5s. 2d., which sum the defendants admitted to be due, and the defendants were given leave to defend as to the balance, viz., £2,033 3s. 7d. On Feb. 25, 1957, this order was varied by HINCHCLIFFE, J., in chambers, who made an order granting to the commissioners liberty to sign judgment for the full amount indorsed on the writ. On appeal to the Court of Appeal, the defendants raised an additional ground of defence, namely, that reg. 12 was ultra vires, and on Mar. 22, 1957, the court ordered that the order of Feb. 17, 1957, should be restored on the ground that the ultra vires issue was " a point of the highest importance " which ought to be considered by a trial judge. By para. 5 of their defence, which was delivered on Apr. 5, 1957, the defendants pleaded that reg. 12 was and is ultra vires, and in para. 6, as amended with leave on July 10, 1959, they stated their intention to contend that the letter of Aug. 6, 1956, was not signed by a person properly authorised by the Customs and Excise Act, 1952, to make such a demand on behalf of the commissioners and that the defendants therefore denied that the commissioners had made any lawful demand for payment of £2,639 8s. 9d. within reg. 12. By order dated Jan. 11, 1961, made by Master JACOB for Master LAWRENCE, it was ordered that the questions raised in para. 5 and para. 6 be tried before all the other questions in the proceedings. These questions were (1) whether reg. 12 of the Purchase Tax Regulations, 1945, was and is ultra vires the commissioners; (2) whether the letter dated Aug. 16, 1956, was not a lawful demand for payment under the provisions of reg. 12, by reason that the letter was written or signed by one Piper (as was admitted by the commissioners) and that he was not at the material time a person properly authorised by the commissioners to act on their behalf within s. 4 of the Customs and Excise Act, 1952. The second question was to be determined on the basis of agreed facts set out in writing.

J. R. Cumming-Bruce for the commissioners, the plaintiffs.
P. T. S. Boydell for the defendants.

Cur. adv. vult.

July 21. **SACHS, J.,** read the following judgment in which, having expressed his indebtedness to counsel for assistance extending over many days, and described the two preliminary issues as of high importance as between Crown and subject, he stated the facts and continued: By the order of Jan. 11, 1961, the following issues are to be tried before all other questions raised in the proceedings: first, whether reg. 12 of the Purchase Tax Regulations, 1945, was ultra vires, and, secondly, whether on certain facts which had been agreed the demand of Aug. 16, 1956, was a lawful demand, in view of the fact that Mr. Piper was not a person in whom due authority had been vested

* The text of s. 4 (1), so far as material, is set out at p. 659, letter I, post.

A under the provisions of s. 4 of the Customs and Excise Act, 1952. It is to be noted that the second question falls to be determined on an agreed statement of facts. As regards the first question, not unnaturally, there is no such statement. It soon became plain, however, that for a proper appreciation of the question raised by the first issue it was essential to understand not only the scheme of the relevant provisions of the Finance Acts and of the Purchase B Tax Regulations, 1945 (1), but also something of the practice and procedure followed in relation to the ascertainment and collection of the tax. Here again I wish to express my indebtedness to Mr. Cumming-Bruce for the material which, with the assent of Mr. Boydell, he placed before the court. This was all the more helpful because there appears to exist no recognised text-book on purchase tax (or at least none was cited) though there is available (2) a very useful small C handbook, "Purchase Tax" by Mr. A. T. Grieve, designed, apparently, to acquaint manufacturers, wholesalers, and others, with the practical problems which they may encounter when making returns. In view of the chances that any decision of a court of first instance will be carried to appeal by the party adversely affected, it may well be that one of the most useful services that can be rendered in this court to those who may later have to consider the D issues is to examine the scheme of the relevant legislation, to relate the information given to me as to practice and procedure, and to give a full outline of the submissions made by counsel. For this purpose, it is best first to set out the position apart from the effect of reg. 12 of the Purchase Tax Regulations, 1945, and then to discuss the impact of that regulation on the position as a whole.

Purchase tax was introduced by, and is still in the main regulated by, the E provisions of Part 5 of the Finance (No. 2) Act, 1940. Of that Act the charging sections as in force in 1952 and 1956 were ss. 18, 21, 24, 25, 26 and 29, coupled with an interpretation section [s. 41]; to which had been added ss. 16 and 17 of the Finance Act, 1946, and ss. 23 and 24 of the Finance Act, 1948. In addition, there were in the Act of 1940 sections which dealt with the machinery of collection, to which I will refer later. There were also numerous sections F imposing penalties, but these do not require consideration. The charging sections provide that the tax be charged on the wholesale value of chargeable goods bought under chargeable purchases and on goods which become chargeable goods by virtue of having chargeable processes applied to them. Section 18 of the Act of 1940 defines chargeable purchases, s. 21 defines wholesale value, ss. 24, 25 and 26 contain provisions as to certain purchases being deemed to be G chargeable purchases, and s. 29 provides for relief for exported goods. Section 16 of the Act of 1946 contains the definition of chargeable processes, and s. 17 deals with the tax to be charged on goods resulting from such processes. Sections 23 and 24 of the Act of 1948 extend the meaning of the word "manufacture" and deal with other matters not relevant to the issues before the court. In addition, Sch. 8 to the Act of 1940 contains detailed provisions as to how the H wholesale value specified in s. 21 is to be computed. The charging sections and Sch. 8 between them set out the basis on which the subject is to be taxed. Their provisions are essentially compact, but none the less one has only to look cursorily at them to observe how large can be the number of disputes which may arise on questions of fact, mixed fact and law, and pure law, as between the Crown and any subject who carries on a variegated wholesale, manufacturing, I or importing business. Section 25, which relates to the appropriation of chargeable goods, and the definition of "purchase" in s. 41 (the interpretation section) each of themselves can raise problems, not least in regard to "sale or return" transactions that not even the many relevant passages in BENJAMIN ON SALE can readily solve. In addition to the charging sections and the schedule above

(1) S.R. & O. 1945 No. 517.

(2) See generally on purchase tax title REVENUE, Part 4, in 33 HALSBURY'S LAWS (3rd Edn.) 219 et seq.

mentioned, there are lengthy schedules of Finance Acts which lay down purchase tax rates and contain lists that specify which goods are chargeable and which are exempt (compare Schs. 1 and 2 to the Finance Act, 1958 (3)). These schedules have become notorious as providing anomalies and difficulties, and give rise to a forest of disputable points. How vast is that forest can perhaps best be observed by a glance at Notice 78 as issued by the commissioners in November, 1959, with its current amendment slips.

It is to be noted that the defendants manufactured some two hundred different lines of brassware and other articles, some of which were and some of which were not, at the material times, subject to purchase tax. As, however, the question of ultra vires turns on what reg. 12 enables the commissioners to do and not on what they did in this particular case, the court was not informed of any of the matters which were or were likely to be in dispute between the parties in regard to any of the items of tax which in the aggregate amounted to £2,033, or what information was given to the defendants to show how that amount was made up; in particular, the court was not shown what was referred to as the long affidavit sworn on behalf of the defendants. That course was entirely proper, and was taken with the concurrence of both counsel on the initiative of counsel for the commissioners.

From the charging provisions I turn to those which lay down the machinery of ascertainment and collection. The broad central features of the scheme in this behalf are to be found in ss. 18 (3), 23 and 27 of the Act of 1940. Under their provisions, wholesale merchants, manufacturers, and others who sell chargeable goods have to be registered; the tax becomes due on delivery of those goods under the relevant purchases or on certain appropriations of goods; the seller or person appropriating becomes accountable for the tax, and the seller has to add to any invoice to the buyer a statement of the amount due in respect of that tax. Section 31 (1) provides that the tax shall be accounted for and paid in accordance with regulations made by the commissioners under s. 33. The Purchase Tax Regulations, 1945, prescribe, inter alia, that all registered persons shall keep full and true accounts in such form as the commissioners may require and retain them (reg. 9), shall provide the commissioners with information (reg. 14), and shall produce their books on demand (reg. 14). The registered person is bound by reg. 10 (1) to furnish quarterly returns of the tax for which he is accountable in a form approved by the commissioners, and he has to pay the tax at the time of making the return (reg. 10 (2)). Section 31 (2) of the Act of 1940, as amended (4), enacts:

> "Tax, chargeable by virtue of a purchase, or of the application of a chargeable process, shall be recoverable as a debt due to His Majesty from the person accountable therefor."

In aid of the implementation of the general scheme above outlined, the commissioners issue forms on which the quarterly returns are made: of these the one most generally used is P.T. 11. On that form reference is made to the necessity for complying with the directions given in Notices 77, 78 and 79 and supplementary directions as issued by the commissioners: the registered person has to declare that those directions have been followed. The notices and supplementary notices are voluminous—Notice 78 alone contains some ninety pages; the extent to which their contents can in law properly be styled "directions" given under the regulations, I do not pause to consider.

At this point it is convenient to examine how (omitting the impact of reg. 12) the subject can exercise the normal right of a taxpayer to obtain the decision of a

(3) Schedule 1 to the Act of 1958 has been repealed by the S.L.R. Act, 1959, Sch. 2, and Sch. 2 has been amended by the Finance Act, 1959, s. 15, s. 16, s. 37 (5), Sch. 8, Part 1, and by purchase tax orders made under the Finance Act, 1948, s. 21.

(4) The subsection was amended by the Finance Act, 1944, s. 10, Sch. 2, and the Finance Act, 1946, s. 17, Sch. 5.

A court of competent jurisdiction on any point on which he finds himself in dispute with the Crown. On the vast majority of issues (including questions as to what constitutes a chargeable purchase, what constitutes a chargeable process, what constitutes an appropriation, and whether particular goods are chargeable or are exempt) the subject has at any rate two ways of obtaining a ruling from the courts. He can commence an action for a declaration or he can defend proceedings B commenced by the commissioners by virtue of s. 31 (2) of the Act of 1940 for the recovery of tax. With certain exceptions (not relevant to the issue in hand) the only way in which the Crown can recover the tax is by taking proceedings by virtue of that subsection; in that event the commissioners must prove that there was in fact tax due under the charging provisions of the statute and the schedules previously cited. The subject may deny that any alleged transaction C took place, or he may admit the transaction and deny that it attracted tax. In addition, the subject may be, and often is, offered the opportunity of joining with the commissioners in submitting a case for the opinion of counsel and abiding by that opinion. The counsel in question are independent and are taken in due turn from a panel of those nominated by the Attorney-General. Disputes as regards "wholesale value" are subject to special provisions. These are set D out in s. 21 of the Act of 1940, by sub-s. (2) of which

> ". . . the question shall be referred to the arbitration of a referee appointed by the Lord Chancellor, who shall not be an official of any government department . . ."

His decision on facts becomes final, but in so far as law is concerned the matter E can, as counsel for the commissioners readily conceded, go to the courts in the usual way on a Case Stated. It follows that until one comes to reg. 12 the scheme of the Act does nothing to deny to the subject his vital right to have the independent decision of the courts on the question whether or not tax is due, though as regards wholesale value the decision on facts of an independent arbitrator is final.

F Next I turn to reg. 12 and its effect. It reads as follows:

> "If any person fails to furnish a return as required by these regulations or furnishes an incomplete return the commissioners may, without prejudice to any penalties which may be incurred by such person, determine the amount of the tax appearing to them to be due from such person and demand payment thereof, which amount shall be deemed to be the proper tax due G from such person and shall be paid within seven days of such demand unless within that time it is shown to the satisfaction of the commissioners that some other amount is the proper tax due which other amount shall immediately be paid to the commissioners."

It was claimed by the commissioners in this court and admitted by the defendants H that on the true construction of that regulation, first, that once a return made under reg. 10 is in fact incomplete, the commissioners have the power to determine what appears to them to be the amount of tax which should have been shown on that return as payable, and to demand that sum; and, secondly, that after the demand has been made the courts cannot inquire whether the sum "deemed to be the proper tax" is or is not in fact or in law the proper tax.

I It was further so claimed and admitted that once the return was incomplete by virtue of an inaccuracy relating to goods of say Item A (forming part of the goods which were or should have been the subject-matter of the return), then the commissioners were entitled to make a determination under reg. 12 as to all goods, including those of entirely different designs, types and groups, in respect of which in their opinion tax should have been included in that particular return. The position then would be that whilst the question whether the return was incomplete by virtue of the inaccuracy relating to the single Item A would be a matter on which the subject could seek a decision of the courts, yet once

the existence of an inaccuracy as to one point exists the subject loses his rights to get the court's ruling on all other transactions and all other goods which in the commissioners' view attracted tax over the period covered by the return. Thus, if for a quarter, either no return is furnished "as required" or if the return furnished is incomplete even to a small extent, the liability of the subject is altered from a liability to tax lawfully due according to the charging provisions to a liability for the tax believed by the commissioners thus to be due.

As regards the widely used form P.T. 11, it is to be noted that the sole relevant entries required to be made in the return were simply to place figures against the following:

> "(i) Total amount of tax due and payable on all deliveries on sale and on all appropriations and applications to retail and other chargeable processes of chargeable goods during the period Jan. 1 to Mar. 31, 1953. (ii) Total amount of tax due and payable on goods specified in the schedule overleaf resulting from chargeable processes completed by the registered person during the period Jan. 1 to Mar. 31, 1953."

(The schedule overleaf simply refers to groups or classes of articles.) No details of the nature or quantities of the goods or of the chargeable processes are required: nor could they in practice be given on these forms, though on forms P.T. 9 and P.T. 26, referable to imported goods, provision is made for the entry of details.

That an inaccuracy in a figure returned in form P.T. 11 in law renders that return "incomplete" has been assumed by both parties throughout these proceedings. That assumption I accept without pausing to consider it further; moreover, on the issue of ultra vires reference could equally well have been made instead to the other forms. On the footing that a return on P.T. 11 is incomplete if the figure for the amount of tax due and payable is not as high as in law it should be, it is, however, relevant to observe that such an inaccuracy may be due to many causes. Such causes can include an error in casting figures, inadvertent failure to include some goods known to be chargeable, a misconstruction of the charging principles, for instance, those defining what goods are chargeable, or a deliberate attempt to conceal taxable transactions from the commissioners. Whatever the cause or size of the inaccuracy, once it exists then reg. 12 applies. Thus, for instance, if an inaccuracy due to misconstruction of the charging provisions in relation to one type of article recurs, however innocently, in returns over several quarters, the commissioners can over all those periods substitute as to all transactions and goods relevant to the returns their own views as to what should be the tax in place of those which would result from a decision of a court.

The way in which determinations under reg. 12 may be recorded and the relevant demands notified to the subject can conveniently be seen from the demand made in the present case dated Aug. 16, 1956. This simply sets out for each of the four respective quarters concerned, first, the total amount of tax appearing to the commissioners to be due from the defendants, next, the amount shown in the defendants' return and paid by them, and, lastly, the amounts still due and payable. No details are given how the excess of the first figure over the second is made up; there is no indication whether the whole or any part of the excess relates to transactions or goods on which some tax had been returned or whether the whole or any part of that excess relates to transactions and goods which had not been the subject of any return. It is obvious that such a determination when it relates to several quarterly returns by firms carrying on business on a large scale may cover a series of points which might, if litigated, be of an order normally apt for reference to an official referee. Regulation 12, however, provides (as the demand of Aug. 16, 1956, recited) that the amount demanded

A "... shall be deemed to be the proper tax due ... and shall be paid within seven days ... unless within that time it is shown to the satisfaction of the commissioners ..."

that some other amount is the proper tax due.

The period of seven days given to the subject to ascertain what the commissioners have really decided (if they are prepared to tell him—a doubtful question, B having regard to other matters mentioned by counsel for the commissioners), to formulate his case in reply, and to satisfy the commissioners of its validity, can be compared with the eight days normally allowed to a litigant to enter an appearance in the courts. One does not have to take into account the possible posting of demands on Fridays before a bank holiday, or at the beginning of a wakes period, to appreciate that the seven days left to the subject is derisory C in a case such as the present. Nor does it appear in point in relation to the question of vires that reg. 19 gives the commissioners power to modify the application of anything in a regulation.

As regards the procedure which the commissioners in fact follow before making a determination and their reasons for wishing to have a regulation in its present form, I appreciate that these do not strictly affect the question of vires. On D the other hand, they do serve to illustrate points relevant to the construction of s. 33 of the Finance (No. 2) Act, 1940, under which the regulations are made. Accordingly it is right to record the information helpfully laid before the court by counsel for the commissioners, quoting his exact words where this seems of assistance. The commissioners have offices in various centres in England, including one in Birmingham which has a stamp "Customs and Excise Purchase E Tax Area 33". When the local officer considers that there is cause for an investigation and so reports, the matter falls to be examined by one of the investigating teams which the commissioners maintain both inside and outside London. There is such a team located in Birmingham, but they do not exist in all big cities, e.g., Newcastle has not got one. Such investigations, though the practice varies greatly, may entail "most elaborate inquiries". When these are complete F it appears that a report is made to London, and it is there that any determination under reg. 12 is made and any demand consequent thereon is posted. How after such a procedure it could be within the realms of possibility for the commissioners to have representations made to them and examined by those familiar with the inquiries, and to come to a decision within the above-mentioned seven days, is a question which carries its own answer.

G As regards the practical reasons for having a regulation such as the one now under consideration, and in particular for the commissioners wishing to be able to make a determination which could not be examined by the courts, counsel for the commissioners put the matter thus:

"The scheme is a fiscal mechanism of great originality and has as its lynch pin accurate returns made by registered persons who have to retain H their books for a number of years. These books contain particulars of each transaction with retailers which attract tax. The books are kept by the wholesaler so there can be a comparison between them and the retailers."

Then, after dealing with certain questions how the subject might normally obtain declarations from the courts in actions for that purpose, he went on as follows:

I "The whole system of collection of tax breaks down when returns are false. On discovery of facts tending to show falsification or incompleteness of returns, it is possible for the commissioners to make assessments by virtue of highly confidential inquiries of customers. These customers might not be prepared to give information if it was made known to the suppliers that they had done so."

Apart from all other possible criticisms, such a procedure, as counsel for the defendants pointed out, maximises the chances of the appraisals of evidence

and rulings on points of law involved in a determination failing to accord with such decision as would be reached by a court acting in accordance with the elementary principles of natural justice. For even assuming, as one would always wish to assume, that every investigator of facts and every officer charged with making a determination on the facts as reported, were consistently imbued with a desire to be fair and had the requisite time and patience, the odds become heavily weighted against the accuracy on findings of fact and decisions of law alike. The findings of fact have to be based on evidence which cannot be tested in the normal way either for bias or for reliability; no opportunity becomes available to the party charged to rebut or explain those facts; and rulings of law would naturally tend, and indeed under civil service procedure almost inevitably must, follow the line of the departmental view instead of being formed independently after argument. On top of that comes such increase in margin of error as may be consequent on lack of previous judicial experience on the part of those who determine and report respectively.

Regulation 12 thus has the following effects as regards determinations made under it when once an inaccuracy appears in a return. On the matters thus determined it excludes the subject from access to the courts; it substitutes for the liability imposed by the charging section and schedules to pay the appropriate tax in law due a liability to pay whatever the commissioners believe to be the appropriate tax; it enables the commissioners to take into account evidence obtained under conditions of secrecy on the footing that it is not to be disclosed to the subject; it enables the commissioners so to announce their determination as not to reveal what they considered to be wrong in the return; it enables them to withhold from the taxpayer information even as to what are the goods or transactions on which the tax is determined to be due. The regulation on the face of it is one that can hardly even faintly be argued to provide for the appearance of justice being done, and it is capable of producing results adversely different, so far as the subject is concerned, to those which would result from a judicial determination of the tax payable. When using phrases such as " it enables the commissioners " or " it is capable of producing results ", I have in mind that counsel for the commissioners rightly both conceded and contended that where vires are concerned the relevant tests, both as regards the section which confers the power to make regulations and the regulations themselves, must depend on what results are as a matter of construction capable of being produced and not what results are known to have occurred. It is, strictly speaking, irrelevant that at any given time the commissioners, their officers and their staff are each and all acting benevolently and pursue the course of openly putting before the subject all points relevant to the assessment of tax and of resolving, so far as practicable, disputable points in the subject's favour; it is equally not relevant if on the contrary some of the numerous persons concerned act on the view that the interests of the country are best served by extracting from the subject the utmost that can properly be said in their opinion to be due after secret inquiry. On the other hand, whilst points available to the subject on such an issue as ultra vires cannot be altered by reason of any acts done by the commissioners, they may yet be sharpened by reference to what the commissioners happen to be doing.

Having described the general scheme of the legislation which imposes purchase tax and the impact on it of reg. 12, I now come to consider the submissions made by counsel whether the commissioners had power to make it by virtue of that portion of s. 33 (1) of the Act of 1940 which reads:

> " The commissioners may make regulations providing for any matter for which provision appears to them necessary for the purpose of giving effect to the provisions of this Part of this Act and of enabling them to discharge their functions thereunder, and in particular, but without prejudice to the generality of the preceding words, . . , "

A It is to be noted that there are four paragraphs setting out purposes for which regulations may be made. None of these was relied on by the commissioners as authorising, say, 12 years in so far as reference was made to it.

> "(a) for ascertaining all chargeable purchases and all such appropriations and applications as are mentioned in s. 25 of the Act and all chargeable persons by whom tax is chargeable, and the amounts of tax
>
> B **chargeable by virtue thereof . . .**"

It is contended on behalf of the defendants that there such an argument as was based on that paragraph.

Counsel for the defendants has referred to the well known rule that a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect. In this behalf and in relation to its importance he referred to judgments of high authority. Included amongst them was the passage in the judgment of Romer, L.J., in *Lee v. Showmen's Guild of Great Britain* (6):

> C "The proper tribunals for the determination of legal disputes in this country are the courts and they are the only tribunals which, by training and experience and assisted by properly qualified advocates, are fitted for the task. The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his
>
> D **legal rights.**"

The more recent authority cited was *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (7), and that passage in the speech of Viscount Simonds

E **which reads as follows** (8):

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair, J., called it in *Francis v. Yiewsley and West Drayton U.D.C.* (9), a 'fundamental rule' from which
>
> F I would not for my part sanction any departure."

As regards statutes imposing taxation, particular reference was made to the words used by Lord Reid when stating the opinion of the Board consisting of Lord Simonds, Lord Normand, Lord Radcliffe, Lord Asquith of Bishopstone and himself in *Bennett & White (Calgary), Ltd. v. Sugar City Municipal District* (10):

> G "In these Lordships' judgment the effect of these authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorises assessment allows an appeal or a series of appeals against assessments to other
>
> H tribunals is not sufficient to deprive the taxpayer of that right."

In addition reference may usefully be made to the words used by Scrutton, L.J., in his judgment in *Re Broder, Re Venomous Actions Act, 1896* (11), where, in relation to the right of Parliament to deprive the subject of his right to appeal to the courts, he said (12):

> I "But the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension."

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(6) The Finance (No. 2) Act, 1949, s. 35 (1) (a), as amended by the Finance Act, 1950, s. 20 (1).
(7) [1959] 3 All E.R. 1; [1960] A.C. 260.
(8) [1960] 3 All E.R. at p. 6; [1960] A.C. at p. 268.
(9) [1957] 1 All E.R. 456; [1957] 2 Q.B. 136.
(10) [1951] A.C. at pp. 505, 506.
(11) [1915] 1 K.B. 21.
(12) [1915] 1 K.B. at p. 30.

Next counsel for the defendants relied on a number of cases which related to the ever-continuing struggle between the executive and the subject, a struggle in which the former with the aid of apt phraseology seeks to make regulations enabling it to exercise arbitrary powers, whilst the subject seeks to resist its claims. One series of such cases arose out of regulations purporting to be made under s. 1 (1) of the Defence of the Realm Consolidation Act, 1914, of which the following are the relevant words:

> " His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm . . ."

In *Chester* v. *Bateson* (13), and *Newcastle Breweries, Ltd.* v. *R.* (14), certain regulations were held either in whole or in part to be ultra vires: the test applied being in effect whether the regulation in question was or was not reasonably capable of being a regulation for securing public safety and the defence of the realm (15). In the first of those two cases AVORY, J., considered that the regulation was also in violation of the Magna Carta (16), the Bill of Rights (17), and the Statute of Northampton (18). In addition, counsel for the defendants cited the cases in which courts have declined to regard provisions " for the final determination " of disputes by some person or tribunal as excluding their powers judicially to determine the subject-matter of the dispute either in certiorari proceedings or in an action for a declaration (compare *R. & W. Paul, Ltd.* v. *Wheat Commission* (19)). He contended, and it was not disputed, that in this behalf there was no difference between proceedings which derived from the prerogative writs and proceedings which were taken to obtain a declaration. In relation to taxation of the subject he later referred to *A.-G.* v. *Wilts United Dairies* (20), a case in which the House of Lords negatived the assertion of a right by the executive to impose taxation by regulation and consequent order without there being express power given them to this effect in the controlling statute. On that footing counsel submitted that the common law presumption that the legislature did not intend to deny the subject access to the Supreme Court on a justiciable issue ought not to be held rebutted save by clear and express words; that there was no more justiciable issue than the question whether or not the subject was liable to pay tax; and that there was nothing either in the express words of the Act of 1940 or to be implied therefrom which empowered the commissioners to deny the defendants in this case access to the courts.

In answer to those submissions counsel for the commissioners relied in essence on a single point, viz., that s. 33 was explicit and unambiguous in giving the commissioners untrammelled powers so long as they used them in good faith. This, he submitted, was the effect of the words in sub-s. (1) of that section

> ". . . for which provision appears to them necessary for the purpose of giving effect to the provisions of this Part of this Act and of enabling them to discharge their functions thereunder . . ."

On behalf of the commissioners he asserted, with special reference to the phrase " appears to them necessary ", that those are the

> " widest words which Parliament can use to confer an unfettered discretion, and that they constitute most unambiguous, plain, and unqualified terminology for the purpose of conferring unfettered legislative discretion to do what appears to them to be necessary."

After citing a series of authorities to which I will duly refer in relation to the exercise of powers given by statutes containing similar provisions, counsel for

(13) [1920] 1 K.B. 829. (14) [1920] 1 K.B. 854. (15) [1920] 1 K.B. at p. 864.
(16) (1297), 25 Edw. 1; 4 HALSBURY'S STATUTES (2nd Edn.) 21.
(17) (1688), 1 Will. & Mar. Sess. 2 c. 2; 4 HALSBURY'S STATUTES (2nd Edn.) 151.
(18) (1328), 2 Edw. 3; 4 HALSBURY'S STATUTES (2nd Edn.) 63.
(19) [1936] 2 All E.R. 1243; [1937] A.C. 139. (20) (1922), 91 L.J.K.B. 897.

A the commissioners submitted that they were the sole and unappealable judges of what was necessary for the purposes referred to in s. 33 and that the relevant words "were put in to confer arbitrary powers". His submissions continued thus:

> "There is no case in which where an authority has been given power to determine the connexion between the power to be exercised and the purpose B described by statute, where the court has decided that the competent authority misjudged the connexion. My submission is that provided it appears to them to be necessary for giving effect to the relevant provisions, it is not open to a court to examine the question whether the regulation was in fact necessary."

C He further submitted:

> "I put it that even if on such evidence as exists there is no such connexion yet, if the commissioners acted in good faith, the court cannot intervene."

As an alternative to that latter proposition he put it that

> "once there can on the available evidence be a connexion, then in the D absence of bad faith, the court cannot inquire whether in fact there is such a connexion."

As regards any regulation which contradicted the provisions of the statute under which the power to make the regulation was given, he submitted that that regulation would be intra vires though there would arise the question whether its contents should not be disregarded in so far as repugnant to the provisions E of the main statute. Counsel was not prepared to concede that a regulation which was in this manner repugnant was ultra vires, though he did concede that this was an alternative method of approach.

In support of these propositions counsel for the commissioners cited in the first place a series of decisions relating to regulations made under the powers given by the Emergency Powers (Defence) Act, 1939. The vital phraseology of F this statute (21) differed from that used in the comparable enactment (22) of 1914 in that in relation to the powers of His Majesty by Order in Council to make regulations for securing the public safety, the defence of the realm, and so forth, there is introduced immediately before the words "for securing the public safety" the phrase, "as appear to him to be necessary or expedient". The same phrase recurs in many of the regulations themselves, including, for G instance, reg. 51 (2), the subject of the decision in *Demetriades* v. *Glasgow Corpn.* (23) in the House of Lords. Of the decisions which counsel cited some were concerned with the question whether a regulation was intra vires, others with the question whether the subject could challenge the legality of an act done under a regulation containing that phrase. As counsel for the commissioners pointed out, the principle applied in each such case was the same. The first of the series was H *R.* v. *Comptroller-General of Patents, Ex p. Bayer Products, Ltd.* (24); the next *Progressive Supply Co., Ltd.* v. *Dalton* (25), a decision of FARWELL, J.; then the decisions in two successive weeks of the Court of Appeal in *Carltona, Ltd.* v. *Works Comrs.* (26), and *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (27); and,

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(21) See s. 1 (1) of the Act of 1939, which, so far as material, provided: "Subject I to the provisions of this section, His Majesty may by Order in Council make such regulations (in this Act referred to as 'Defence Regulations') as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war . . ."

(22) See s. 1 (1) of the Defence of the Realm Consolidation Act, 1914, which, so far as material, provided: "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm . . ."

(23) [1951] 1 All E.R. 457.

(24) [1941] 2 All E.R. 677; [1941] 2 K.B. 306.

(25) [1942] 2 All E.R. 646; [1943] Ch. 54.

(26) [1943] 2 All E.R. 560.

(27) [1943] 2 All E.R. 546.

finally in this series, the decision of the House of Lords in *Demetriades* v. *Glasgow Corpn.* (28), which I have already mentioned. A

Particular reliance was placed on the language used by SCOTT, L.J., in the *Bayer* case (29), where speaking of the words " as appear to him to be necessary or expedient ", he said:

> ". . . it is not open to His Majesty's courts to investigate the question as to whether or not it was in fact necessary or expedient for the purposes named to make the regulations which were made. The principle upon which delegated legislation must rest in our constitution is that the legislative discretion which is left in plain language by Parliament is one which is to be final, and not subject to control subsequently by the courts." B

Similarly stress was laid on that passage in the judgment of LORD GREENE, M.R., in the *Point of Ayr Collieries* case (30), which commences with the words (31): C

> " If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen." D

It was pointed out that in *Demetriades* v. *Glasgow Corpn.* (28), which related to acts done under a regulation which concerned the user of land, LORD NORMAND stated (32):

> "Again, the terms of the regulation leave no jurisdiction to the courts to entertain the question whether the competent authority has acted with reasonable care and skill, and it is not intelligible to say that a negligent or unskilful act is not a thing which any person having an interest in the land would be entitled to do by virtue of that interest. In the absence of averments of bad faith or ulterior motive the jurisdiction of the courts is excluded and the competent authority is the judge of the use which it should make of the land and of what it should do in connexion with such use for the purposes of the requisition." E F

Other cases relating to the effect of parallel words in emergency legislation in Canada and Cyprus were also cited, viz., *A.-G. for Canada* v. *Hallet & Carey, Ltd.* (33) and *Ross-Clunis* v. *Papadopoullos* (34) in the Privy Council. In the Canadian case, where the Board (constituted by VISCOUNT SIMON, LORD NORMAND, LORD RADCLIFFE, LORD ASQUITH OF BISHOPSTONE and LORD COHEN) upheld the validity of an expropriatory Order in Council, LORD RADCLIFFE in reference to the words " as he may . . . deem necessary or advisable ", after mentioning the well-known general principle that a strict construction must be applied to statutes encroaching on the rights of the subject, said (35): G

> " For here the words that invest the governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way. But then, expropriation is altogether capable of being so related. Nor can a court pause in doubt over the question whether this is an Act by which it is intended to authorise interference with private rights . . ." H I

Then after considering the authorities he added that (36)

(28) [1951] 1 All E.R. 457.
(29) [1941] 2 All E.R. at p. 681; [1941] 2 K.B. at p. 312.
(30) [1943] 2 All E.R. 546.
(31) [1943] 2 All E.R. at p. 547.
(32) [1951] 1 All E.R. at p. 460.
(33) [1952] A.C. 427.
(34) [1958] 2 All E.R. 23.
(35) [1952] A.C. at p. 450.
(36) [1952] A.C. at p. 451.

A ". . . it would be impossible to extract from the decision in the *Wilts United Dairies* case (37) any general principle of construction that made general words in a statute incapable of authorising the gravest possible inroads upon private rights."

Turning from emergency legislation, counsel for the commissioners referred B to decisions under planning legislation, such as *Re City of Plymouth (City Centre) Declaratory Order; Robinson* v. *Minister of Town and Country Planning* (38), which was concerned with a statute containing the words " where the minister . . . is satisfied that it is requisite ". In that case SOMERVELL, L.J., said (39):

" I think the Act gives the minister the power to come to his decision as an administrative decision, which, no doubt, he can be called on to justify C in Parliament, but which he cannot be called on to justify in a court of law on the ground that there was either insufficient or no evidence on which a reasonable man in the position of the minister could so decide."

In addition there were cited cases where the statute itself uses the words " in the opinion of ", " or appears to be " or some such similar phrase. The first D of these was *Robinson* v. *Sunderland Corpn.* (40), which decided that the court could not go behind a decision of a local authority where the relevant words in a statute were:

" If a house . . . appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water closet . . ."

E The other cases were to a like effect.

The submissions for the commissioners thus lacked nothing in breadth or boldness. In amplification of their effect in relation to the particular powers given to them under s. 33 of the Act of 1940, counsel for the commissioners, with his usual clarity and candour, submitted, in answer to questions put to F him, that on its proper construction it enabled the commissioners to make intra vires regulations to detain a taxpayer in their offices to obtain relevant information from him; to stop him from drawing on his bank account whilst indebted to them; to take his money away from his person to satisfy such debts; to impose penalties for matters not already the subject of penal provision in the Acts; to provide for recovery of debts in courts which would not otherwise have G jurisdiction; and finally to make a regulation that the commissioners might do any act which appeared to them necessary for the purposes of giving effect to the provisions of this Part of the Act and of enabling them to discharge their functions thereunder. A regulation such as that last mentioned would, according to his submission, likewise enable the commissioners lawfully to effect the above types of detention of the person, blocking of a bank account, or taking of money. H Moreover, I understood it to be suggested that s. 30 (2) of the Act of 1940 might well already put it into the power of the commissioners to do such acts (41). As regards a regulation raising penalties imposed by existing legislation it was submitted that it too would be intra vires, though the increased penalties would probably not be enforceable on the ground that a subordinate regulation would I be taken to be overridden by the main statute.

Acceptance of all the above submissions may well, of course, not be necessary for the success of the commissioners on the particular issue now under consideration; moreover it is right to remember that regulations have to be laid before the House of Commons and may, if their effect is appreciated, be annulled during

(37) (1922), 91 L.J.K.B. 897. (38) [1947] 1 All E.R. 851; [1947] K.B. 702.
(39) [1947] 1 All E.R. at p. 861; [1947] K.B. at p. 720. (40) [1899] 1 Q.B. 751.
(41) The text of s. 30 (2) of the Act of 1940 is set out at p. 658, letter G, post.

the next twenty-eight days (42). Yet those submissions serve to illustrate the claims which it is suggested that s. 33 enables the executive to proffer if thought fit: and they do act as a reminder of the need for the court's vigilance and the need to apply to it what SCRUTTON, J., termed (43) the "least onerous meaning". Moreover, they illuminate the position in which the subject could find himself under s. 30 (2) if the commissioners are correct in their interpretation of s. 33. When using the phrase "if their effect is appreciated", I had in mind a submission made on behalf of the commissioners as to the use of the formula "appears to them necessary". That formula was suggested to be a "drafting mechanism employed for the exclusion of the jurisdiction of the court" on the footing that "modern drafting technique is to use words which do not exclude jurisdiction in terms but positively repose arbitrary power in a named authority". The art of excluding the subject from benefits by a positive definition which does not specifically refer to the exclusion is, of course, one that has been brought to a high degree of perfection in Whitehall; and it attracts profound respect for the craftsmanship of those whose duty it is to employ it. On the other hand it does not always lead to a quick appreciation by others of the effect of legislative provisions.

In addition to the general propositions thus put forward submissions were made for the commissioners in the alternative, as to matters which arise if, contrary to their main contention, the courts are entitled to go behind the implicit decision of the commissioners that reg. 12 was one which was within their power to make and can thus consider what are the purposes for which the commissioners can make regulations. As to the purposes set out in paras. (a) to (f) inclusive of s. 33 (1), counsel for the commissioners tended to eschew reliance on any of them. He preferred to put it forthrightly that the regulation fell within the generality of the opening five lines of the section (44), and defined the purpose of the regulation as being for the "exaction of purchase tax from a registered wholesaler in so far as he is liable to pay"; exaction, he defined, as including compulsion to pay. Counsel did, however, suggest that the regulation might at any rate in part be one for the purpose set out (45) in para. (a). In this behalf he argued that something was needed in the regulations to provide for the assessment and payment of tax in cases where returns were not made by those who should make them and where the returns made were incomplete, and that this need constituted as between the provisions of the Act and the regulation a manifest nexus decisive in excluding the jurisdiction of the court to inquire into vires. His concluding point was that the right to decide whether or not the subject should have some form of appeal from the determination (a form which might, for instance, be parallel to that given in similar circumstances by certain provisions of the Income Tax Act, 1952) was solely a matter for the commissioners; that right, he pressed on the court, was incident to the "untrammelled powers given to the commissioners".

That, accordingly, was the way in which there was developed on behalf of the commissioners the single essential point—that whenever a competent authority can rely on the drafting mechanism of the words "appears to them to be necessary", no court can inquire into an action done by that authority in good faith. It is a mechanism which, if the submissions for the commissioners are right, can achieve and effect exclusion of the subject from almost every right given to him

(42) Section 34 (1) of the Act of 1940 as enacted requires purchase tax regulations to be laid before the House of Commons and provides for their annulment by affirmative resolution within twenty-eight days of their being laid; but, by virtue of s. 1 (1) of the Statutory Instruments Act, 1946, such regulations must now be made by statutory instrument and under the provisions substituted by s. 4 (3), s. 5 (2) and s. 7 (2) of the Act of 1946, a copy of the instrument must normally be laid before the House of Commons before being made and the period for annulment is forty days from the date of the laying of the copy. (43) In *Re Boaler*, [1915] 1 K.B. at p. 36.

(44) The relevant lines are printed at p. 650, letter I, ante.

(45) Paragraph (a) of s. 33 (1) is set out at p. 651, letter A, ante.

A by the common law or statute: in particular it can render nugatory those decisions of the court which have denied to the executive the right to have their decisions on justiciable matters treated as "final" merely by so stating.

In reply, counsel for the defendants contended that whenever a question of vires arose where regulations had been made by a competent authority under a section empowering it to do what to it appeared necessary, it was always open B to the court to examine whether or not that regulation contained provisions of a type which the statute granted them power to lay down, and that only in so far as they were of that type might an exercise in good faith of the discretion granted to that authority be beyond inquiry. In this two-tier approach, as he termed it, to the question of vires, the first stage required an objective conclusion reached after an examination of the general scheme of the legislation. Counsel submitted C that in all the cases cited for the commissioners the courts had in fact thus considered matters relevant to this first stage, saving only where the fact that the regulation or Act in issue was so plainly within the powers granted that the contrary could not be suggested. Not least he relied on those passages in the judgments of LORD GREENE, M.R., in *Carltona, Ltd.* v. *Works Comrs.* (46) and *Point of Ayr Collieries* v. *Lloyd-George* (47), which respectively, run as follows (48):

D "All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction"

E and (49):

"It is the competent authority that is selected by Parliament to come to the decision, and, if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the minister."

F On that footing counsel for the defendants argued that reg. 12 failed to pass the first stage test; he asserted in that behalf that one essential vice of the regulation was that it sought by aid of a "statutory fiction" (quoting a phrase of counsel for the commissioners) to make the subject pay such tax as the commissioners believed to be true, whereas the charging sections imposed only such tax as was lawfully due.

G The arguments on the first and main issue having been so lucid, it is now practicable to state my conclusions relatively compactly. In the first place I reject the view that the phrase "appear to them to be necessary" when used in a statute conferring powers on a competent authority, necessarily makes that authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have. It is axiomatic that, to H follow the words used by LORD RADCLIFFE in *A.-G. for Canada* v. *Hallet & Carey, Ltd.* (50) "the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention". It is no less axiomatic that the application of that rule may result in identic phrases receiving quite different interpretations according to the tenor of the legislation under consideration. As an apt illustration of such a result it is not necessary to go further I than *Liversidge* v. *Anderson* (51) and *Nakkuda Ali* v. *M. F. de S. Jayaratne* (52), in which cases the words "reasonable cause to believe" and "reasonable grounds to believe" received quite different interpretations. To my mind a court is bound before reaching a decision on the question whether a regulation is intra vires to examine the nature, objects, and scheme of the piece of legislation

(46) [1943] 2 All E.R. 560.
(47) [1943] 2 All E.R. 546.
(48) [1943] 2 All E.R. at p. 564.
(49) [1943] 2 All E.R. at p. 547.
(50) [1952] A.C. at p. 449.
(51) [1941] 3 All E.R. 338; [1942] A.C. 206.
(52) [1951] A.C. 66.

as a whole, and in the light of that examination to consider exactly what is the area over which powers are given by the section under which the competent authority is purporting to act. In taking that view I respectfully apply the line of approach adopted by LORD GREENE, M.R., in the cases previously cited, where he referred to the need for the acts of the competent authority to fall within the four corners of the powers given by the legislature. It is also to be noted that the observations of LORD GREENE in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (53) which were relied on by counsel for the commissioners were confined to " regulations of this character ", a phrase which in the context can refer only to emergency legislation. The view that it is right in each case to examine the nature, objects and scheme of the relevant legislation as a whole is further supported by the fact that in the bulk of the cases cited for the commissioners the court at one stage or another took such a course. Examples of judgments touching the Defence Regulations where such an examination, sometimes of a greater and sometimes of a lesser degree, can be found, include those of FARWELL, J., in *Progressive Supply Co., Ltd.* v. *Dalton* (54), of SELLERS, J., in *Thorneloe & Clarkson, Ltd.* v. *Board of Trade* (55) and those of LORD NORMAND and LORD REID in *Demetriades* v. *Glasgow Corpn.* (56). More importantly perhaps as regards other cases, a considerable portion of the judgments and opinions respectively in *Re City of Plymouth (City Centre) Declaratory Order; Robinson* v. *Minister of Town and Country Planning* (57); *A.-G. for Canada* v. *Hallet & Carey, Ltd.* (58) and *Ross-Clunis* v. *Papadopoullos* (59), are taken up by such examinations. I do not accept the submission that those examinations were irrelevant or misconceived.

Having reached this conclusion I now turn to the legislation under consideration in the present case. Of its nature it concerns the taxation of the subject and is thus widely different from both emergency legislation and legislation calling for administrative decisions in relation to planning. I have already discussed its scheme and at this stage merely repeat that until one reaches reg. 12 one finds a quite normal set of provisions which define the goods and transactions which attract tax and leave it to the courts to decide disputes between the executive and the subject in a normal way. As already mentioned, s. 31 (2) of the Act of 1940 in particular provides that the tax shall be recoverable as a debt and enables the subject thus to obtain decisions on points in dispute. It is in relation to this general scheme that the functions of the commissioners are by s. 30 provided to be as follows:

> " (1) The tax shall be under the care and management of the commissioners.
>
> " (2) The commissioners may do all such acts as may be deemed necessary and expedient for raising, collecting, receiving, and accounting for the tax in the like and as full and ample a manner as they are authorised to do with relation to any duties under their care and management."

It is next to be observed that it is fully practicable to draft a regulation which enables the commissioners to assess tax where there has been no return or an incomplete return without in that regulation providing that the assessment cannot be made the subject of an appeal. Indeed, no parallel provision of any Act was cited to me which excluded all right of appeal to an independent tribunal. Whilst the present case relates to an incomplete return, it is pertinent that reg. 12 equally applies whenever any person fails to furnish a return " as required by these regulations ". That is a phrase of wide implications which are by no means reduced by the instruction on form P.T. 11 that the return must comply with

(53) [1943] 2 All E.R. at p. 547. (54) [1942] 2 All E.R. 646; [1943] Ch. 54.
(55) [1950] 2 All E.R. 245. This case was concerned with the construction of s. 1 (4) of the Industrial Organisation and Development Act, 1947.
(56) [1951] 1 All E.R. at pp. 458, 462.
(57) [1947] 1 All E.R. 851; [1947] K.B. 702. (58) [1952] A.C. 427.
(59) [1958] 2 All E.R. 23.

A the directions given in the various notices. Suffice it to say that it does not seem necessary to pause to consider the precise nature of those implications and their effect.

It is against the background of the foregoing examination of the relevant legislation that the court has to interpret the words in s. 33 (1) of the Act of 1940: "for the purpose of giving effect to the provisions of this Part of this Act and of B enabling them to discharge their functions thereunder" to see what is the area over which the power of the commissioners to make regulations extends. The word "and", as was rightly conceded by counsel for the commissioners, is one which, if the court can (contrary to his main submission) consider the ambit of the powers given by s. 33, necessitates the regulations being such as are required for the discharge of the commissioners' functions as well as their being C related to the provisions of Part 5 of the Act. On this footing it is to my mind clear that reg. 12 is ultra vires on at any rate three grounds, which to my mind are distinct in law though they overlap in so far as they may be different ways of expressing the result of certain facts. First, it is no part of the functions assigned to the commissioners to take on themselves the powers of a High Court judge and decide issues of fact and law as between the Crown and the subject. Secondly, it D renders the subject liable to pay such tax as the commissioners believe to be due, whereas the charging sections impose a liability to pay such tax as in law is due. Thirdly, it is capable of excluding the subject from access to the courts and of defeating pending proceedings. This is a distinct ground that needs to be stated separately not least because there is nothing in the regulation to preclude the commissioners from making a determination on a transaction whilst proceed- E ings are pending in the High Court either for a declaration or for the determination of a Case Stated on a s. 21 arbitration. The regulation thus enables the commissioners to oust the subject's right to have issues determined in the courts not only before relevant proceedings are commenced but whilst they are pending. The first ground derives from the proper construction of the word "functions" in s. 33; the second from the fundamental repugnance of reg. 12 to the charging F provisions of the relevant legislation; and the third from a general examination of the nature, objects and scheme of the legislation. There also exists, parallel to the third ground, a subsidiary repugnance between the regulation and that part of s. 21 which makes obligatory the reference of certain disputes to arbitration.

In the result this attempt to substitute in one segment of the taxpayer's affairs the rule of tax collectors for the rule of the law fails. The defendants, accordingly, G here succeed at the first stage of the two-tier approach, i.e., on an examination as to what is the area within which the commissioners can exercise powers. It is thus not necessary to consider whether at the second stage the courts are invariably as powerless as counsel for the commissioners suggested to examine whether a particular regulation is one which can be said to be proper and "necessary" in the exercise of those powers. In particular nothing that I have H said must be taken as encouraging the view that in the particular and perhaps peculiar sphere of tax legislation the subject can merely by regulation validly be ousted from access to the courts: still less that a court would, on the ipse dixit of the competent authority, inevitably be bound to hold that denial of justice to the subject was something that could properly be termed "necessary".

There remains the issue whether the demand of Aug. 16, 1956, referred to in I para. 6 of the statement of claim, was made by a person duly authorised under s. 4 of the Customs and Excise Act, 1952, to make it. Section 4 (1) provides that any act authorised to be done by the commissioners may be done either by the commissioners themselves, or if the commissioners so authorise, by a secretary or assistant secretary or by any other person to whom general or special authority has been given in writing. No reliance was or could be placed on s. 4 (2).

[HIS LORDSHIP stated the authority and actions of Mr. Seed and Mr. Piper (see p. 644, letter B, ante) and continued:] In those circumstances, it is clear that the making of the demand was authorised by a person entitled to make it

and was later made by a responsible officer. The point taken on behalf of the defendants is thus singularly devoid of merits. It could not have arisen if Mr. Seed had signed both documents instead of only one, and it could not have arisen if Mr. Piper had been given authority in writing to do that which was in practice part of his normal routine duty. A

The commissioners are in a position parallel to that of the ministers referred to in the judgment of LORD GREENE, M.R., in *Carltona, Ltd.* v. *Works Comrs.* (60), in that their functions also are so multifarious that they could never personally attend to them all and the powers given to them are normally exercised under their authority by responsible officials of the department. In that situation the point now taken probably could not have arisen before s. 4 (1) of the Act of 1952 came into force: for there was nothing in the earlier Acts which made it necessary for any authority given to officers other than assistant secretaries to be in writing. It is, however, clear, as was rightly conceded on behalf of the commissioners, that now whenever an act, other than a purely ministerial act, is by relevant legislation authorised to be done by the commissioners, then that act can only be done by a person duly authorised, as set out in s. 4 (1). At one stage it was submitted that any demand for payment made by virtue of reg. 12 was a purely ministerial act and thus, unlike the determination referred to in that regulation, one to which s. 4 (1) did not apply: that submission, however, was not pressed because even after a determination has been made it is an important matter of discretion to decide whether and when there should be issued the demand which has the effect mentioned in the regulation. In the result the point at issue became an extremely narrow one. The defendants submitted that it was the act of demanding which had to be made by a duly authorised person and that the relevant words "any act . . . may be done" ought not to be construed as if it read "any act may be authorised". For the commissioners it was argued that in relation to a demand s. 4 (1) ought not to be read as if it contained a provision that the demand must be signed by one of the persons referred to in that sub-section; and that the demand in the present case was really the act of Mr. Seed so that it was not in point whether Mr. Seed signed it or indeed if the document were sent off without any signature at all. The commissioners relied on the maxim qui facit per alium facit per se, the defendants on the maxim delegatus non potest delegare. On this narrow issue my mind has fluctuated and my conclusions have been reached with hesitation. B C D E F

It is to be noted that throughout the 321 sections of the Act of 1952 a careful distinction is drawn between those acts which only a commissioner can do and those which can be done by an officer or other designated persons. The acts which are reserved to the commissioners are all of importance but none the less have in practice often to be performed in various parts of the country by others than the commissioners personally. The provisions of s. 4 (1) thus seem to be designed for the protection of those who may be affected by such acts. The demand on which the present action is founded was one which both in terms of pleading and in common parlance was made by the letter of Aug. 16. That demand was an act which cannot be said to have been done by the commissioners personally. To have effect it must thus, having regard to s. 4 (1), be an act which was in law that of Mr. Seed. Having read and re-read the letter, the act to my mind was that of Mr. Piper, and though authorised by Mr. Seed, was not the act of Mr. Seed himself. On that basis it was not the act of any person nominated by s. 4 (1). On such a point it is doubtful whether authority can be of assistance, but I am inclined to think that in *Miles* v. *Bough* (61), the reasoning of COLERIDGE, J. (62), is in point despite the fact that he was dealing with a section which related to signatures (63). In coming to this unsatisfactory conclusion, which depends on the special facts of this case, I draw some comfort G H I

(60) [1943] 2 All E.R. at p. 563.
(61) (1842), 3 Q.B. 845.
(62) (1842), 3 Q.B. at p. 868.
(63) (1842), 3 Q.B. at p. 849.

A from the fact that the commissioners can so easily provide against a recurrence of the situation, even if they have not already done so. Moreover, in a taxing statute it is better that sections designed to give protection to the subject be construed strictly, rather than that there be allowed a laxity, so as to enable the merits of a case to hold sway.

In the result the answers to the two questions formulated in the order of B Master JACOB dated Jan. 11, 1961, are accordingly as follows:—(1) Regulation 12 of the Purchase Tax Regulations, 1945, was at all material times ultra vires the commissioners. (2) The demand dated Aug. 16, 1956, was not a lawful demand under the said reg. 12 by reason of the fact that it was not made by a person properly authorised under the provisions of s. 4 of the Customs and Excise Act, 1952.

C *Judgment for the defendants on the preliminary points; action dismissed with costs.*

Solicitors: *M. G. Whittome* (for the commissioners); *Stafford Clark & Co.*, agents for *Faber & Co.*, Birmingham (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

D

THE TRADESMAN.

SOCIÉTÉ ANONYME HERSENT v. UNITED TOWING CO., LTD. AND ANOTHER.

E [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), July 24, 25, 1961.]

Arbitration—Stay of proceedings—Protocol agreement—Contract for towage containing arbitration clause alleged to be a nullity—Action brought for negligence—Whether stay of action should be granted—Exercise of discretion if arbitration had not been pursuant to protocol agreement—Arbitration Act, 1950 (14 *Geo.* 6 *c.* 27), *s.* 4.

F By a towage contract dated Dec. 24, 1958, between the plaintiffs (a French company) and the first defendants, an English towage company, the towage company contracted to tow the plaintiffs' two vessels by tug from Pointe Noire in French Equatorial Africa to Philippeville in Algeria. Clause 11 of the agreement purported to exclude the towage company from almost every liability*. By cl. 14 any dispute was to be submitted to arbitration in G the United Kingdom. The plaintiffs' vessels were both lost at sea in February, 1959, during the towage. The towage company denied liability. On Nov. 9, 1959, both parties entered into an agreement for the reference of all questions in connexion with the loss of the two vessels to a named arbitrator. In May, 1961, no progress in the arbitration proceedings having been made, H the plaintiffs put forward a contention that the exception clause in the towage contract was so wide as to render the contract a nullity. In June, 1961, the plaintiffs issued a writ claiming that the towage contract was a nullity and claiming damages for negligence. On motion under s. 4 of the Arbitration Act, 1950, to stay proceedings on the footing that the arbitration was pursuant to an agreement to which the protocol† on the execution of foreign arbitral awards applied,

I **Held:** although at some time a substantial point of law on the question whether the towage contract was valid would have to be decided, yet the towage contract must be treated as valid until a court decided otherwise; therefore, the arbitration clause was enforceable and, by virtue of the

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* The terms of the clause are set out at p. 662, letter F, post.

† I.e., the Protocol on Arbitration Clauses signed at Geneva on Sept. 24, 1923 (published as Treaty Series No. 4 (1925), Cmd. 2312, and set out in Sch. 1 to the Arbitration Act, 1950). The British ratification was deposited on Sept. 27, 1924, and the French ratification was deposited on June 7, 1928 (Treaty Series No. 29 (1928), Cmd. 3266).

mandatory terms of s. 4 (2)* of the Arbitration Act, 1950, a stay of proceedings must be granted. A

Heyman v. *Darwins, Ltd.* ([1942] 1 All E.R. 337) considered.

Per CURIAM: if the court had had the discretion conferred by s. 4 (1)† of the Act of 1950, then a stay of proceedings would have been directed in the circumstances of the case (see p. 667, letter F, post).

[Editorial Note. The decision in the present case should be considered with *Radio Publicity (Universal), Ltd.* v. *Compagnie Luxembourgeoise de Radiodifusion and Wireless Publicity, Ltd.* ([1936] 2 All E.R. at p. 728). B

As to reliance on an arbitration clause after repudiation of a contract containing it, see 2 HALSBURY'S LAWS (3rd Edn.) 17, para. 42, text and note (u).

As to staying an action under the Arbitration Act, 1950, s. 4, see 2 HALSBURY'S LAWS (3rd Edn.) 21, paras. 50, 51, especially note (c). C

As to conditions of obtaining a stay, see ibid., 24-26, paras. 55-60; and for cases on the subject, see 2 DIGEST (Repl.) 480, *369*, 485, *395*, 492, *435*.

For the Arbitration Act, 1950, s. 4, Sch. 1, see 29 HALSBURY'S STATUTES (2nd Edn.) 93, 122.]

Case referred to:

Heyman v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2 Digest (Repl.) 492, *435*. D

Motion.

This was a motion by the United Towing Co., Ltd., the first-named defendants, that all further proceedings in an action against the first-named defendants might be stayed pursuant to s. 4 of the Arbitration Act, 1950, on the ground that the plaintiffs and the first-named defendants were parties to a submission to arbitration made on Nov. 9, 1959, in pursuance of an agreement dated Dec. 24, 1958, to which the protocol set out in Sch. 1 to the Arbitration Act, 1950, applied. On Dec. 24, 1958, the first-named defendants, an English company, entered into an agreement with the plaintiffs, a French company whose registered office was in Paris, for the towage of the dredger Provence and the barge Derocheuse II from Pointe Noire in French Equatorial Africa to Philippeville in Algeria by one approved tug. Clause 11 of the towage contract provided: E F

"the company [i.e. the first defendants] is not to be held responsible for the acts, neglect, or default of the company, their servants, or agents, or for any loss of life, or injury to persons, or for any damage or delay or loss or expense or salvage that may arise to or of or be caused by any vessel, craft, object, or person whilst being or about to be or having been towed or otherwise served or the cargo on board such vessel, craft or object, or any other ship or cargo or any pier, wharf or other property or any other person whatsoever through collision or otherwise and the consequences thereof, howsoever and wheresoever such loss of life or injury or damage, delay, loss, expense or salvage rise, and whether caused by the negligence or default of the company, their servants, or agents or any breach of warranty, express or implied, whether before or at the commencement of the towage or other service or arising during or after the performance thereof or any interruption thereof or otherwise, and the hirer and/or owners of the property and/or the persons served by the engagement shall undertake to bear, satisfy and indemnify the company against all liability for G H

* Section 4 (2), so far as material, reads: "Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in Sch. 1 to this Act applies . . . commences any legal proceedings in any court against any other party to the submission . . . any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings." I

† The relevant terms of s. 4 (1) are printed in footnote (1) at p. 664, post.

A such losses, injuries, damages, delays and the consequences thereof. The company has the right of substituting one tug for another and of towing more than one vessel at a time and shall be entitled to reasonable remuneration in respect of any towage or service which is not completed by reason of any cause whatsoever, and these general conditions shall remain in force notwithstanding any deviation or failure in the performance of the towage B or other services and whether remuneration is payable to the company in respect of such towage or other services or not."

Clause 12 of the towage contract provided:

"Notwithstanding the provisions of cl. 11 the shipowners will not be held responsible for any loss, injury or damage to or of the company's tugs or their crews or any damage to third parties caused by direct collision with the C tugs unless such loss, injury or damage is due to the negligence of the shipowners, their servants or agents."

Clause 14 of the towage contract provided:

"That in the event of any dispute arising in connexion with this agreement the same shall be submitted to arbitration in the U.K. in accordance with the terms of the Arbitration Act, 1950, or any modification or re-enact- D ment thereof."

The towing under the towage contract began, but met with disaster and the plaintiffs' two vessels were lost. In August, 1959, London solicitors for the plaintiffs wrote setting out their claim. Liability was not accepted by the first defendants. On Sept. 14, 1959, the plaintiffs' solicitors invited comments on the existence of the arbitration clause. In reply the first defendants' solicitors E suggested that there should be a single arbitrator and put forward the names of two experienced leading counsel of the Admiralty Bar. On Sept. 18, 1959, the plaintiffs' solicitors agreed to the appointment of Mr. Naisby, Q.C., as arbitrator. By an agreement dated Nov. 9, 1959, between the solicitors for the plaintiffs and the solicitors for the first defendants, on behalf of the parties, it was agreed that pursuant to the arbitration clause in the towage contract all F questions between the parties thereto in connexion with the loss of the two vessels should be referred to the sole arbitrament of Mr. Naisby, Q.C., and that the plaintiffs should deliver a statement of claim within twenty-one days and the first defendants should deliver a statement of defence within twenty-one days thereafter. Nothing further happened until by letter dated May 5, 1961, the plaintiffs' solicitors, referring to the towage contract, advanced the conten- G tion that the exceptions contained in cl. 11 of the towage contract were so wide as to render the contract a nullity. It was also pointed out that the master of the tug should be a party to the proceedings as well as the owners. On June 13, 1961, the plaintiffs issued a writ in which the first-named defendants and the master of the tug, Donald Christie White, were defendants, claiming against the first-named defendants a declaration that the towage contract was not a H valid contract in law or that cl. 11 was invalid or not binding on the plaintiffs, and against both defendants damages for negligence or for breach of duty as bailees in connexion with the loss of the plaintiffs' two vessels whilst being towed.

The authority and cases enumerated below were cited in argument in addition to the case cited in the judgment*.

I * I.e., 8 HALSBURY'S LAWS (3rd Edn.) 113, 117; *Charleton* v. *Spencer*, (1842), 3 Q.B. 693; *Willesford* v. *Watson*, (1873), 8 Ch. App. 473; *Ex p. Dawes, Re Moon*, (1886), 17 Q.B.D. 275; *Orr* v. *Mitchell*, [1893] A.C. 238; *Cheshire* v. *Bailey*, [1905] 1 K.B. 237; *Produce Brokers Co., Ltd.* v. *Olympia Oil & Cake Co., Ltd.*, [1916] 1 A.C. 314; 13 Asp. M.L.C. 393; *The Cap Palos*, [1921] All E.R. Rep. 249; [1921] P. 458; 15 Asp. M.L.C. 403; *The President van Buren*, [1924] All E.R. Rep. 334; 16 Asp. M.L.C. 444; *Radio Publicity (Universal), Ltd.* v. *Compagnie Luxembourgeoise de Radiodifusion and Wireless Publicity, Ltd.*, [1936] 2 All E.R. 721; *Crane* v. *Hegeman-Harris Co., Inc.*, [1934] 4 All E.R. 68; *Smith, Hogg & Co., Ltd.* v. *Black Sea and Baltic General Insurance Co., Ltd.*, [1940] 3 All E.R. 405; [1940] A.C. 997; 19 Asp. M.L.C. 382; *Firestone Tyre & Rubber Co., Ltd.* v. *Vokins & Co., Ltd.*, [1951] 1 Lloyd's Rep. 32; *Fairclough Dodd & Jones, Ltd.* v. *J. H. Vantol, Ltd.*, [1956] 3 All E.R. 921.

H. V. Brandon, Q.C., and *J. S. Hobhouse* for the plaintiffs, the Société Anonyme Hersent. A

J. Franklin Willmer for the first defendants, the United Towing Co., Ltd.

The second-named defendant did not appear and was not represented.

KARMINSKI, J., after referring to the nature of the motion and the facts of the case and the course that the matter had taken, and setting out the terms of cl. 1 of the submission to arbitration, continued: That, then, is the position as it stands today. The arbitration has never gone forward, but the arbitrator has ordered a statement of claim which has not yet been filed. B

It is said on behalf of the plaintiffs that there is no valid arbitration agreement here because the main agreement is so wide as to be a nullity. It was said by counsel for the plaintiffs, as I understood his argument, on behalf of the plaintiffs that art. 11 of the general service conditions was such as to kill any consideration for the contract, and he desires to argue at the right time and place that the agreement is a nullity. He says also that it is perfectly true, and has never been disputed, that the submission to arbitration was signed by his clients or on their behalf, but he submits that the submission is merely a limb of the main tree, namely, the agreement; without the main tree, the limb has no life or existence of its own. The point has been very vigorously canvassed before me with great skill by all counsel concerned and I am very much indebted to them. I would have liked the opportunity, had this not been the end of the legal year, to have put my conclusions in writing after rather more thought than I can possibly give them at the conclusion of argument of this kind; but as I have formed, rightly or wrongly, a clear view of the matter I have no hesitation in giving them now and briefly. C D E

Counsel for the first defendants says that s. 4 of the Arbitration Act, 1950, means precisely what it says. Under s. 4 (1) there is a discretion in the court to stay proceedings or otherwise (1); but under s. 4 (2), which concerns what are conveniently called protocol cases (2) there is no discretion and the court, if satisfied that the provisions of s. 4 (2) have been complied with, "shall", in the words of the subsection, "make an order staying the proceedings". If, therefore, I am satisfied that the present case is caught under the protocol restrictions I have no discretion to exercise. In that connexion evidence was put before me of two documents in the Treaty Series of 1925 and 1928, reinforced by a certificate from the librarian and Keeper of the Papers at the Foreign Office which leave me in no doubt that the protocols between this country and the Republic of France were duly ratified. The British ratification was deposited in September, 1924, and the French ratification was deposited in June, 1928, and the librarian at the Foreign Office certifies: "The protocol is still in force between the United Kingdom and France". No evidence being called to the contrary, I of course accept that certificate and I find that the protocol, as certified by the librarian at the Foreign Office, is still in force. F G

That brings me back to counsel for the plaintiffs' argument. He pointed out that there is a point of law yet to be argued; but he submits it is eminently arguable, and not, as counsel for the first defendants put it, nugatory. I accept at once that there is a point, possibly difficult, to argue here whether or not the towage agreement of December, 1958, exists at all, and at some stage that H

(1) Section 4 (1), so far as material, reads: "If any party to an arbitration agreement . . . commences any legal proceedings in any court against any other party to the agreement . . . in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." I

(2) Section 4 (2), so far as material, is set out at footnote *, p. 662, ante.

A will have to be considered. It is, of course, a matter of some regret that the point was not raised before; but counsel for the plaintiffs, with his usual candour, took the blame on his own shoulders and said the idea was his and apparently was brought forward by him at a later stage when he was consulted in the matter.

I approach the matter in this way: At some time a substantial point of law on the validity of this agreement will have to be argued before some tribunal B and with a result which I cannot now possibly foresee. I am not disposed to say that there is no point to argue. For all I know, there may be very strong argument to be developed in favour of counsel for the plaintiffs' point. Having decided that I now have to consider the real point in this case: whether the possibility that the original agreement may be void is a sufficient ground for voiding not only the agreement, but also the submission to arbitration.

C Counsel for the first defendants in his reply argued that until the agreement was shown to be void it was in existence as an agreement to which the protocol of s. 4 (2) applied, and I believe that to be the correct approach. The point in its essence is not a very complicated one. It can be stated in this way. On the face of it there is a perfectly valid and effective agreement entered into between the parties, whom I am prepared to assume were quite familiar with maritime D law and custom in general as well as commercial usage. That agreement was put into effect when the tow started. That operation terminated disastrously at some point en route. The parties to the agreement treated it as alive when they entered into the agreement for submission in November, 1959, and it was only later, as I have already mentioned, that doubts were thrown on it. I cannot at this stage decide whether the agreement was good or bad. It may be E voidable, but not on the face of it void, although it may be determined hereafter so to be. But I have come to the conclusion that I would be quite wrong to treat this as a void agreement or as a void submission to arbitration until the matter had been decided by a court or by an arbitrator.

The question whether or not the arbitrator has power to determine the validity of an agreement of this kind was considered, though not, I think, F directly, in *Heyman* v. *Darwins, Ltd.* (3). That was a case with an arbitration clause which provided that any difference or dispute which may arise " in respect of " or " with regard to " or " under the contract " shall be referred to arbitration. What happened in that case was that a dispute arose between the parties and the appellants commenced an action against the respondents claiming (a) a declaration that the respondents had " repudiated and/or evinced an G intention not to perform " the contract and (b) damages. The respondents, who admitted the existence of the contract and denied that they had repudiated it, applied to have the action stayed in order that it might be dealt with under the arbitration clause, and it was held by their Lordships that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed.

The facts in that case were a good deal different from the facts in the present H case, but there were some general observations from their Lordships which deal with the general question of the power of an arbitrator to decide whether or not the contract was void and unenforceable. VISCOUNT SIMON, L.C., said this (4):

> " . . . it is of much practical importance that the law should be quite plain as to the scope of an arbitration clause in a contract where the clause I is framed in wide and general terms such as this, and I trust that the decision of the House in this appeal may be useful for this purpose and will remove any misunderstanding which may have grown up out of certain phrases in some of the previous decisions to which I have referred. At the risk of some repetition, I would summarise what I conceive to be the correct view on the matter as follows.

(3) [1942] 1 All E.R. 337; [1942] A.C. 356.
(4) [1942] 1 All E.R. at p. 343; [1942] A.C. at p. 366.

"An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

"If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so."

I pause there to consider one phrase in particular in the Lord Chancellor's speech because he has used the phrase there of the alleged contract being void ab initio, giving as an example the fact that such a contract was illegal; so that if the agreement or the contract is void ab initio there is clearly nothing on which to found an arbitration clause. But quite different, as I see it, is the position where the contract is not void ab initio, but may on examination be pronounced void; that is, until that stage it is voidable only.

Other observations are to be found in the speeches of their Lordships in that case of which I would refer briefly to two only. LORD WRIGHT said this (5):

"I see no objection to a submission of the question whether there ever was a contract at all, or whether, if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question."

LORD PORTER said this (6):

"Meanwhile, I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so."

It is important at this stage to look at the words themselves both in the contract of towage and the submission. Clause 14 of the towage agreement provides:

"That in the event of any dispute arising in connexion with this agreement the same shall be submitted to arbitration in the U.K. in accordance with the terms of the Arbitration Act, 1950 . . ."

The submission to arbitration (which was drafted and approved by the solicitors on both sides, very experienced in maritime work), said this:

(5) [1942] 1 All E.R. at p. 353; [1942] A.C. at p. 385.
(6) [1942] 1 All E.R. at p. 357; [1942] A.C. at p. 392.

A "All questions between the parties hereto in connexion with the loss of the said vessels shall be and are hereby referred to the sole arbitrament of Mr. John Vickers Naisby, Q.C."

I propose to take the agreement first. As I have already indicated, it may on examination prove to be a nullity, but in my view at the moment until the matter has been decided it must stand. I do not propose to discuss at this stage, B or at all, whether the submission to arbitration could stand by itself as an independent contract. Having regard to the view that I have formed about the agreement for towage I do not myself think it necessary to discuss that. I would, if necessary, like to reserve any expression of opinion on that interesting topic to an occasion when it really arises.

I am now in this position. I have no doubt at all that the arbitration clause C in the agreement is enforceable, and it is reinforced, as it were, by the submission to arbitration. Counsel for the first defendants has said that it is a clear case of a protocol arbitration under s. 4 (2), and, on the findings which I have made, I can find no escape from that. That means that it is caught within s. 4 (2) of the Arbitration Act, 1950.

I have, however, been asked expressly by counsel for the first defendants, D in view of the possibility of an appeal, to deal with the question how I would have exercised my discretion if I had been able to find that this was a submission in an arbitration agreement under s. 4 (1). I was rather tempted at an earlier stage in the argument to suggest that time and money might be saved if the issue as to the validity of the agreement went straight to this court, because it appears to me then that it would save possibly one stage in the litigation by E cutting out, if necessary, an appeal from the arbitrator to this court, thence to the Court of Appeal and perhaps finally to the House of Lords. It was pointed out to me by counsel for the plaintiffs that the issue of law here is not only interesting but also concerns damages which have been roughly assessed at about a quarter of a million pounds. I expressed hope at that stage that possibly some form of compromise might be reached as to the disposal of that F matter by going straight to the court; but having heard counsel for the first defendants' argument in reply I have come to the conclusion that on balance, taking all the circumstances into account, justice would be better done if I exercise my discretion in favour of staying the suit because there has been already a long delay and in my view the probabilities are that the arbitration might be set down and dealt with before this court could find time after pleadings G had been closed to deal with the issue. He also pointed out that although so far the question has devolved entirely on the point of law of the construction of the agreement, there may have to be canvassed serious questions of fact, about which I know nothing since they have not been dealt with on this application to stay. Lastly he pointed out with force that the parties having agreed to an arbitrator of great experience at the Admiralty Bar, there was no reason here H to fear that the learned arbitrator would not be sufficiently well-equipped to deal with any question of law likely to arise. In the end I came to the conclusion that if I had had a discretion to exercise I should on balance have exercised it in favour of a stay; but, as I have said, I have determined this matter in the light of s. 4 (2). Once I have found the agreement to be within that subsection I have no choice but to stay the suit, and that I do.

Order accordingly.

Solicitors: *Thomas Cooper & Co.* (for the plaintiffs); *Theodore Goddard & Co.*, agents for *Andrew M. Jackson & Co.*, Hull (for the first defendants).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

A

R. *v.* JONES.

[COURT OF CRIMINAL APPEAL (Ashworth, Salmon and Winn, JJ.), July 24, 25, October 4, 1961.]

Criminal Law — Evidence — Cross-examination — Previous conviction — Cross-examination of accused as to similar acts—Existence of previous conviction of some offence shown by accused's evidence in chief—Admissibility of questions in cross-examination—"Tending to show"—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 *proviso* (*f*) *and exception* (*i*).

B

Criminal Law—Sentence—Consecutive sentences—Whether sentence of life imprisonment to run consecutively with sentence of imprisonment then being served permissible and desirable.

C

In s. 1 proviso (f) of the Criminal Evidence Act, 1898*, the words "tending to show" mean, on their true construction, "tending to reveal", and if the revelation as to the previous conviction has already been deliberately made by the accused himself, the prohibition enacted by the first part of the proviso does not apply (see p. 674, letter D, post).

D

The appellant was charged with the non-capital murder of a young girl guide. Three months previously he had been convicted of rape on another young girl guide and sentenced to fourteen years' imprisonment. There were significant similarities between the two cases, such as would have rendered admissible at the murder trial evidence as to the circumstances in which the offence of rape was committed, for the purpose of identifying the appellant as the offender in both cases. The cross-examination of a police officer by the appellant's counsel and the examination-in-chief of the appellant were such that the jury were made aware by him that he had been convicted of some unspecified offence. In the absence of the jury counsel for the Crown requested leave to put to the appellant in cross-examination questions based on evidence given by the appellant at his trial for rape. It seemed that the judge inclined to the view that the matter was one for the discretion of the prosecution, not for his discretion. He clearly indicated, however, unwillingness to rule against admitting the questions. The questions were put and were such as to create an impression that the appellant had committed or had been charged with some other offence previously, which had been reported in a Sunday newspaper. The appellant was convicted and sentenced to life imprisonment to commence at the end of the sentence he was then serving for his conviction of rape. On appeal against conviction and sentence,

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Held: (i) the discretion whether the questions were admissible was that of the judge and not of the prosecution (see p. 672, letter B, post).

(ii) the questions put in cross-examination of the appellant did not, in so far as they tended to show that the appellant had been previously convicted, tend to reveal anything of which the jury had not previously been aware (see p. 674, letter D, post); therefore, they were admissible, since they did not, within the true meaning of s. 1 proviso (f) of the Act of 1898, tend to show that the appellant had committed or had been convicted of or charged with any offence other than that with which he was charged at his trial (see p. 675, letter D, post).

H

I

Dicta in *R.* v. *Ellis* ([1910] 2 K.B. 746) applied.

(iii) the judge had power to make the life sentence consecutive to the earlier sentence of fourteen years, though a consecutive sentence was undesirable (see p. 675, letter I, post).

Per CURIAM: (i) if the cross-examination had tended to show that the appellant had committed the particular offence of rape for which he had

* Section 1, proviso (f) is set out at p. 673, letter C, post.

A been convicted previously, the cross-examination would have been justified by exception (i) to s. 1 proviso (f) of the Act of 1898, notwithstanding that the Crown had not first adduced evidence of the commission of the crime by the appellant; nevertheless it may be undesirable, in general, that such matter be adduced first in cross-examination (see p. 675, letters A and B, post).

B (ii) even if circumstances in which an accused was charged previously are relevant (as, e.g., where a precisely similar alibi was set up), cross-examination in relation to them will usually be inadmissible if it is impossible to conduct it without revealing that the accused had previously been merely charged, for exception (i) to s. 1 proviso (f) of the Act of 1898 does not extend to such cross-examination owing to the absence of the words " or charged C with " from the exception (see p. 674, letter H, post).

Appeal dismissed.

[As to admissibility of similar acts, see 10 HALSBURY'S LAWS (3rd Edn.) 443, para. 819; and for cases on the subject, see 14 DIGEST (Repl.) 420-423, *4090-4094, 4097-4104, 4118.*

As to cross-examination of defendant and admissibility of evidence on previous D charges, see 10 HALSBURY'S LAWS (3rd Edn.) 449-453, paras. 828, 829, 831; and for cases on the subject, see 14 DIGEST (Repl.) 511, 512, *4942-4945, 4948, 4949, 4956-4958,* 515, *4983.*

As to concurrent and consecutive sentences, see 10 HALSBURY'S LAWS (3rd Edn.) 493, para. 898, note (f); and for cases on the subject, see 14 DIGEST (Repl.) 375, *3673, 3674,* 565, *5645, 5646.*

E For the Criminal Evidence Act, 1898, s. 1 proviso (f), see 9 HALSBURY'S STATUTES (2nd Edn.) 614.]

Cases referred to:

Makin v. *A.-G. for New South Wales,* [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 14 Digest (Repl.) 420, *4094.*

F *Maxwell* v. *Director of Public Prosecutions,* [1934] All E.R. Rep. 168; [1935] A.C. 309; 103 L.J.K.B. 501; 151 L.T. 477; 98 J.P. 387; 24 Cr. App. Rep. 152; 14 Digest (Repl.) 515, *4983.*

R. v. *Cohen,* [1938] 3 All E.R. 380; 159 L.T. 477; 26 Cr. App. Rep. 190; 14 Digest (Repl.) 512, *4957.*

R. v. *Cokar,* [1960] 2 All E.R. 175; [1960] 2 Q.B. 207; 124 J.P. 313; 44 Cr. App. Rep. 165; [1960] 2 W.L.R. 836; 3rd Digest Supp.

G *R.* v. *Ellis,* [1910] 2 K.B. 746; 79 L.J.K.B. 841; 102 L.T. 922; 74 J.P. 388; 5 Cr. App. Rep. 41; 14 Digest (Repl.) 636, *6448.*

R. v. *Straffen,* [1952] 2 All E.R. 657; [1952] 2 Q.B. 911; 116 J.P. 536; 36 Cr. App. Rep. 132; 14 Digest (Repl.) 428, *4158.*

Stirland v. *Director of Public Prosecutions,* [1944] 2 All E.R. 13; [1944] A.C. 315; 113 L.J.K.B. 394; 171 L.T. 78; 109 J.P. 1; sub nom. *R.* v. H *Stirland,* 30 Cr. App. Rep. 40; 14 Digest (Repl.) 511, *4949.*

Appeal.

This was an appeal by Albert Arthur Jones against his conviction and sentence on June 19, 1961, at the Central Criminal Court before SACHS, J., and a jury, for the non-capital murder of Brenda Jean Nash. He was sentenced to life I imprisonment, the sentence to commence on the expiration of a sentence of fourteen years' imprisonment imposed on him at the Central Criminal Court on Mar. 15, 1961, on his conviction by a jury of the rape of a girl aged eleven years. The grounds of appeal against conviction included the ground that the judge wrongly permitted the cross-examination of the appellant and his wife as to certain conversations between them and wrongly held that he had no discretion to disallow such cross-examination or wrongly refused to exercise such discretion, and that the probative value of such cross-examination was far outweighed by the prejudice it tended to create as it suggested to the jury that the appellant

had been previously questioned about similar conversations and reminded them that he had recently been convicted for rape. On sentence, it was submitted that the judge failed to sentence the appellant in accordance with s. 9 (1) of the Homicide Act, 1957*.

The facts appear in the judgment of the court. The cases enumerated below were cited in argument in addition to those in the judgment†.

N. J. L. Brodrick, Q.C., and *Michael Hoare* for the appellant.

J. M. G. Griffith-Jones and *J. C. Mathew* for the Crown.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *J. R. Cumming-Bruce* as amici curiae.

Cur. adv. vult.

Oct. 4. **ASHWORTH, J.:** Before I read this judgment of the court I should perhaps say that it has been seen and approved by WINN, J., who is unable to be present today, and has, in fact, been jointly prepared by all three members of the court.

The appellant was convicted of murder at the Central Criminal Court on June 19, 1961. The victim was a young girl, and on the evening of Oct. 28, 1960, she attended a girl guide meeting, leaving for home at about 9.25 p.m. She was not seen alive again; but on Dec. 11, 1960, her body was found near Camberley; it appeared that she had been indecently assaulted, struck about the head and strangled. Underneath her head was found a small piece of chain. The appellant is a married man with a fifteen-year-old son and lived at Hounslow. He was the owner of a black Vauxhall car and there was evidence to the effect that a car of that type was seen on the evening of Oct. 28 in the area where the girl was last seen alive. There was also evidence that the driver of that car was the appellant. Some three months before his trial on the charge of murder,

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* Section 9 (1), so far as material, reads: "Where a court . . . is precluded by this Part of this Act from passing sentence of death, the sentence shall be one of imprisonment for life."

† The following cases were cited in argument on conviction: *R.* v. *Blake*, (1844), 6 Q.B. 126; *R.* v. *Rawton*, (1864), Le. & Ca. 520; 10 Cox, C.C. 25; *R.* v. *Chitson*, [1909] 2 K.B. 945; 2 Cr. App. Rep. 325; *Perkins* v. *Jeffery*, [1915] 2 K.B. 702; *R.* v. *Lee Kun*, [1916] 1 K.B. 337; 11 Cr. App. Rep. 293; *R.* v. *Kennaway*, [1917] 1 K.B. 25; *R.* v. *Lovegrove*, [1920] 3 K.B. 643; *R.* v. *Cravitz*, (1931), 23 Cr. App. Rep. 74; *Woolmington* v. *Director of Public Prosecutions*, [1935] All E.R. Rep. 1; [1935] A.C. 462; 25 Cr. App. Rep. 72; *R.* v. *Day*, [1940] 1 All E.R. 402; 27 Cr. App. Rep. 168; *R.* v. *Sims*, [1946] 1 All E.R. 697; 31 Cr. App. Rep. 158; *Noor Mohamed* v. *R.*, [1949] 1 All E.R. 365; [1949] A.C. 182; *Harris* v. *Director of Public Prosecutions*, [1952] 1 All E.R. 1044; [1952] A.C. 694; *R.* v. *Wattam*, (1952), 36 Cr. App. Rep. 72; *R.* v. *Samuel*, (1956), 40 Cr. App. Rep. 8; *R.* v. *Dunbar*, [1957] 2 All E.R. 737; [1958] 1 Q.B. 1; 41 Cr. App. Rep. 182.

The following cases were cited in argument on sentence after the court had intimated the appeal would be dismissed: *R.* v. *Greenberg, No. 2*, [1943] 1 All E.R. 504; [1943] K.B. 381; *R.* v. *Cannell*, (1953), 37 Cr. App. Rep. 188; *R.* v. *Cunningham*, [1955] Crim. L.R. 193, where the Court of Criminal Appeal substituted a sentence of life imprisonment for what LORD GODDARD, C.J., as president of the court, described as the worst case of rape for years. In the course of his judgment he said "Under the Criminal Justice Act, 1948, where a sentence of life imprisonment is imposed the Home Secretary has always power at any time to review the sentence and it may be that it would be more beneficial to the public and more merciful to the prisoner if we alter the sentence from a definite period of eighteen years to a sentence of life imprisonment. That will enable this man to be kept until the Home Secretary is satisfied that if he is allowed to go out into the world again, women will be safe from him. It will not necessarily keep him as long as the sentence passed upon him; it may keep him for that time or it may keep him longer." *R.* v. *Grantham*, [1955] Crim. L.R. 386, where the Court of Criminal Appeal took the same course as in *R.* v. *Cunningham* and substituted a life sentence for fifteen years' imprisonment for similar reasons; *R.* v. *Holmes*, [1955] Crim. L.R. 578, where the Court of Criminal Appeal substituted for a sentence of ten years' imprisonment a life sentence for similar reasons; *R.* v. *O'Connor*, [1960] Crim. L.R. 275, where the Court of Criminal Appeal substituted a sentence of five years' imprisonment for one of life on the ground that it was a case which merited punishment, and punishment for a definite number of years and not a sentence which puts the duty of deciding when to release the prisoner on other authorities; *R.* v. *Blake*, ante, p. 125.

A the appellant was convicted at the Central Criminal Court on a charge of rape, the victim on that occasion also being a young girl guide who was attacked on her way home from a guide meeting in September, 1960. There were significant similarities between the two cases which it is unnecessary to set out in detail; it is sufficient to say that, in the opinion of this court, they were such as would have rendered admissible on the murder trial evidence as to the circumstances B in which the offence of rape was committed, for the purposes of identifying the appellant as the offender in both cases: for the relevant principles, see *Makin* v. *A.-G. for New South Wales* (1), and, more recently, *R.* v. *Straffen* (2). In addition to these similarities, there was a further remarkable feature common to both cases. When the police first interviewed the appellant in the course of their inquiries into the murder, the appellant accounted for his movements on C the evening of Oct. 28 by stating that he had paid a visit to his sister-in-law at Beckenham. This statement was admittedly false; but the appellant adhered to it until Jan. 6, 1961, or thereabouts, when he substituted the account of his movements which he later gave in evidence at the murder trial, namely, that he had spent the late evening of Oct. 28 with a prostitute in the West End [of London]. This revised account included details of his wife's stormy reaction to D his late return home, and her conversations with him on the two following days. When the appellant was tried on the rape charge in March, 1961, the account of his movements on the relevant evening in early September, 1960, and his wife's reaction was almost exactly the same as the revised account relating to Oct. 28. The main issue at the hearing of the appeal against conviction was whether the appellant could be cross-examined in the murder trial in regard to the two E similar explanations which he had given concerning his movements on the respective evenings, with a view to showing that the similarities between them were so remarkable as to render the evidence incredible.

It is convenient first to dispose of the other issue raised in the appeal against conviction. As already stated, a small piece of chain (exhibit 7) was found under the victim's head, and when the appellant's house was searched two pieces of F chain were found in his son's room (exhibits 10 and 11). An expert witness called for the Crown said that the three pieces were of similar pattern and of similar material, but that exhibit 7 had been made on a different machine from that on which exhibits 10 and 11 were made; later in his evidence he added that the shape of the links in exhibit 7 was different from that of the shape of the links in exhibits 10 and 11. There was evidence that the appellant had mended G chains for his son, and the suggestion made by the prosecution was that exhibit 7 had fallen from his pocket when he was concealing the girl's body near Camberley. If there had been any peculiarity about exhibit 7 and a similar peculiarity had been found in exhibits 10 or 11, the prosecution's suggestion would have been of great cogency, but in fact there was no such peculiarity and the chains in question were all of a cheap and common type, obtainable at many multiple stores. In H these circumstances, while the evidence was relevant, it was by no means conclusive. The learned judge, however, was undoubtedly greatly impressed by it, and, in the course of his summing-up, commented in strong terms on the improbability of there being, so to speak, no common link between the three exhibits. It was contended for the appellant that these comments were based on a misapprehension of the evidence, alternatively that they were not justified I by the evidence, and in any event amounted to misdirection. We cannot take that view. It may be that the learned judge's view was expressed more strongly than the facts warranted, but he had already directed the jury that, if they disagreed with any of his comments, they could and should disregard them, and, in our opinion, there was no misdirection in regard to the three exhibits.

As already stated, the main issue relates to questions asked during the cross-examination of the appellant. Before that cross-examination began, counsel for

(1) [1894] A.C. 57. (2) [1952] 2 All E.R. 657; 36 Cr. App. Rep. 132.

the Crown rightly mentioned the matter to the learned judge in the absence of the jury, and requested, in so far as it was a matter for the discretion of the judge, permission to put questions based on the evidence which the appellant had given in his trial for rape. At that stage a discussion ensued on the footing that the matter depended solely on the exercise of a discretion. The learned judge seems to have been inclined to the view that it was a matter not for his discretion but for the discretion of the prosecution. He clearly indicated, however, his unwillingness in any event to rule against the proposed questions. In this connexion, we think it right to emphasise that, in our view, if the questions were in law admissible, the matter was one for the learned judge's discretion and not for the prosecution's.

In *Stirland* v. *Director of Public Prosecutions* (3), VISCOUNT SIMON, L.C., said (4):

> "It must not be forgotten that the judge presiding at a criminal trial has a discretion (as VISCOUNT SANKEY, L.C., said in *Maxwell's* case (5)) to disallow questions addressed to the accused in cross-examination if he considers that such questions, having regard to the issues before the jury and to the risk of the jury being misled as to what those issues really are, would be 'unfair', and the judge's disallowance cannot be challenged on appeal."

At the hearing before us it was not seriously contended that, if the questions were in law admissible, the learned judge's exercise of his discretion in permitting the questions was open to criticism, and we are of opinion that the relevance and probative value of the evidence resulting from the questions were such as to make it quite impossible to say that the learned judge erred in principle.

The relevant part of the cross-examination of the appellant is contained in just over three pages of the transcript. We do not think it necessary to set out the questions and answers in full, but we quote the following:

> "Q.—Were you asked some time ago about another occasion when you had been out at night and coming home late? A.—Yes. Q.—The date on which you were late home one night, was that a few weeks before Oct. 28? A.—Yes. Q.—And did you give an explanation as to what you had been doing on that night and what took place on that night? A.—Yes. Q.—Was the explanation that you gave then the truth? A.—Yes . . . Q.—Did you say, and I am reading from a note of what was taken down and you must tell me if it is correct or not, 'She was very annoyed and wanted to know where I had been'? A.—Yes . . . Q.—I want you to think: when you were giving that explanation about the previous week-end, and in particular that Sunday, did you say that your wife came into the kitchen and showed you a newspaper? A.—Yes. Q.—A newspaper carrying an account of some incident, and did you say that she said this, 'Do you know anything about this?'? A.—Yes . . . Q.—Did you say of that previous week-end when she put the paper before you and asked you that, 'Good Lord, you do not think I had anything to do with that'? A.—I think that is what I said. Q.—That is virtually what you have told us you said on Sunday the 30th? A.—Yes . . . Q. —I want to make it quite clear what I am putting to you: You have given two explanations of your movements on two different evenings on each of which you happen to turn up late at home? A.—Yes. Q.—And the position is this, is it not, that each of those explanations is virtually word for word the same as the other? A.—Well, yes."

In our view, this part of the cross-examination of the appellant, taken as a whole, must have created the impression in the minds of the jury that the

(3) [1944] 2 All E.R. 13; 30 Cr. App. Rep. 40.
(4) [1944] 2 All E.R. at p. 17; 30 Cr. App. Rep. at p. 55.
(5) *Maxwell* v. *Director of Public Prosecutions*, [1934] All E.R. Rep. at p. 174; [1935] A.C. at p. 321; 24 Cr. App. Rep. at p. 173.

A appellant had, shortly before the murder of Brenda Nash either committed or been charged with some offence on a Friday night which was reported in a newspaper on the following Sunday. If our view is right, the problem arises whether the questions were forbidden by s. 1 of the Criminal Evidence Act, 1898.

The Act of 1898 provided safeguards for an accused person who chooses to give evidence and was designed to apply the same principles to evidence elicited B by cross-examination of the accused, as were laid down in *Makin* v. *A.-G. for New South Wales* (6) as being applicable to evidence led by the prosecution. The relevant provisions of s. 1 of the statute are as follows:

> "Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . . Provided as follows:— . . . (e) A person charged and being a witness in pursuance of this Act may be C asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged: (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i) the D proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, . . . or (iii) he has given evidence against any other person charged with the same offence."

E The safeguards afforded to an accused person were considered by this court in *R.* v. *Ellis* (7), where the following words appear (8):

> "It will be convenient to consider, first, what is the meaning of the words of the statute—'any question tending to show that he has committed . . . any offence, . . .' It is plain that it must include many more questions than F the simple question whether the prisoner has committed a particular offence. It is also plain that whether the question 'tends to show' cannot be decided by looking merely at a single question. Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any G question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would, in our opinion, tend to show that the prisoner had committed that other offence. It does not in the least depend on the object of the counsel putting the question. The words of the Act are not 'with a view to show', they are 'tending to show'. Moreover, if they do so tend, it is quite H immaterial whether the evidence would be admissible or the question admissible on other grounds. As we read the statute, when a prisoner is charged with offence A, questions tending to prove offence B are not to be asked unless the proof of offence B is evidence of offence A. If it were otherwise the protection of the prisoner would be liable to be destroyed by a side wind. This disposes also of the proposition that the questions were admissible I as going to the general credit of the witness. Nothing goes more to the general credit of a witness than a previous conviction; but no question tending to show this is to be asked."

See also *R.* v. *Cohen* (9). In considering our decision in the present appeal, we have kept well in mind the principles applied in the two cases last cited and in other similar cases.

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(6) [1894] A.C. 57. (7) [1910] 2 K.B. 746; 5 Cr. App. Rep. 41.
(8) [1910] 2 K.B. at p. 757; 5 Cr. App. Rep. at pp. 55, 56.
(9) [1938] 3 All E.R. 380; 26 Cr. App. Rep. 190.

Section 1, proviso (f), includes within its ban two distinct lines of questioning. In the first place, it prohibits questions tending to show that the accused has committed or been convicted of or been charged with any offence other than that wherewith he is then charged. In the second place it prohibits questions tending to show that the accused is of bad character. In a sense it may be said that the two lines overlap, since questions tending to show conviction of any other offence would almost certainly tend to show that the accused was of bad character, but, in our view, any difficulty of construction arising on this score can be met by treating the second part of proviso (f) as referring only to questions tending to show that the accused is otherwise than (i.e., apart from any other offence within the first part) of bad character. It was a feature of the present case that, in the course of the cross-examination of a police officer by the appellant's counsel and in the course of the appellant's own evidence in chief, reference was made to the fact that the appellant " had been in trouble with the police ". Accordingly, as was conceded by counsel for the appellant during the hearing of this appeal, the jury were made aware, at the appellant's own instance, of the fact that he had been convicted before of some unspecified offence. This is the meaning which they would certainly have given to the expression quoted, unqualified as it was by any statement that such " trouble " had been cleared up by an acquittal. In these circumstances, in so far as the cross-examination of the appellant tended to show only that he had been previously convicted, it did not tend to reveal anything to the jury of which they had not already been made aware. In our opinion, the words in the proviso, " tending to show ", mean, on their true construction, " tending to reveal ", and if the revelation as to a previous conviction has already been deliberately made by the accused himself, the prohibition enacted by the first part of the proviso does not apply.

At this stage it is convenient to mention the absence in exception (i) to proviso (f) of the words " or charged with ". This point was dealt with in *Maxwell* v. *Director of Public Prosecutions* (10), and was recently considered in this court in *R.* v. *Cokar* (11), in which LORD PARKER, C.J., said (12):

> ". . . it seems to this court quite impossible, under exception (i) . . . to question a man in regard to a charge in respect of which he was acquitted."

The reason for the absence of " charge " in exception (i) may be that proof that the accused had on a previous occasion been charged with another offence (as opposed to proof of commission or conviction) could not be " admissible " evidence to show that he is guilty of " the offence wherewith he is then charged " within the words of the exception. Moreover, even when the accused has put his character in issue, " it is no disproof of good character that a man has been suspected or accused of a previous crime." Such questions as: " Were you suspected? ", or " Were you accused? " are inadmissible because they are irrelevant to the issue of character and can only be asked if the accused has sworn expressly to the contrary, per VISCOUNT SIMON, L.C., in *Stirland* v. *Director of Public Prosecutions* (13). On the other hand, the circumstances in which an accused was previously charged, e.g., the fact that he set up a precisely similar alibi, may be highly relevant but impossible to elicit in cross-examination without revealing the fact that the accused has previously been merely charged. In such cases, the absence of the words " or charged with " in exception (i) would appear to make this line of cross-examination usually inadmissible.

It was urged on behalf of the appellant that the cross-examination tended to show that the appellant had committed the rape for which he was tried in March, apparently on the footing that it is to be assumed that the jury had derived the knowledge from newspapers or otherwise *extra* the evidence called in the murder

(10) [1934] All E.R. Rep. 168; [1935] A.C. 309; 24 Cr. App. Rep. 152.
(11) [1960] 2 All E.R. 175; 44 Cr. App. Rep. 165.
(12) [1960] 2 All E.R. at p. 176; 44 Cr. App. Rep. at p. 168.
(13) [1944] 2 All E.R. at pp. 18, 19; 30 Cr. App. Rep. at p. 55.

A trial of the circumstances of that rape. We cannot accept that submission, for there is no material before us to justify the assumption on which it is based. At the same time we are of opinion that, if that submission were right, or if counsel for the Crown had chosen to cross-examine the appellant with the express object of establishing that he had in fact committed the rape, the cross-examination would have been justified by virtue of exception (i). Counsel for the appellant B contended that cross-examination sanctioned by that exception is permissible only if the Crown have first adduced evidence as part of their case to prove that the accused in fact committed the other crime, but we see no reason in law to limit the operation of the exception in this way. Nevertheless we think it might in general be undesirable that such matter should be first adduced in cross-examination; in a case, unlike the present, in which the accused desired to dispute C or explain the alleged similarity of circumstances or pattern of the two offences he would thereby both be deprived of any opportunity to cross-examine prosecution witnesses and be exposed to the gravely prejudicial effect of suggestive questions to which his negative answer might be of no avail.

In our view, this appeal fails because the cross-examination did not tend to show (in the sense of revealing) that the appellant had committed or been D convicted of or been charged with any offence other than that wherewith he was then charged. Further, in so far as the cross-examination tended to show that he was of bad character, the revelation had likewise already been made.

There remains the question of sentence. The learned judge in passing sentence said:

E "You have been found guilty now of two crimes, evil to a degree beyond all adjectives, and it is proper that you should serve your sentence for the first crime and that neither as a matter of fact nor of appearance should it cease to be operative. In these circumstances I pass on you the sentence according to statute that you be sentenced to imprisonment for life and for the protection of the public I think firstly that it should be a sentence F to commence on the expiration of your existing sentence and secondly that it would be lamentable indeed if on the second sentence you did not serve a far longer time than on the first."

It was contended before us that the form of the sentence was wrong in principle in that it amounted to a "sentence of life imprisonment less the unremitted G portion of the sentence of fourteen years". Further, it was contended that the learned judge was in error in supposing that, if the sentence of life imprisonment were made to take effect at once, the sentence of fourteen years would merge with it and for practical purposes cease to operate. We were assisted on this point by the Attorney-General, as amicus curiae, and he assured us that the two sentences would not merge, if the life sentence were made concurrent, and H that the sentence of fourteen years would not be affected in any way. According to him, there was no practical difference whatever between a life sentence made concurrent and one made consecutive, but he submitted the view that it is undesirable to make the life sentence consecutive since it achieves no practical result. We have no doubt that the learned judge had power to make the life sentence consecutive to the earlier sentence of fourteen years, but we accept the I Attorney-General's submission that a consecutive sentence is undesirable. Since the practical result would be the same in any event, we see no reason to allow the appeal against sentence, and it is dismissed. We would only add that our attention was called to several unreported judgments of this court in regard to life sentences (14). It is, in our view, difficult to reconcile all the observations

(14) I.e., *R.* v. *Cunningham*, *R.* v. *Grantham*, *R.* v. *Holmes* and *R.* v. *O'Connor*, summarised at p. 670, letters H and I, ante.

contained in those judgments, but on the present occasion there is no need to attempt the task. A

Appeal dismissed.

Solicitors: *Owen White & Catlin* (for the appellant); *Director of Public Prosecutions* (for the Crown); *Treasury Solicitor* (for the Attorney-General as amicus curiae).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*] B

WITHERS *v.* PERRY CHAIN CO., LTD.

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), July 20, 21, 1961.] C

Master and Servant—Duty of master—Employment of servant—Employment only possible at some risk to health of servant—Servant wishing to engage or continue in employment—No duty on master to refuse to employ or to dismiss servant.

On Apr. 9, 1956, an employee, after five years in the same job, had to stop work because of dermatitis. The dermatitis was due to grease with which the job brought her into contact, but the employers took all proper precautions and were in no way to blame for it. On May 14, 1956, the employee returned and asked for a job. The employers then gave her a different job (job No. 2), which was in their opinion the driest job that they had available for her, but in which there was some contact with grease. The employee again developed dermatitis on June 22, 1956, and was off work until Aug. 14, 1956, when she asked for, and was given back, job No. 2. She developed dermatitis again, and was off work from Sept. 26, 1956, to Nov. 12, 1956, when she returned, asked for work, and was offered and accepted job No. 2 again. On appeal by the employers against a finding by the trial judge that the employers were negligent in permitting the employee to continue with job No. 2 in and after May, 1956, D E F

Held: the appeal must be allowed because the employers were under no duty to dismiss or to refuse to employ an adult employee who wished to do a job merely because there might be some slight risk to the employee in doing the work.

Per DEVLIN, L.J.: if the employer were to conceal the risk or fail to give the employee information which he had and which might help her to evaluate it properly, there might perhaps be a liability, or there might be a case where the employer impliedly warranted that the job was safe for the employee (see p. 680, letter H, post). G

[As to a master's common law duty of care for his servants' safety, see 25 HALSBURY'S LAWS (3rd Edn.) 508, para. 976; and for cases on the subject, see 34 DIGEST 194-196, *1580-1601.*] H

Case referred to:

Paris v. *Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.

Appeal.

The defendant employers appealed against the decision of STEVENSON, J., at Swansea Assizes on Dec. 5, 1960, that they were liable in damages for negligence to the plaintiff, their employee. The facts are stated in the judgment of SELLERS, L.J. I

D. P. Croom-Johnson, Q.C., and *P. L. W. Owen* for the defendants.
H. E. Hooson, Q.C., and *B. Griffiths* for the plaintiff.

SELLERS, L.J.: It is, I suppose, to be accepted (as counsel for the plaintiff seemed to think it was) that gratitude is not to be found in industrial relationships,

A but this present claim by the plaintiff against her employers, the defendants, does seem to me to have an element of ingratitude. When she was a girl of some seventeen or eighteen years of age she went into the employment of the defendants, who apparently manufacture component parts for bicycles. She continued in her employment for some five or six years before anything untoward occurred to her, but apparently she has a skin which is susceptible to certain ingredients B in lubricating grease, oil and paraffin, which she used over those five years in the course of her work. She had to assemble some parts. In the first task, which has been referred to as job No. 1, she was assembling ball-bearing cages, something to do with the hub of a bicycle, and placing a dust cover over the assembly. In the course of that she had to put some grease in the lining of the hub. Having been employed from 1951 on the same work, she developed C skin trouble on both hands to such extent that she had to stop work on Apr. 9, 1956. She was off for three or four weeks. No one, I think, has suggested that the employers could be blamed for that misfortune. They had recognised that there are some people—although happily not all—who are affected by grease and they had taken all reasonable precautions by providing gloves if the operator wished to wear them and by providing cream, which was thought then at least D to be some protection against the irritant in the grease, and no breach of duty was established in any way. The girl was sufficiently informed of those matters. There were notices up, and there were ample washing facilities, as the judge found.

Having been off work for three or four weeks, she came back on May 14, 1956, with a certificate from her panel doctor which was a "clean" certificate, and E she asked for work. It was suggested (I am not sure whether it emanated from her) that she should go to some other employment. I think that she did ask for a change. The defendants through their servants, a Mr. West and a Mr. Brown, looked about for another employment, and she entered on what has been described as job No. 2, which was the assembling of a driving sleeve. That was free from grease and it was said to be, and thought, I am sure quite genuinely, F by Mr. Brown and Mr. West, to be the driest job available in the factory, having regard to the sort of work that she was qualified to do and was seeking to do, which was this automatic assembly work. She worked at that task from May 14 for a relatively short period until June 22, when she was off work again until Aug. 14, 1956. One has, as one traces the history later on, to recognise that much later, in 1959, there was an outbreak of dermatitis and it may be that this trouble in G June was a recurrence of and a sequel to her original dermatitis in April, 1956, but it is said that she was in contact between May and June with another different substance from that which was the cause of complaint in April, 1956, and that that had played its part in producing the skin trouble in June. She was off then for seven and a half weeks, which was a longer period than her first absence from work but not, I think I might say, an unduly long period having H regard to the experience one has of the effect of skin troubles of this sort.

She returned again and asked for work on Aug. 14, 1956, again producing a "clean" medical certificate. She sought, and was placed on, her previous job, No. 2, which she had been doing after her return in May—that is, the driving sleeve assembly. Again skin trouble developed, and on Sept. 26 she was off for a fairly long period. By Nov. 12 she had returned. She asked for work and I accepted work again on job No. 2, the same work which she had received when she asked for a change of employment on May 14 previously. But, when she returned on Nov. 12, she asked—very properly—if she could be transferred elsewhere, to see if that would be any better employment without this unfortunate consequence. The only work available free from contact with anything that might be said to be harmful, or substantially so, was in the packing department. However, the employers, perhaps of their own accord and certainly under trade union influence, were not prepared to dismiss someone in the packing department in order to give employment to the plaintiff but had it in mind to give her

different employment if a vacancy occurred. It did, in January, 1957, and from then onwards she went to her job No. 3, which was, as I understand, packing in greaseproof paper the complete hub assembly. She was on that work for the whole of 1957 and 1958 and was not apparently seriously inconvenienced by dermatitis until January, 1959. Then she went off work again.

Now, for some two years she had not been in contact with the material which was in use in job No. 2, and apparently there was not much grease, although perhaps a little, in job No. 3. That occurrence or outbreak of dermatitis may well be accounted for—as may be, if the facts were known, the intervening two—by the original skin trouble in April, 1956, which had been brought on by her earlier employment. It has not been so regarded in this case. In fact no one has sought to establish, as far as I can see, what did cause the skin trouble in January, 1959. It may of course have been brought about by many domestic matters wholly apart from her work—as indeed may the others, but one must concede that whilst at work there was contact with certain ingredients which might bring on skin trouble.

She was still at work, as I understand, up to the time of the trial, but perhaps with this temporary break in 1959 while she was still at work a writ was issued claiming damages against her employers alleging, as I understand, that, knowing that she was suffering and had suffered from dermatitis from about May 14, 1956, until Jan. 26, 1957, they employed her on work involving contact with lubricating suds which they ought to have known were irritant and might exacerbate or cause dermatitis. The learned judge found in her favour and awarded her some £480 odd damages, saying that he had come to the conclusion that the defendants

> "were negligent in permitting her to continue with the work she did on the driving sleeve assembly in and after May, 1956."

That is said to be a breach of duty found against the employers at common law, as no statute is invoked in the circumstances of this case. The position was that when the plaintiff returned after the first breakdown of the skin of her hands in May, 1956, there was this discussion about getting other work and it would appear clear that the defendants gave her what they thought to be the best available work which they had. In fact if she had not taken that work it would seem that she would not have worked at all and would not have earned any wages, which apparently she sought to do.

I cannot believe that the common law requires employers to refuse to employ a person who is willing to work for them simply because they think that it is not in the person's best interests to do the work. That would be imposing a restriction on the freedom of the individual which is foreign to the whole spirit of the common law of our country. That they have the right to refuse to employ her is clear, and many employers might be very selective in the workpeople they take on for various processes. But that is to the financial disadvantage of many who would be quite willing to do the work which is there available if they could only be engaged for it.

In this case the work to which the plaintiff was put when she got the alternative employment was, it would appear quite clear (and it was unchallenged), intended to be the driest work that they had. The component parts which she had to assemble for the driving sleeve portion of the bicycle came (in order to remove some of the roughness of the metal) through a bath consisting of some lubricating suds which had some oil in the proportion of one to forty-two of water. That was heated up to 170 degrees Fahrenheit and apparently had the effect of smoothing out the roughnesses of the component. After the component parts had passed through that bath they were then put into a hot air chamber of some sort, where they were to dry, and having been dried out they were then available, when they cooled, for the operator who had this task (which was the plaintiff's task at the time) to take them and assemble them. The case that was made was that this

A was not suitable employment for her because, having been through this bath of lubricating suds, they had attached to them sufficient of the deleterious ingredients in the suds (which was the mineral oil, I understand) to do some further damage to the skin of the operator's hands. This drying process, if it were properly carried out, would in all probability result in the removal of all liquid and all deleterious matter from the point of view of the plaintiff. That was the B view of the employers when they put her on this work. Perhaps it is too much to say that the process would *ensure* the removal of liquid and deleterious matter, which was the case that the plaintiff was trying to advance. She went to work at that process not once, not twice, but three times, without a word of protest that the parts which she had to assemble were coming out wet or unsuitable for her to assemble or in a manner in which they were likely to cause C her any trouble. If it had been just once that she had done the work and then said "Well, I cannot do that because I think there is a substance there which is going to do me harm", that would have been one case, but she comes back again on Aug. 14, 1956, and continues with the same work without any protest, and again later in the year, in November. All the time, one of those who had befriended her in finding her some work, Mr. West, was, on his evidence, D about the premises all day long.

When the case comes before the court, it is said that the employers should not have put her on this work, because these things were coming out wet. As an issue of fact, the learned judge seems to have preferred the plaintiff's evidence that they were. Quite why, when one looks at the evidence, I find it, with great respect to the learned judge, very hard to understand, because there was in fact E a device (it was, I think, an automatic device) whereby the component parts on a tray travelled through the lubricating suds into this drying process and after they were dried (as Mr. Brown clearly said in evidence) they had to cool, whereby one would have anticipated that the moisture would go off in the cooling process, and then they were stacked in boxes and stood on end before they were called on for assembly. As far as the defendants were concerned, though any workman F might lapse from time to time and not do his job properly, and it may be that on occasions the operator who superintended the washing of the parts hurried it a little too much and did not allow them long enough to dry, I cannot think that it was a very frequent occurrence. At any rate, the employers were familiar with their process, and as far as I can see they need not be aware that from time to time one of their employees might fail in his duty. However, as far as this case G is concerned, if this plaintiff had any complaint against a fellow-operator so closely adjacent to her in the process which had to be carried on, she has not alleged it. She never alleged it to Mr. West, who was about every day. She never alleged it in her work. She went back to the same circumstances that she had had on two occasions before, having worked there three separate times, and not a word was said about it. She had a good ground of action at common law, H if it was justified, by including in her claim, and perhaps putting in her claim exclusively, a liability of the defendants for the negligence of one of their servants, a fellow-servant of the plaintiff herself. That cause of action has been open to a worker in a factory for a long time now, but not a suggestion of that is made in the claim. On this appeal she sought to make some amendment so as to take advantage of such findings of the learned judge as there were in his judgment I in order to establish that type of responsibility of the defendants. This court thought, having regard to the course of the trial, the pleadings, and the way the evidence developed, that it was too late to raise any such allegation. For myself, on the evidence I do not think that such a case was established. [HIS LORDSHIP referred to certain evidence and continued:] This appeal has to be decided on the basis on which the learned judge decided it. With great respect to him, I think there is no such duty at common law requiring an employer to dismiss someone rather than to retain him or her and allow him or her to earn their wages, notwithstanding that there may be some risk. The duty remains

the same. The duty of the defendants in this case was to take all reasonable care for the plaintiff in the employment in which she was engaged, including, of course, a duty to have regard to the fact that she had had dermatitis previously. Beyond that I do not think the common law can be invoked.

Applying that standard, and no higher one, the evidence in this case does not establish any breach of that duty. The plaintiff had the advantage of her wages and her employment in circumstances in which every consideration was given by the defendants in order to assist her; and I add (as I think I started by saying) that it seems to me a little lacking in gratitude to bring this action against her employers when she has had the advantage which she sought to obtain.

I would allow the appeal and find in favour of the defendants.

DEVLIN, L.J.: The only allegation of negligence with which we have to deal is the one that is framed in para. 6 (c) of the statement of claim, which is as follows:

> " Knowing that the plaintiff was suffering or had suffered from dermatitis, from about May 14, 1956, until about Jan. 26, 1957, employed the plaintiff . . . upon work involving contact with lubricating suds, which they knew or ought to have known were irritant, and likely to exacerbate or cause dermatitis."

The learned judge has found that when the plaintiff returned to work in May, 1956, having suffered from dermatitis but being declared by her doctor to be fit for work, they ought not to have put her to work of a sort which contained a risk (although, as he says, " a small risk ") of recrudescence of this trouble. They did do so, and the learned judge finds them negligent in so doing. He states his conclusion in the words which SELLERS, L.J., has read:

> ". . . these defendants were negligent in permitting her to continue with the work she did on the driving sleeve assembly in and after May, 1956."

It has not been suggested that the defendants deliberately exposed the plaintiff to risk. They clearly were anxious to give her the sort of work that she wanted. But it is said that they ought to have appreciated that the job that they selected for her was not in fact safe for her and refused her permission to do it. In my opinion there is no legal duty on an employer to prevent an adult employee from doing work which he or she is willing to do. If there is a slight risk, as the judge has found, it is for the employee to weigh it against the desirability, or perhaps the necessity, of employment. The relationship between employer and employee is not that of a schoolmaster and pupil. There is no obligation on an employer to offer alternative safe employment, though no doubt a considerate employer would always try to do so—as the defendants thought they had done here. Nor is there any obligation on an employer to dismiss an employee in such circumstances. It cannot be said that an employer is bound to dismiss an employee rather than allow her to run a small risk. The employee is free to decide for herself what risks she will run. I agree with what SELLERS, L.J., has said, that if the common law were to be otherwise it would be oppressive to the employee, by limiting his ability to find work, rather than beneficial to him. If the employer were to conceal the risk or fail to give the employee information which he had and which might help her to evaluate it properly, there might perhaps be a liability; or I suppose there might be a case in which an employer impliedly warranted that a job was safe for a particular employee. I do not need to go into those questions because that is not the breach of duty which is alleged here. It may be also (on the principle of *Paris* v. *Stepney Borough Council* (1)) that when the susceptibility of an employee to dermatitis is known there is a duty on the employer to take extra or special precautions to protect such an employee. But it is not suggested that there were any extra or special precautions here which could have been taken. In my judgment the duty which is implicit in

(1) [1951] 1 All E.R. 42; [1951] A.C. 367.

A the learned judge's finding of negligence does not in law exist, and therefore his finding should be set aside.

There is, however, another matter with which we have been invited to deal in the course of this appeal. I said that it was not suggested that there were any extra or special precautions that ought to have been taken in connexion with the work which the plaintiff was given to do in May, 1956. It has, however, been B suggested that the defendants or their servants failed to take the ordinary precautions which ought to have been taken in connexion with that work in that they failed to see that the components which the plaintiff had to handle had been properly dried. That has nothing to do with the plaintiff's particular disability. Any employee, whether she had suffered from dermatitis or not, would be entitled to complain if she was put to work on components that were C supposed to be entirely dry and free from all deleterious substances if, through the negligence of one of her fellow-employees, they were found to be in a harmful condition.

I have read the allegation which is the only relevant one on which the learned judge made his finding. [HIS LORDSHIP considered the evidence on this point, referred to the application to raise negligence by a fellow servant, gave the D reasons for not allowing that matter to be raised, and concluded:] The learned judge's judgment being erroneous for the reasons that I have given, the appeal should, in my judgment, be allowed.

DANCKWERTS, L.J.: I agree with the judgments which have been delivered, and I do not think that it is necessary for me to add anything more.

E *Appeal allowed.*

Solicitors: *Clifford-Turner & Co.* (for the defendants); *Evill & Coleman* (for the plaintiff).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

F

NOTE.

FIELDRANK, LTD. *v.* STEIN.

G [COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), July 26, 1961.]

Practice—Summary judgment—Leave to defend—Conditional leave—Payment into court as condition of giving leave—Need for foundation for imposing such condition—R.S.C., Ord. 14, r. 1.

[As to conditional leave to defend, see 22 HALSBURY'S LAWS (3rd Edn.) 762, para. 1624; and for cases on the subject, see DIGEST (Practice) 278, *121.*]

H Cases referred to:

Jacobs v. Booth's Distillery Co., (1901), 85 L.T. 262; Digest (Practice) 278, *121.*

Lloyd's Banking Co. v. Ogle, (1876), 1 Ex.D. 262, 264; 45 L.J.Q.B. 606; 34 L.T. 584; Digest (Practice) 284, *178.*

Interlocutory Appeal.

I The defendant appealed from an order of MEGAW, J., dated July 4, 1961, made on appeal from a decision of a master on a summons by the plaintiffs asking for summary judgment for £366 14s. under R.S.C., Ord. 14. The facts are stated in the judgment of DEVLIN, L.J.

M. P. Solomon for the defendant.

J. R. Phillips for the plaintiffs.

DEVLIN, L.J., delivered the judgment at the request of SELLERS, L.J.: In this case the defendant appeals from an order made by MEGAW, J., in which the

learned judge refused to give unconditional leave to defend but gave leave on the condition that the defendant paid into court the whole of the amount claimed by the plaintiffs. The defendant now asks that that condition should be removed and that he should have unconditional leave to defend.

The claim is for £366 14s., and it is described in the statement of claim as money paid by the plaintiffs to the defendant for a consideration which has wholly failed. The particulars allege that the plaintiffs paid this sum to the defendant as a deposit on a contract to be negotiated by the defendant for the purchase on behalf of the plaintiffs of various quantities of Bedford springs and spares. They further allege that none of the goods have been delivered by the defendant and that the defendant has not returned the sum of £366 14s. It is not alleged that the contract was not negotiated by the defendant for the plaintiffs, and by implication, since it is complained that none of the goods have been delivered by the defendant, it would appear that it is accepted that it has been. If the contract has been negotiated and the goods have not been delivered to the plaintiffs, the proper claim in law is not for repayment of money for a consideration which has wholly failed, but for such relief as a principal may obtain if an agent who has bought goods on his behalf and been paid for them fails to hand them over. However, that is the way in which the claim has been presented; and we have no further enlightenment on it because, apart from the formal affidavit under R.S.C., Ord. 14, there has been no affidavit filed by the plaintiffs.

The defendant has filed an affidavit in which he sets out a case which is accepted by counsel who has argued the case on behalf of the plaintiffs as raising a triable issue under R.S.C., Ord. 14. That case, shortly, is that the two parties, the plaintiffs and the defendant, agreed to buy these goods in partnership and to re-sell them to a foreign purchaser whom they had to find, that the defendant accordingly bought the goods, the plaintiffs putting up half the money (that being the sum which the plaintiffs say was the deposit), and that the defendant has been unable to re-sell the goods for lack of an export licence. The defendant says that he has offered to deliver to the plaintiffs half the materials which he has bought, but that that offer has been refused. As against that, there has been no further affidavit, but there has been exhibited for the first time in this court a bundle of correspondence which consists of requests for the money and requests that the transaction, whatever it may have been, should be cleared up; it does not state specifically what the transaction is said to have been. In those circumstances, counsel for the plaintiffs concedes that there is a triable issue and, therefore, that there must be leave to defend; the only question is whether it was a proper exercise by the learned judge of his discretion in the matter that he should have imposed the condition of payment into court.

The broad principle, which is founded on *Jacobs* v. *Booth's Distillery Co.* (1) is summarised on p. 266 of the ANNUAL PRACTICE (1962 Edn.) in the following terms:

> "The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition."

If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to some comments that have been made on *Jacobs* v. *Booth's Distillery Co.* (1). They will be found at pp. 251 and 267 of the ANNUAL PRACTICE, 1962. It is suggested (see p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267 the learned editors of the ANNUAL PRACTICE have this note:

(1) (1901), 85 L.T. 262.

A "The condition of payment into court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the master is prepared very nearly to give judgment for the plaintiff'."

B It is worth noting also that in *Lloyd's Banking Co.* v. *Ogle* (2), in a dictum which was said to have been overruled or qualified by *Jacobs* v. *Booth's Distillery Co.* (3), BRAMWELL, B., had said that

"... those conditions [of bringing money into court or giving security] should only be applied when there is something suspicious in the defendant's mode of presenting his case."

C I should be very glad to see some relaxation of the strict rule in *Jacobs* v. *Booth's Distillery Co.* (3). I think that any judge who has sat in chambers in R.S.C., Ord. 14 summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being D made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency; but, with great respect to the learned judge, I do not think that, giving the widest interpretation to his power to impose a condition, it was the right course to take in the circumstances here. There is not merely a triable issue put forward but E one which has not been challenged on affidavit by the plaintiffs. There is some doubt (as I have pointed out) whether they can succeed in the form of action which they have elected to adopt on their writ. If the defendant's case is the right one, then, in accordance with the agreement that was made, he will have parted with the money—the so-called "deposit"—and got only the material in exchange, and it might well be a hardship on him that he should have to find F the money to pay into court as a condition of being allowed to set up his version of the bargain, which, as I have said, on the affidavits is not contradicted. There is no sign of any bad faith. It is said that there was some delay in the defendant's returning from America to face the R.S.C., Ord. 14 summons, and it is said that that influenced the master. There is nothing to show that it influenced the learned judge, and I do not think that it should have done, because G it does not reflect on the merits.

For these reasons, I would allow the appeal and give the defendant unconditional leave to defend.

DANCKWERTS, L.J.: I agree.

SELLERS, L.J.: I agree.

Appeal allowed: unconditional leave to defend.

Solicitors: *Tringhams* (for the defendant); *J. H. Milner & Son* (for the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(2) (1876), 1 Ex.D. at p. 264. (3) (1901), 85 L.T. 262.

ATTORNEY-GENERAL OF CEYLON *v.* SCINDIA STEAM NAVIGATION CO., LTD.

A

[PRIVY COUNCIL (Lord Cohen, Lord Denning, Lord Morris of Borth-y-Gest, Lord Guest and Mr. L. M. D. de Silva), July 24, 25, 26, October 3, 1961.]

Shipping—Bill of lading—Evidence of shipment of goods—Condition that weight, contents and value of bags shipped unknown.

B

Shipping—Carriage of goods by sea—Short delivery—Bills of lading stating number of bags shipped but containing condition that weight, contents and value unknown—Mode of proof of contents and weight of missing bags by consignee—Indian Carriage of Goods by Sea Act, 1925, *Schedule, art.* III, *r.* 3, *r.* 4—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5 *c.* 22), *Schedule, art.* III, *r.* 3, *r.* 4.

C

By an agreement dated Apr. 22, 1953, certain shipping lines including the defendant agreed with the Food Commissioner of Ceylon to ship rice from Burma to Ceylon. The agreement provided that the carriage of each cargo should be governed by the terms and conditions of the bill of lading which the shipowner or his agent "shall and are hereby required to issue" to the shipper or consignee. Pursuant to that agreement a number of bags of rice were shipped on the defendant's vessel at Rangoon by the State Agricultural Marketing Board of the Union of Burma for carriage to Colombo and delivery there to the Director of Food Supplies. The bags were shipped under three bills of lading issued by the defendants which, respectively, stated the number of bags shipped as 2,187 bags, 47,992 bags and 50,473 bags, giving a total of 100,652 bags shipped. The bills stated that the bags were shipped in apparent good order and condition and contained full boiled rice. By a paramount clause in each bill of lading the Indian Carriage of Goods by Sea Act, 1925, and the Schedule thereto were applied to the contracts contained in the bills. Each bill was subject to a condition—"Number and Contents 1. Weight, contents, and value when shipped unknown". A stamped indorsement on each bill provided that the ship was not responsible, inter alia, for bursting of bags and loss of contents. Having loaded the cargo at Rangoon the vessel proceeded direct to Colombo without calling at any intermediate port. Her only cargo was the bags shipped at Rangoon. At Colombo the cargo was discharged into lighters and carried to a landing stage. The double tally carried out when the bags were loaded into and landed from the lighters showed that 100,417 bags were landed, namely, 235 fewer than the 100,652 bags recorded in the three bills of lading as having been shipped at Rangoon. The 100,417 bags landed included 541 torn and repaired bags and 287 bags of sweepings of spillage of rice from the ship's hold. It was the normal practice if any bags shipped were completely emptied by spillage to deliver the empty bags to the consignee, but no empty bags were delivered in the present case. The evidence established that each of the full bags delivered weighed 160 pounds, and that the contents of the 287 bags of sweepings did not fully account for the deficiencies in weight of the 541 torn and repaired bags. The plaintiff, suing on behalf of the Government of Ceylon, claimed damages for failure to deliver the 235 bags of rice. By r. 3 of art. III of the Indian Carriage of Goods by Sea Act, 1925, the carrier or his agent after receiving goods into his charge "shall, on demand of the shipper" issue a bill of lading showing among other things the number, quantity, or weight of the packages and, by r. 4 of art. III, such a bill of lading "shall be prima facie evidence of the receipt by the carrier of the goods as therein described."

D E F G H I

Held: the plaintiff was entitled to damages for short delivery of 235 bags of rice for the following reasons—

(i) although there was no evidence that any demand had been made for the issue of the bills of lading within r. 3 of art. III of the Schedule to the

A Indian Carriage of Goods by Sea Act, 1925, yet the statements in the bills of lading as to the number of bags shipped were strong prima facie evidence (though not conclusive evidence) that the stated number of bags had in fact been shipped; accordingly, there being no evidence sufficient to displace the prima facie evidence of the bills of lading, the plaintiff had established that 100,652 bags, viz., 235 bags more than were delivered at Colombo had B been shipped at Rangoon.

Canada & Dominion Sugar Co., Ltd. v. *Canadian National (West Indies) Steamships, Ltd.* ([1947] A.C. 46) considered.

New Chinese Antimony Co., Ltd, v. *Ocean S.S. Co., Ltd.* ([1917] 2 K.B. 664) distinguished.

Hogarth Shipping Co., Ltd. v. *Blyth, Greene, Jourdain & Co., Ltd.* ([1917] C 2 K.B. 534) and *Smith & Co.* v. *Bedouin Steam Navigation Co.* ([1896] A.C. 70) applied.

(ii) the reasonable and proper inference from the established evidence was that the 235 missing bags contained rice and that each of them weighed approximately 160 pounds, viz., the same weight as the full bags which were delivered; accordingly the plaintiff had proved his loss.

D Dicta of LUSH, J., in *Hogarth Shipping Co., Ltd.* v. *Blyth, Greene, Jourdain & Co., Ltd.* ([1917] 2 K.B. at p. 542) and HILL, J., in *R. & W. Paul, Ltd.* v. *The Pauline* ((1920), 4 Lloyd's Rep. at p. 222) applied.

Appeal allowed.

[**Editorial Note.** Article III, r. 3 and r. 4 of the Schedule to the Indian Carriage of Goods by Sea Act, 1925, are in the same terms as rr. 3, 4 of art. III E of the Schedule to the Carriage of Goods by Sea Act, 1924.

As to carriage under the Carriage of Goods by Sea Act, 1924, see 30 HALSBURY'S LAWS (2nd Edn.) 606-614, paras. 765-771; and for cases on the subject, see 41 DIGEST 381-384, *2269-2290.*

For the Carriage of Goods by Sea Act, 1924, Schedule, art. III, r. 3, r. 4, see 23 HALSBURY'S STATUTES (2nd Edn.) 888.]

F Cases referred to:

Canada & Dominion Sugar Co., Ltd. v. *Canadian National (West Indies) Steamships, Ltd.*, [1947] A.C. 46; [1947] L.J.R. 385; 2nd Digest Supp.

Craig Lines S.S. Co. v. *North British Storage & Transit Co., S.S. Craigforth*, 1921 S.C. 114; 58 Sc.L.R. 132; [1920] 2 S.L.T. 418; 41 Digest 382, *2276ii.*

G *Hain S.S. Co., Ltd.* v. *Herdman & McDougal*, (1922), 11 Lloyd's Rep. 58.

Harrowing v. *Katz & Co.*, (1893), 10 T.L.R. 115; *affd.* C.A., (1894), 10 T.L.R. 400; H.L., (1895), 12 T.L.R. 66; 41 Digest 377, *2227.*

Hogarth Shipping Co., Ltd. v. *Blyth, Greene, Jourdain & Co., Ltd.*, [1917] 2 K.B. 534; 86 L.J.K.B. 1426; 117 L.T. 290; 14 Asp. M.L.C. 124; 41 Digest 381, *2265.*

H *New Chinese Antimony Co., Ltd.* v. *Ocean S.S. Co., Ltd.*, [1917] 2 K.B. 664; 86 L.J.K.B. 1417; 117 L.T. 297; 14 Asp. M.L.C. 131; 41 Digest 382, *2278.*

Paul (R. & W.), Ltd. v. *The Pauline*, (1920), 4 Lloyd's Rep. 221.

Royal Commission on Wheat Supplies v. *Ocean S.S. Co.*, (1922), 11 Lloyd's Rep. 123.

I *Smith & Co.* v. *Bedouin Steam Navigation Co.*, [1896] A.C. 70; 65 L.J.P.C. 8; 41 Digest 378, *2246.*

Appeal.

Appeal by the Attorney-General of Ceylon from a decree of the Supreme Court of the Island of Ceylon (BASNAYAKE, C.J., and PULLE, J.), dated Oct. 28, 1958, allowing an appeal by the respondent, the Scindia Steam Navigation Co., Ltd., from a decree of the District Court of Colombo, dated Dec. 6, 1956, ordering the respondent to pay the appellant the sum of Rs. 14,279·19 less

the notional insurance for short delivery of 235 bags of rice. The facts are set out in the judgment of the Board. A

E. F. N. Gratiaen, Q.C., W. Jayawardena and *A. C. De Zoysa* for the plaintiff, the appellant.

M. R. E. Kerr, Q.C., for the defendant, the respondent.

LORD MORRIS OF BORTH-Y-GEST: The issue which arises in this appeal is whether the appellant (who sues on behalf of the Government of Ceylon) is entitled to recover damages from the respondent company on the basis that there was a short delivery of certain bags of rice which were alleged to have been shipped on the respondent's vessel s.s. Jalaveera. The Government of Ceylon import rice from Burma and in connexion with the carriage of such rice the Food Commissioner of Ceylon entered into an agreement (dated Apr. 22, 1953) with a number of shipping lines, collectively called the Conference Lines, of which the respondent company was one. Pursuant to that agreement the Conference Lines agreed (subject to certain terms as to quantity) to ship the rice which the Government of Ceylon purchased in Burma. The freight to be charged was not to exceed the rate of rupees thirty-three per ton of twenty hundredweights net for carriage from any one port of Burma to the port of Galle or Colombo in Ceylon. By cl. 6 (1) of the agreement it was provided that: B C D

> "The transport and carriage of each separate cargo of rice shall be governed by the terms and conditions of the bill of lading which the owners or agents of the owners of the carrying vessels shall and are hereby required to issue to the shippers or consignees which shall be deemed to be the contract of carriage in respect of that cargo between the shipper and/or consignee on the one hand and the owners of the carrying vessels on the other: provided, however, that the rate or rates of freight charged and entered in the bill of lading shall not be in excess of the rates laid down in cl. 3." E

Between about Sept. 14 and Sept. 17, 1953, a number of bags were shipped on the s.s. Jalaveera at Rangoon by the State Agricultural Marketing Board of the Union of Burma for carriage to Colombo and delivery to the Director of Food Supplies Colombo. The director was an officer of the Government of Ceylon. It was not disputed before their Lordships that the appellant was entitled to sue on behalf of the government. The goods were shipped under three bills of lading dated respectively Sept. 14, 16 and 17, 1953. The claim which the appellant presented in the action was that 100,652 bags had been taken on board, that the bags contained rice and that there was a failure to deliver 235 of them. In respect of such failure he claimed damages. The claim succeeded in the District Court of Colombo but the judgment and decree of that court dated Dec. 6, 1956, was set aside by the Supreme Court of Ceylon on Oct. 28, 1958. By leave of the Supreme Court this appeal is now brought. F G

The three bills of lading were all in similar terms. There was a paramount clause, the opening words of which were: H

> "All the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925, and the Schedule thereto are to apply to the contract contained in this bill of lading . . ."

The bills of lading recited that there were shipped in apparent good order and condition certain numbers of packages "being marked and numbered as per margin". In the first bill of lading the number of bags was given as 2,187 bags, in the second 47,992 bags and in the third 50,473 bags. The total was therefore 100,652 bags. In the margin there were "Particulars declared by shipper". There were columns headed "Leading marks", "Number of packages or pieces", "Description" and "Said to weigh". On each bill of lading particulars were given. The descriptions which were given recorded that the stated numbers of bags contained "Full boiled rice 1953 crop". The net weights of the contents of each group of bags were given. Thus in the first bill of lading the total net I

A weight of the 2,187 bags was given and the net weight of each of the 2,187 bags was stated to be 159·74821 pounds. The average net weight per bag as stated in the three bills was approximately 160 pounds. (The average net weight per bag on the basis of the average weights stated in the bills of lading was said to be 159·84 pounds.) Each one of the bills of lading recorded in the margin the total gross and net weights of the goods in respect of which it was issued.
B Each of the bills of lading further provided:

> "This bill of lading is issued subject to the following further conditions:—
> "Number and Contents
> "1. Weight, contents, and value when shipped unknown. The company is not to be responsible for any loss, damage or delay whatsoever, directly or indirectly resulting from insufficiency of the address, or packing, internal
> C or external; nor for condition of contents of re-shipped or re-exported goods."

There was also the following stamped indorsement on each one of the bills of lading:

> "Ship not responsible for:—
> D "Damage from heating and/or caking of new rice grain or bran: obliteration of marks, deterioration of contents or staining of bags caused by the nature of contents and/or shortage of weight caused by the evaporation of contents: bursting of bags and loss of contents.
> "Ship not responsible for weight of bags on outturn."

After the s.s. Jalaveera had loaded her cargo at Rangoon she proceeded direct
E to Colombo. She did not touch at any intermediate port. There was no other cargo than the bags which were shipped by the State Agricultural Marketing Board of Burma. At Colombo the cargo was discharged into lighters and then carried in the lighters to a landing jetty and thence into customs warehouse. The evidence established that in the transhipment of rice it was a usual occurrence that by the time the cargo arrived in Colombo many of the bags were torn.
F The bags are stacked in the ship and the pressure of the top ones on the lower ones causes rice to leak out of the lower ones. As would be expected some of the contents of the bags spilled out into the holds of the ship. The spillages consisted of rice from the bags. The torn bags were repaired before being off-loaded. Other bags (empty ones) were sent on board into which the sweepings were placed which resulted from the spillages. Those bags were specially
G marked to indicate that they were sweepings bags.

A tally of the number of bags was carried out as the cargo was loaded into lighters. Certain "boat notes" were prepared showing the numbers of bags that were carried in each lighter. The "boat notes" were initialled by someone on behalf of the ship.

It is provided by s. 30 of the Customs Ordinance (Vol. IV—Legislative Enact-
H ments of Ceylon—c. 185) that the master of every ship arriving in the island must make a report in accordance with the terms of the section to the customs house which report must include the marks, numbers, and contents of every package or parcel of goods on board and by s. 31 the master must at the time of making such report deliver to the collector of customs the manifest of the cargo of such ship when a manifest is required and if so required by the collector
I the master must produce to him any bills of lading. By s. 40 of the ordinance it is provided that with all goods unladen from any ship there is to be sent with each boat load a boat note specifying the numbers of packages and the marks and numbers or other description thereof and that such boat note is to be furnished and signed by an officer of the ship and, if there is a custom house officer on board, the boat note is to be signed by such officer also. The tindal and owner of the boat into which the goods are laden is held responsible for the due landing and delivery at the custom house of all the goods so laden and specified in the boat note.

The bags that were torn and had been repaired were individually weighed before they were loaded into lighters. In similar manner the bags of sweepings were individually weighed before they were loaded into lighters. In addition to the tally carried out when the bags were loaded into lighters there was a further tally by customs officers before the bags were put into the customs warehouse. There were produced at the trial some 144 boat notes. They showed that unloading proceeded between Sept. 24 and Oct. 2, 1953. These boat notes in the aggregate recorded that 100,402 bags had been taken off the ship. They were "said to be" bags of rice. In all but two instances the tally as to the numbers of bags taken off the ship into lighter agreed with the second tally which recorded the numbers of bags landed from the lighters. The boat notes in the aggregate recorded that 100,417 bags had been loaded into warehouse from the lighters. (Boat note no. 138 showed that the tally of the number of bags landed from lighter was 574 as compared with the tally of 563 of the number recorded as having been put on lighter: boat note no. 144 showed that the tally of the number of bags landed was eighty-two as compared with the tally of seventy-eight of the bags put on lighter.) Taking the corrected figure of 100,417 the result was that 235 fewer bags were landed into warehouse at Colombo than the number of 100,652 which the three bills of lading recorded as having been loaded into the ship at Rangoon. After being landed the bags were fumigated before being put into the customs warehouse.

The numbers of bags which were landed (100,417) included a total of 541 bags which had been torn and repaired: the total weight of these 541 bags was 500 hundredweights 1 quarter 6 pounds. In addition to the 100,417 bags there were also landed into warehouse 287 bags of sweepings. These sweepings in total weighed 263 hundredweights 0 quarters 13 pounds. On the basis of those figures the Director of Food Supplies asserted, by letter dated Oct. 29, 1953, that had the 541 bags not been torn they would have contained 772 hundredweights 0 quarters 9 pounds instead of the 500 hundredweights 1 quarter 6 pounds which they actually contained and that there was still a shortage of over eight hundredweights even after taking into account the 263 hundredweights 0 quarters 13 pounds which were contained in the 287 bags of sweepings. By a previous letter dated Oct. 3, 1953, he had stated that a claim for a short discharge of 250 bags of rice would be made.

The evidence established that if a bag which the ship had taken on board was found to have become completely emptied of its contents the empty bag would according to general practice be delivered to the consignee. There would be entries on the boat notes relating to such empty bags. In fact there was no mention of any original bag having been delivered empty to the landing company. If any empty bags which were sent on to the ship at Colombo in order that they might be used to contain sweepings were not in fact used the practice was to return them and to make entry in respect of them on the boat notes. The last boat note (no. 144) did in fact record the number of empty "sweepings" bags which were returned to the shore. After the bags were landed into the customs warehouse they were later delivered into the lorries of the Director of Food Supplies for transport to the government granaries. These deliveries took place between Sept. 25 and Oct. 27, 1953. At the time of delivery ex warehouse a tally was made in the presence of a customs officer. Considerable further spillage took place before the bags left the customs warehouse. This resulted partly from the fact that more bags became damaged and torn, and partly from the fact that the process of unloading the bags from the ship involved the use of hooks. These hooks caused holes to be made in the bags through which rice leaked out. The deliveries from the customs warehouse showed that the number of bags which were delivered was 100,417 and of these the number which (inclusive of the 541 torn and repaired bags taken from the ship) were torn or stitched or had mouths burst was 4,367: the gross weight of these 4,367 bags was 4,072 hundredweights 2 quarters 20 pounds. The deliveries from

A the customs warehouse of bags of sweepings reached a total number of 1,804 (being 1,517 more than the 287 bags of sweepings off-loaded from the ship): the gross weight of these 1,804 bags of sweepings was 2,569 hundredweights 0 quarters 6 pounds. It will be seen that the total gross weight of the 4,367 bags and the 1,804 bags was 6,641 hundredweights 2 quarters 26 pounds. After the Director of Food Supplies had asserted his claims against the respondent company in B October, 1953, the agents for the respondent company stated that the entire cargo loaded at the port of shipment had been discharged and delivered at Colombo. They further said (by letter dated Nov. 20, 1953):

> "We understand that a quantity of as much as hundredweights 403-0-18 pounds was delivered to you as excess sweepings after setting off against shortage in torn and mouth burst bags ex wharf. It will be noted, therefore, C that this excess quantity more than covers the weight of the bags alleged to have been short-delivered."

The quantity of 403 hundredweights 0 quarters 18 pounds was calculated as follows. If the 4,367 bags had had a "sound weight" of 160 pounds per bag the total would have been 6,238 hundredweights 2 quarters 8 pounds. The total weights of the 4,367 bags together with the 1,804 bags of sweepings as delivered D ex warehouse was 6,641 hundredweights 2 quarters 26 pounds. The difference between the 6,641 hundredweights 2 quarters 26 pounds and 6.238 hundredweights 2 quarters 8 pounds was 403 hundredweights 0 quarters 18 pounds and the contention was that such quantity more than accounted for the contents of the 235 bags which were said to have been missing.

On the basis of the facts referred to above the appellant, as plaintiff, com- E menced proceedings in the District Court of Colombo. By his plaint dated Aug. 31, 1954, he claimed that there had been a short delivery of 235 bags of rice from the ship. The claim was for Rs. 14,279·19 as the full value of the 235 bags of rice and of the freight charges, customs duty, warehouse rent, harbour dues and insurance. In the answer of the respondent the provisions of the bill of lading were referred to and in addition to pleading certain defences which are F not now material it was said that the ship had voyaged from Rangoon to Colombo direct and without touching at any intermediate port and that the entire quantity of goods or cargo on board the ship was discharged at Colombo and that thereupon "in terms of the said bills of lading and in law the liability of the defendant absolutely ceased". The learned judge in the District Court held that 100,652 bags of rice had been shipped on board at Rangoon and that G delivery was made at Colombo of only 100,417 bags. He held that the bills of lading afforded prima facie evidence (which was subject to being rebutted) of the number of bags of rice that were taken on board the ship. He gave judgment for the amount claimed less a small amount referable to insurance. The plaintiff appellant did not appeal against the deduction when the case went to the Supreme Court and their Lordships have not been concerned with such deduction.

H On appeal to the Supreme Court the order of the learned district judge was set aside and the action was dismissed. The Supreme Court held that the plaintiff had not established by evidence that the total quantity of rice handed over by the shipper at Rangoon had not been discharged by the carrier at Colombo. The provisions of the bill of lading were referred to and it was held that the plaintiff had to prove by evidence that the shipper had handed to the defendant's I ship 100,652 bags of rice each weighing 160 pounds. The judgment proceeded:

> "This he cannot do except by calling a witness or witnesses able to speak to that fact. He has failed to do so. In view of the conditions in the bills of lading quoted above he is not entitled to rely on the weight, number and quantity given in them as establishing his claim."

New Chinese Antimony Co., Ltd. v. *Ocean S.S. Co., Ltd.* (1) was referred to and in the judgment it was further said:

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(1) [1917] 2 K.B. 664; 14 Asp. M.L.C. 131.

"The burden is on the plaintiff to establish the facts on which he relies to succeed in this case. Apart from the conditions above mentioned there is in the instant case in the defendant's favour the added circumstance that the ship was loaded only with rice consigned to the Director of Food Supplies, Colombo, and that she did not call at any intermediate port before reaching Colombo."

It was also pointed out that it had not been contended that any rice was retained in the ship after the unloading at Colombo.

The first question which arises is whether the appellant established that 100,652 bags were shipped at Rangoon for delivery to the Director of Food Supplies at Colombo. The onus of proving that fact undoubtedly rested on the appellant. It was forcibly pointed out by the respondent that the appellant had chosen to rely for proof solely on producing the bills of lading and that the appellant had not traced the bills of lading to their source or supported them by producing and proving mate's receipts and tallymen's books. The respondent further submitted that the bills of lading did not yield prima facie evidence of the number of bags that had been shipped.

As has been mentioned above the bills of lading applied the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925, and the Schedule thereto. Rules 3 and 4 of art. III of the Schedule to that Act are in the following terms:

"3. After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods start, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained in such a manner as should ordinarily remain legible until the end of the voyage; (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper; (c) The apparent order and condition of the goods:

"Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

"4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with para. 3 (a), (b) and (c)."

The respondent submitted, in reliance on *Canada & Dominion Sugar Co., Ltd.* v. *Canadian National (West Indies) Steamships, Ltd.* (2) that there was no evidence that the shipper had made any demand of the nature referred to in r. 3. While it is to be observed that pursuant to cl. 6 (1) of the Conference Lines agreement, as referred to previously, the owners of the carrying vessels were required to issue bills of lading in respect of the separate cargoes of rice, the fact in any event is that in the present case three bills of lading were actually issued. They contained respectively the admissions or acknowledgments that 2,187 bags and 47,992 bags and 50,473 bags "being marked and numbered as per margin" were shipped. Their Lordships consider that though these statements in the bills of lading as to the numbers of bags shipped do not constitute conclusive evidence as against the shipowner they form strong prima facie evidence that the stated numbers of bags were shipped unless it be that there is some provision in the bills of lading which precludes this result. Was there then any such provision in

(2) [1947] A.C. 46.

A the present case? There was a condition in the terms:—"Weight, contents and value when shipped unknown". That meant that in signing a bill of lading acknowledging the receipt of a number of bags there was a disclaimer of knowledge in regard to the weight or contents or value of such bags. There was, however, no disclaimer as to the numbers of bags. Their Lordships cannot agree with the view expressed in the judgment of the Supreme Court that the B conditions in the bills of lading disentitled the appellant from relying on the admissions that bags to the numbers stated in the bills of lading were taken on board.

The present case differs from *New Chinese Antimony Co., Ltd.* v. *Ocean S.S. Co., Ltd.* (3). In that case a bill of lading for antimony oxide ore stated that 937 tons had been shipped on board: in the margin was a typewritten clause:— C "A quantity said to be 937 tons" and in the body of the bill of lading (printed in ordinary type) was a clause:—"weight, measurement, contents and value (except for the purpose of estimating freight) unknown". It was held that the bill of lading was not even prima facie evidence of the quantity of ore shipped and that in an action against the shipowners for short delivery the onus was on the plaintiffs of proving that 937 tons had in fact been shipped. (See also *Craig* D *Lines S.S. Co.* v. *North British Storage & Transit Co., S.S. Craigforth* (4).) In *Hogarth Shipping Co., Ltd.* v. *Blyth, Greene, Jourdain & Co., Ltd.* (5) a captain signed a bill of lading for a specified number of bags of sugar: one of the exceptions and conditions of the bill of lading read "weight, measure, quality, contents and value unknown". It was held by LUSH, J., that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles and E not as to their contents.

Even though the appellant called no evidence from Rangoon and took the possibly unusual course of depending in the main on the production of the bills of lading their Lordships conclude that the bills of lading did form strong prima facie evidence that the s.s. Jalaveera had received the stated numbers of bags for shipment to Colombo and delivery to the Director of Food Supplies. (See F *Smith & Co.* v. *Bedouin Steam Navigation Co.* (6).) The shipowners would, however, be entitled to displace the prima facie evidence of the bills of lading by showing that the goods or some of them were never actually put on board: to do that would require very satisfactory evidence on their part. In his speech in the case last cited LORD HALSBURY, L.C., said (7):

G "To my mind, the cardinal fact is that the person properly appointed for the purpose of checking the receipt of the goods has given a receipt in which he has acknowledged, on behalf of the person by whom he was employed, that those goods were received. If that fact is once established, it becomes the duty of those who attempt to get rid of the effect of that fact to give some evidence from which your Lordships should infer that the H goods never were on board at all."

Unless the shipowners showed that only some lesser number of bags than that acknowledged in the bills of lading was shipped then the shipowners would be under obligation to deliver the full number of bags. (See *Harrowing* v. *Katz & Co.* (8), *Hain S.S. Co., Ltd.* v. *Herdman & McDougal* (9) and *Royal Commission on Wheat Supplies* v. *Ocean S.S. Co.* (10).)

I Though by relying on the bills of lading the appellant presented prima facie evidence that 100,652 bags (marked and numbered as in the margins of the bills) were shipped, the bills of lading were not even prima facie evidence of the weight or contents or value of such bags. This was the result of the incorporation in

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(3) [1917] 2 K.B. 664; 14 Asp. M.L.C. 131.
(4) 1921 S.C. 114.
(5) [1917] 2 K.B. 534; 14 Asp. M.L.C. 124.
(6) [1896] A.C. 70.
(7) [1896] A.C. at p. 76.
(8) (1894), 10 T.L.R. 400.
(9) (1922), 11 Lloyd's Rep. 58.
(10) (1922), 11 Lloyd's Rep. 123.

the bills of lading of the provision previously referred to (11). (See *New Chinese Antimony Co., Ltd.* v. *Ocean S.S. Co., Ltd.* (12).) It was for the appellant to prove the contents of the bags and the weight of the bags and it was for him to prove his loss by proving what it was that the bags contained and by proving what was the value of what the bags contained. The respondent company submitted that such proof was lacking. The respondent company further submitted (a) that there was evidence which displaced the prima facie evidence of the shipment of 100,652 bags and which lead to the conclusion that there never were 235 missing bags and (b) that if alternatively 100,652 bags were in fact shipped the evidence showed that all the contents of such bags were discharged at Colombo —with the result that the liability of the respondent company would be limited to the value of 235 empty bags.

In support of the respondent company's submission under (a) it was urged that it was improbable that 235 bags had been put on board at Rangoon and had then been in some manner removed. It was further urged that inasmuch as the ship sailed directly from Rangoon to Colombo and carried no other cargo than was shipped by the State Agricultural Marketing Board Union of Burma and that it was not suggested that any rice was retained in the ship's hold after discharge at Colombo the probabilities were that the number of bags shipped was not 100,652 but 100,417. Their Lordships cannot accept the view that these circumstances are of sufficient weight to displace the prima facie evidence of the shipment of 100,652 bags. Nor do their Lordships consider that any useful purpose would be served by speculating as to possible explanations as to what might have happened. It was for the shipowners to explain away their acknowledgment of the number of bags that they had received.

On the basis that 100,652 bags were shipped the evidence clearly established a short delivery of 235 bags. The result of the double tally at the time of discharge was that it was satisfactorily proved that only 100,417 bags were discharged. It was not contended by counsel for the respondent company that the 235 original bags were in fact discharged and were missed in the two tallies at Colombo.

It remains to be considered whether the appellant proved the loss that he alleged: linked with the points raised in that issue are those which are involved in the submission of the respondent company referred to under (b). It was for the appellant to prove what was in the missing bags. Their Lordships consider that there was abundant evidence that the missing bags contained rice. Before the time of discharge from the ship there had been some escape of contents from many bags. The number was not negligible. It was rice that had come out of the bags. There were sweepings put into 287 bags and all the sweepings consisted of rice. After the cargo was put into the customs warehouse there was considerable further escape of contents from the bags. In the result there were 1,517 additional bags of sweepings. All the sweepings consisted of rice. Their Lordships conclude that from these circumstances it was a reasonable and proper inference that the bags that were shipped were bags which contained rice.

On the assumption that the bags contained rice the next question is whether there was evidence as to their weight. The provision of the bill of lading which has been quoted previously expressly precludes any dependence on the particulars as to weight which were declared by the shipper. Oral evidence was given at the hearing by a wharf assistant in the Food Commissioner's Department. He had taken test weights of one hundred bags. He had taken one hundred bags "from here and there as they were unloading the bags into the warehouse". His tests gave him an average weight of 159·84 pounds. Their Lordships consider that it was a reasonable and proper inference that that was the weight of the bags of rice which were shipped and counsel for the respondent accepted that the bags if full would contain approximately 160 pounds. It may here be noted that the bills of lading acknowledged that the bags were shipped "in apparent

(11) See p. 687, letter B, ante. (12) [1917] 2 K.B. 664; 14 Asp. M.L.C. 131.

A good order and condition." In this connexion reference may again be made to the decision of LUSH, J., in *Hogarth Shipping Co., Ltd.* v. *Blyth, Greene, Jourdain & Co., Ltd.* (13). In his judgment (14) LUSH, J., pointed out that if a certain number of bags had been lost and if one had to ascertain what was in the bags that were lost, then as a matter of evidence one would almost necessarily infer that the lost bags were bags containing similar goods to those which were not B lost. The decision of HILL, J., in *R. & W. Paul, Ltd.* v. *The Pauline* (15) is also of relevance. There the plaintiffs' case was that by a bill of lading the defendants had represented and stated that they had received on board the Pauline 37,047 sacks of barley said to weigh a stated amount to be delivered at a safe port in England. The plaintiffs claimed that that quantity was shipped but that in breach of the bill of lading the defendants short-delivered at Ipswich C 1,106 sacks. The plaintiffs claimed damages as indorsees of the bill of lading to whom the property in the goods had passed. The defendants asserted that they had never represented or stated as alleged, that the bill of lading contained the words "weight and contents unknown", and that all the cargo was delivered which was in fact shipped. It does not appear to have been in contest that the sacks did contain barley. In dealing with the claim HILL, J., said (16):

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> "It seems to me that the bill of lading coupled with the receipts affords prima facie evidence and that it rests upon the defendants to get rid of that prima facie evidence. In my view they have failed to do so. It is said that to prove the loss of 1,106 bags of barley does not carry the plaintiffs any way unless they can go on and prove the weight that was shipped. I am not at all sure that that is so. Supposing the plaintiffs prove the loss of 1,106 sacks of barley, but are unable to prove the precise weights of the sacks which were lost, because the sacks which were shipped varied in weight, I do not think that that prevents them recovering damages. It only makes it more difficult to compute what damages they have suffered. If that is the true view of the matter, the way I should do it is to take the weight of the sacks shown to have been delivered and upon that make a computation of what weight 1,106 sacks represents . . . there is evidence of 1,106 sacks of barley missing, but I do not know what their weights are, and, therefore, I can only make a rough estimate of the weights and their value. I do not think it right to conclude that because I cannot ascertain the weight I must treat it as negligible and give nothing by way of damages. As a rough and ready way of estimating it I shall take the average weight of the sacks of barley delivered and from that calculate the approximate weight of 1,106 sacks of barley."

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In the present case their Lordships consider that it was shown that there was a short delivery of 235 bags and that such bags had been shipped with rice in them and that each had weighed approximately 160 pounds. Subject to a consideration of the submission of the respondent referred to as (b) previously it would follow that the appellant was entitled to the amount awarded to him in the district H court. It was, however, strongly contended by counsel for the respondent that the evidence established that all the contents of the 100,652 bags were in fact delivered and were received by the Director of Food Supplies. On this submission it was said that what must have happened was that the missing 235 bags became completely denuded of their contents but that such contents were in fact delivered and received. If this submission were correct it was I said that the damages would only amount to approximately £11, as representing the value of 235 empty bags. The evidence established that if a bag became completely empty the general and normal practice was to deliver that empty bag to the consignee. Any empty bags should have been delivered into the lighters and a note should have been made in the boat note in regard to them. It was not disputed that this practice ought to have been followed. No empty

(13) [1917] 2 K.B. 534; 14 Asp. M.L.C. 124.
(14) [1917] 2 K.B. at p. 542.
(15) (1920), 4 Lloyd's Rep. 221.
(16) (1920), 4 Lloyd's Rep. at p. 222.

bags were in fact delivered and no boat note recorded the receipt of any empty bags. The last of the boat notes did make mention of missing bags by the words " and (250) bags more in dispute if considered to be delivered ". A

This submission now being examined is presented on the basis of the figures concerning the deliveries from the customs warehouse. It will have been observed that in regard to the discharges from the ship the Director of Food Supplies had pointed out on Oct. 29, 1953, that had the 541 torn and repaired bags contained their normal quantity the weight would have been 772 hundredweights 0 quarters 9 pounds whereas the weight actually was 500 hundredweights 1 quarter 6 pounds and that the total quantity (263 hundredweights 0 quarters 13 pounds) in the 287 bags of sweepings fell short of the quantity which would be required to supply the deficiency. The argument advanced on behalf of the respondent relates to the deliveries ex warehouse. The number of torn and repaired bags had by the end of the time of such deliveries reached the total of 4,367: the number of the bags of sweepings had increased from 287 to 1,804. The argument proceeded as follows:—the contents of the 4,367 bags had they been full (i.e., containing 160 pounds) together with the contents of 235 bags (containing 160 pounds) would in total have been 6,574 hundredweights 1 quarter 4 pounds: the actual contents of the 4,367 bags and of the 1,804 bags of sweepings were in total 6,641 hundredweights 2 quarters 14 pounds: therefore it was said that the contents of the 235 bags were in fact all accounted for. The excess of some 67 hundredweights (the difference between the 6,641 hundredweights and the 6,574 hundredweights) could it was said be explained as being approximately the gross weight of 4,602 empty bags (i.e., 4,367 + 235). Therefore it was said that the damages should be limited to a sum representing the value of 235 empty bags. This attractively developed argument depended, however, for its validity on the assumption that no rice escaped at all while in warehouse from the 96,050 bags which constituted over and above the 4,367 bags the remainder of the 100,417 bags. Their Lordships cannot think that this assumption is a valid one. The evidence showed that in the process of unloading (as well as of loading) the bags were removed by fixing iron hooks to them: holes were as a result made in the bags through which rice could escape. The loss of rice would not necessarily occur immediately. When stacked in the customs warehouse a great number of the bags would be under the pressure of the weight of other bags on them and rice would be lost from the bags. Furthermore the evidence showed that small quantities of rice may leak out of bags which nevertheless have all the appearances of sound bags. B C D E F G

Quite apart from these considerations the question of short delivery falls to be decided not by reference to the times when there were cartages away from the customs warehouse but by reference to the times of delivery from the ship. If, as their Lordships conclude, the appellant sufficiently proved that 100,652 bags were shipped on board the Jalaveera and that the bags contained rice and that they weighed approximately 160 pounds each, the evidence shows that only 100,417 bags were delivered. If it had happened, as might seem surprising, that 235 bags had become completely denuded of their contents it would be singular and would also be quite contrary to practice if none of the empty bags were delivered. Out of the 100,417 bags which were delivered ex ship some 541 of them had lost some of their contents: those bags had been torn and repaired. The contents of the 287 bags of sweepings were not in the aggregate sufficient to account for the deficiencies of the 541 bags. The contents of 235 bags were not accounted for. The theory that the contents of 100,652 bags were received from the customs warehouse seems to their Lordships to be impossible of reconciliation with the ascertained facts (i) that 100,417 bags and no more were discharged from the ship, (ii) that the 541 torn and repaired bags contained 500 hundredweights 1 quarter 6 pounds and (iii) that the total sweepings (in the 287 bags) were only 263 hundredweights 0 quarters 13 pounds. H I

A Their Lordships would add that the ship's import manifest was put in evidence and was part of the material before the courts below (see s. 31 of the Customs Ordinance (17)). Their Lordships have arrived at their conclusions without having regard to the contents of the manifest: it is abundantly plain, however, that nothing in the manifest conflicts with their Lordships' conclusions but rather supports them.

B For the reasons which have been given their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the judgment of the district court should be restored. The respondent company must pay the costs in the Supreme Court and before their Lordships' Board.

Appeal allowed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Holman, Fenwick & Willan*
C (for the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

D

YOUNG *v.* YOUNG.

[COURT OF APPEAL (Ormerod, Upjohn and Davies, L.JJ.), July 24, 25, 1961.]

Variation of Settlement (Matrimonial Causes)—Post-nuptial settlement—Maintenance agreement made between decree nisi and decree absolute of divorce
E *—Agreement including annuities for wife and children—Agreement by wife not to sue for permanent maintenance—Whether agreement was a post-nuptial settlement—Matrimonial Causes Act,* 1950 (14 *Geo.* 6 *c.* 25), *s.* 25.

After a decree nisi of divorce had been pronounced in favour of the wife but before the decree absolute, a maintenance agreement was made between the parties under which the husband covenanted to pay the wife £416 per
F annum for their joint lives and £130 per annum in respect of each child and the wife undertook to accept this provision in full satisfaction of all provision which the wife might have claimed by way of permanent maintenance following the decree nisi (which was recited), and covenanted not to apply to the court for such maintenance. Certain payments fell due under the agreement before the decree absolute was pronounced. The wife subse-
G quently re-married and went to live in Australia. The divorced husband applied under s. 25 of the Matrimonial Causes Act, 1950, to vary the agreement, as a post-nuptial settlement within that section, by inserting a dum sola clause, which would have the effect of terminating the agreement in the event of re-marriage.

Held: the court had no power to vary the settlement, since it was made
H on the footing that the existing marriage was to be dissolved, not that it should be continued, and was therefore not a post-nuptial settlement within s. 25 of the Matrimonial Causes Act, 1950 (see p. 700, letter B, p. 701, letter A, and p. 702, letter F, post).

Dictum of DENNING, L.J., in *Lort-Williams* v. *Lort-Williams* ([1951] 2 All E.R. at p. 245) applied.

I *Melvill* v. *Melvill and Woodward* ([1930] All E.R. Rep. 79) distinguished.

Decision of BAKER, J. ([1961] 2 All E.R. 843) reversed.

[For what are ante-nuptial and post-nuptial settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451, para. 1014; and for cases on the subject, see 27 DIGEST (Repl.) 645-649, *6089-6112.*

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.]

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(17) See p. 687, letter H, ante.

Cases referred to: A

Bennett v. *Bennett*, [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp.

Lort-Williams v. *Lort-Williams*, [1951] 2 All E.R. 241; [1951] P. 395; 27 Digest (Repl.) 647, *6104*.

Melvill v. *Melvill and Woodward*, [1930] All E.R. Rep. 79; [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206; 27 Digest (Repl.) 646, *6095*.

Prescott (*orse. Fellowes*) v. *Fellowes*, [1958] 3 All E.R. 55; [1958] P. 260; [1958] 3 W.L.R. 288; 3rd Digest Supp. B

Worsley v. *Worsley and Wignall*, (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 27 Digest (Repl.) 245, *1980*.

Appeal.

The wife appealed against an order of BAKER, J., made on June 12, 1961, and reported [1961] 2 All E.R. 843, allowing an appeal by the husband against an order of Mr. Registrar TOWNLEY MILLERS, dismissing a summons taken out by the husband in which he sought to have a maintenance agreement between the parties varied as a post-nuptial settlement within the meaning of s. 25 of the Matrimonial Causes Act, 1950. The wife contended that the agreement was not a post-nuptial settlement within the Act. C D

P. Goodenday for the wife.

Edward Grayson for the husband.

ORMEROD, L.J.: This appeal is against a decision of BAKER, J., given on June 12 of this year whereby he reversed a decision of Mr. Registrar TOWNLEY MILLERS in these circumstances. The marriage between the parties took place in 1935 and two children were born in 1939 and 1942 respectively. At the time when these matters came before the learned registrar no question of maintenance had arisen. The parties unfortunately did not agree and a decree nisi was made in favour of the wife on Apr. 12, 1945, the ground being, as I understand, the adultery of the husband. The wife was given the custody of the children. The decree was made absolute on July 2, 1945, as a result of an order by BARNARD, J., who expedited the making absolute of the decree. In 1945 the time for making a decree absolute was longer than it is at the present time. On May 29, 1945, i.e., between the making and the making absolute of the decree nisi, an agreement was entered into between the parties which provided for sums for the maintenance of the wife and the children. It is the construction of that agreement which has given rise to these proceedings. E F G

The effect of the agreement was that the husband covenanted to pay to the wife a sum of £416 per annum during the joint lives of the parties and £130 per annum in respect of each child up to a certain age which each has long since passed. After the decree was made absolute, the wife re-married. Her husband lived in Australia and she is now domiciled there. This having happened, the husband thought it proper to reduce or to vary his liability under this agreement, but he was unable to take advantage of s. 1 (3) of the Maintenance Agreements Act, 1957, as it is an essential condition before that section can operate that both parties must be domiciled in this country. The husband therefore attempted to vary the settlement under s. 25 of the Matrimonial Causes Act, 1950. The variation that he proposed was that there should be what is called a dum sola clause which would cause the agreement to come to an end when the wife married a second time. These proceedings started by way of summons before Mr. Registrar TOWNLEY MILLERS, who dismissed the summons on the ground that there was no jurisdiction to deal with the matter, as the document in question was not a post-nuptial settlement within s. 25. On appeal BAKER, J., heard the matter in chambers but delivered judgment in open court on June 12 of this year. He reversed the decision of the registrar and sent the matter back to be argued before him whether there should be a variation, as in his view the document was a post-nuptial settlement. H I

A It falls therefore to this court to consider the agreement and the section of the Act of Parliament and to say whether the learned judge was right in the conclusion to which he came that this document was a post-nuptial settlement within the meaning of the section. I have come to the conclusion that the learned judge was wrong, that the decision of the learned registrar should be restored, that this is not a post-nuptial settlement and that s. 25 of the Act of B 1950 cannot operate.

I read s. 25 from RAYDEN ON DIVORCE (8th Edn.), at p. 1188. It provides as follows:

> "The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and C may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage."

D In this case there are two children. That is the section under which the husband hoped to vary this agreement.

As I see this case, it depends on the proper construction of the agreement and no help is to be obtained from extraneous sources and, indeed, it has been decided that in matters of this kind the court must act on the evidence contained in the document itself and not seek for assistance from extraneous sources. It follows E that any decision of this court on this matter is a decision on these particular facts and on the particular document which is presented to us for construction. The agreement was made between the husband and the wife in the period between the date of the decree nisi and the date of the decree absolute, and was dated May 29, 1945. It recited that:

> "On the petition of the wife a decree nisi for the dissolution of the marriage F was made and the custody of the two children was given to the wife"

on Apr. 12, 1945. It then went on to recite that:

> "Prior to the hearing of the cause an order for alimony pending suit was made and the wife is now [i.e., at the time of the agreement] entitled to apply in the registry of the said Division for permanent maintenance."

G The Division is the Probate, Divorce and Admiralty Division of the High Court. Permanent maintenance is granted by the court only to take effect after decree absolute, but it is a well-established practice in the Division, we are told, to make application for permanent maintenance before the decree has been made absolute. The next recital says:

> "Whereas it has been mutually agreed by and between the parties hereto H that in lieu of the wife so applying provision for the wife and the children shall be made in manner hereinafter appearing and that in consideration therefor the wife shall enter into such covenant and declaration as are on her part hereinafter contained."

Then the agreement sets out the various matters which have been agreed between I the parties, to only one or two of which I need refer. There is a covenant by the husband to pay the sums which I have mentioned of £416 per annum less tax for the maintenance of the wife and £130 per annum less tax for the maintenance of each of the two children. There is also a provision that the annuities shall be paid by equal monthly payments, the first to be made on May 1, 1945. It is important to note, because some regard has been paid to it in the argument, that the wife's annuity of £416 was expressed to be calculated as from Apr. 1, 1945. The two provisions which probably are the most important in this discussion are cl. 6 and cl. 7. According to cl. 6:

"The wife hereby accepts the provisions hereinbefore made for her and the children (so long as the same are paid) in full satisfaction of all provisions which but for these presents she might have claimed or obtained from the husband by way of permanent maintenance." A

Clause 7 recites:

"The wife hereby covenants with the husband that she will not apply to any court for any maintenance or any provision to be made for her and the children by the husband in addition to or in excess of the provision hereinbefore mentioned." B

Our attention was very quickly drawn to the fact that according to the decision in *Bennett* v. *Bennett* (1) that provision rendered the whole agreement void. That was one of the matters which, of course, was causing a certain amount of difficulty and trouble to those whose business it was to advise spouses in these circumstances and was one of the reasons why the Maintenance Agreements Act, 1957, was passed. The effect of that Act was that, if an agreement contained a clause of this kind, the agreement itself would still be valid, but the particular clause which attempted to negative the powers of the court would in itself be void. That was the position in this particular case and, therefore, this agreement must be considered as an agreement which does not contain cl. 7 but does contain cl. 6. C D

On an argument based on the construction of s. 25 and the proper construction of the agreement, to which I have referred in some detail, BAKER, J., after a careful consideration of the authorities, decided that this was a case to which s. 25 applied, as this document was a post-nuptial settlement. It appears that there are two ingredients about which the court must be satisfied if a document is to constitute a post-nuptial settlement. The first is that the document must be a settlement. It is not disputed that this document amounted to a settlement. As counsel for the wife said at a very early stage of the argument, the cases had established beyond any doubt that the term "settlement" was not to be used in the strict sense in which a conveyancer might use it but had to be given a liberal interpretation; and, particularly as this was a document providing for periodic payments, then it must be regarded as a settlement. That has not been disputed by anybody and it is on that basis that the question has been considered. There has, however, to be considered the further question whether this is what is described in the Act of Parliament as a post-nuptial settlement; in other words, to adopt the language used by HODSON, L.J., in *Prescott* (*orse. Fellowes*) v. *Fellowes* (2), whether there is present in this agreement a "nuptial element". We have had cited to us a large number of authorities which we have considered but which, if I may say so with the greatest respect to counsel who have been so industrious in finding and citing them to us, do not help us very much on the question that we have to decide, because, so far as I know, there is no authority directly on whether in a case of this kind a nuptial element is or is not present. E F G H

Counsel for the wife raised two points. The first was this, that this could not be an agreement contemplating the continuation of the marriage because, if there was no decree nisi, then there was a failure of consideration, the agreement being or being expressed to be for payments to be made in lieu of payments for permanent maintenance, and in those circumstances the agreement must come to an end. It was pointed out to him in the course of the argument that this could not really be so, because on any showing some part of the consideration was present both at the time when the agreement was made and between the date of the agreement and the date of the decree nisi, and in those circumstances there could not be a total failure of consideration. If that were the only argu- I

(1) [1952] 1 All E.R. 413; [1952] 1 K.B. 249.
(2) [1958] 3 All E.R. 55; [1958] P. 260.

A ment, of course, the agreement would still be in force, decree absolute or no. Counsel for the wife accepted that point of view finally, his researches having failed to disclose, as I think was bound to be the case, any way of countering it. Counsel for the wife took, however, the further point, which does seem to me to be an effective one, that, if there was no decree absolute, the whole basis of the agreement would have disappeared and in those circumstances the contract B would be frustrated. At that late stage of the argument counsel for the wife was entering—as he was perfectly entitled to do—into a field of controversy in the law of contract which offered very considerable difficulties and we did not consider it necessary to take the argument further.

The point which was really made in this case by counsel for the wife was, I think, based to some extent, although not entirely, on the words of DENNING, C L.J., in *Lort-Williams* v. *Lort-Williams* (3). DENNING, L.J., in a very short judgment said this (4):

> "The word 'settlement' in s. 25 of the Matrimonial Causes Act, 1950, is not used in the conveyancing sense. It includes any provision made by a husband for the future benefit of his wife, if it proceeds on the footing of D the then existing marriage."

Then he goes on with other matters. The words to which counsel for the wife attached importance were: "if it proceeds on the footing of the then existing marriage". That, of course, did not mean a great deal to us in this case, but counsel's argument was that the real meaning of those words, as applied to this case, was that the provision was on the footing of the continued existence of the E marriage and not on the footing of the early break-up of the marriage as was the situation here. That argument impressed me very considerably. It did appear to me that, if that were the real issue, then it decided the question whether a nuptial element was present; for it could not be said that a nuptial element was present in the agreement, if its object was to make provision for maintenance of the wife and children after the termination of the marriage.

F Mr. Grayson, in an argument in which he said all that could properly be urged on the part of the husband, argued that this was not an agreement which would be frustrated if there were no decree absolute. This was an agreement which was made during marriage and, for a part of the time at least, it provided for payments to the wife and the children during marriage, and the very fact that the agreement made provision for the children indicated that it was an agreement G on the footing of an existing marriage. He supported his argument to some extent, I think, by the views which were expressed in the judgment in *Melvill* v. *Melvill and Woodward* (5).

This point is a short one and it is unnecessary for me to embark at any length on a discussion of the arguments which have been presented. But, after consideration of all the relevant authorities, it does appear that little or no guidance H is to be obtained from them on what is meant by a nuptial element and this court has to decide in this case—and I cannot do more than emphasise that these cases depend entirely on the documents on which they are founded—whether it cannot be said that a nuptial element was present. It may be that the agreement was entered into before the decree was made absolute. There can be no doubt that it was entered into after the decree nisi, which means, of course, I that the marriage had come to an end to such an extent that the assistance of the court had been invoked to dissolve it, and to all intents and purposes was at an end. There was provision for the maintenance of the wife and the children for a period from some time before the making of the decree absolute, during the joint lives of the husband and the wife and for the children up to the specified age.

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(3) [1951] 2 All E.R. 241; [1951] P. 395.
(4) [1951] 2 All E.R. at p. 245; [1951] P. at p. 403.
(5) [1930] All E.R. Rep. 79; [1930] P. 159.

On the construction of that document it does seem that it cannot be said that a nuptial element was present any more than it can be said that the document was entered into on the footing of the then existing marriage. If "on the footing of the then existing marriage" means, as I think it does, "on the footing of the continuation of the then existing marriage", then that principle cannot apply, since to me it appears clear from the face of this document that the footing on which it was made was that the marriage was to be dissolved and, of course, the agreement was not to be really effective until the decree had been made absolute.

In those circumstances, it seems to me that this was not a post-nuptial settlement within s. 25 of the Act of 1950 and I would allow the appeal and restore the order of the learned registrar.

UPJOHN, L.J.: I agree with the judgment that has just been delivered and would allow the appeal and restore the order of the learned registrar. In order to bring a settlement within s. 25 of the Matrimonial Causes Act, 1950, two elements must be established. First, that it is a settlement; secondly, that it is either an ante- or post-nuptial settlement. We are not concerned with the first because counsel for the wife has wisely conceded that it is a settlement. The whole question, therefore, is whether the document of May 29, 1945, is properly described as a nuptial settlement. No court has ever attempted to define what is a pre-nuptial settlement or what is a post-nuptial settlement and I do not suppose that any court will ever attempt to do so. I certainly am not going to and I am confining my observations, like ORMEROD, L.J., entirely to the facts of this particular case, for in this branch of the law every case must necessarily depend on its own particular facts and in particular on the true construction of the document before the court.

Although no definition has been attempted, the authorities, of which we have looked at a number, make it clear that, in order to be a nuptial settlement, the settlement must be on one of the spouses, in the character of a spouse and during the continuance of the marriage, and on the footing that the marriage is going to continue. I do not think that it has been better put than in the first and, possibly, the best-known of the many authorities, *Worsley* v. *Worsley and Wignall* (6) where LORD PENZANCE said (7):

> "The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife."

Numerous subsequent authorities express the same thought in rather different language, the most recent being *Lort-Williams* v. *Lort-Williams* (8), cited by ORMEROD, L.J., and in particular the judgment of DENNING, L.J. It is also clear from *Melvill* v. *Melvill* (9), a decision of this court, that the question whether a settlement is or is not a settlement for the purposes of s. 25 is purely a question of construction of the particular document. That was made plain by LORD HANWORTH, M.R., and by ROMER, L.J., and it is not permissible to look at extraneous circumstances or to consider the motive for entering into the document to determine its true construction.

I do not think that I can usefully go in detail through this document again, but it is plain that its whole tenor was to make arrangements which were to last after the decree absolute which was then shortly expected. Its object was to make arrangements for the benefit of the wife and for the children of the marriage in lieu of a claim for permanent maintenance, and permanent maintenance can only begin after the decree absolute. Therefore, looking at this document as a whole, it seems to me that it cannot properly be described as a

(6) (1869). L.R. 1 P. & D. 648.
(7) (1869), L.R. 1 P. & D. at p. 651.
(8) [1951] 2 All E.R. 241; [1951] P. 395.
(9) [1930] All E.R. Rep. 79; [1930] P. 159.

A post-nuptial settlement but was a document which in essence and substance was going to take effect on the final dissolution of the marriage and was to govern the relationship of the parties, not while the marriage continued, but after it had been dissolved. Accordingly, I agree with the way in which it appealed to the learned registrar.

The learned judge came to a different conclusion and, looking at his judgment, B I think that he did so because of the fact that when the agreement was made the decree absolute had not been pronounced and was not due to be pronounced, possibly, for four or five months. We know that in fact it was expedited, but I disregard that circumstance. Four or five payments due to the wife might have been paid for her own benefit and for the benefit of the children before the decree absolute and the learned judge reached the conclusion that that was sufficient to C enable him to come to the decision that the agreement was properly described as a post-nuptial agreement. That view has, of course, been in the forefront of the argument of counsel for the husband, but, again confining myself solely to the construction of this particular document, I am unable to reach the conclusion that the fact that certain payments would fall due under it before the decree absolute is sufficient to make it into a post-nuptial settlement. It is true that D those payments would fall due, but the whole tenor and substance of the agreement was to make provision for the wife and the children after the marriage had ceased and the decree absolute had been pronounced.

For those reasons I do not think that this document is properly described as a post-nuptial settlement and, therefore, the appeal must be allowed.

E **DAVIES, L.J.:** I also agree. The petition for dissolution in this case was on Aug. 5, 1944. An order for alimony pendente lite was made on Nov. 24. On Mar. 1, 1945, that order was discharged and a fresh order was made. On Apr. 12 the decree nisi was pronounced. As the law then stood the relevant section with regard to permanent maintenance was s. 190 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, which, in words different from F those at present in force, provided that, on any decree for divorce or nullity of marriage, the court might order, etc. One is familiar with the old controversies that arose as to the meaning of the words, "on any decree". But it was the practice after decree nisi and before the decree absolute had been pronounced to take out an application for permanent maintenance; whether that application was heard before or after the decree absolute, the order did not commence to G run until the decree absolute. That was the position here after the decree nisi, and the document recites that the wife is entitled to make such an application. Then this document was entered into on May 29, 1945. On June 25 leave was given to expedite the decree absolute and the decree was made absolute, as ORMEROD, L.J., has said, on July 2.

H From its terms, that document was substituting and was intended to substitute the payment of the sums provided for in it for the wife's right to permanent maintenance and to children's maintenance. It contemplates, and is to take effect on the basis of, the termination of the marriage and the pronouncement of the decree absolute. As ORMEROD, L.J., has emphasised, it is true that the payments commence to run from Apr. 1 and that the first payment has to I be made on May 1, but the whole tenor of the agreement, as my Lord said, is the substitution of the liability under the document for the liability which the husband might and, indeed, would otherwise be under as from the end of the marriage. I agree with the words used by the learned registrar in this case when he said:

> "Now it seems to me that an agreement made in contemplation of divorce making provision for the woman in her future capacity as a 'single woman' cannot possibly be a marriage settlement."

The learned judge appears to have thought that he was bound by *Melvill* v. *Melvill* (10) to come to the conclusion at which he arrived. In the view that I take of *Melvill* v. *Melvill* (10), it was an entirely different state of affairs from the present one. There, after a husband had filed a petition on the ground of adultery but before the decree nisi or the hearing of the suit, the wife, who was entitled to a considerable amount of property in expectation, proceeded to execute a voluntary settlement intending it, no doubt, to enure to the benefit, not of her then husband (although the word "husband" was used), but of the husband—the man—with whom she was charged with committing adultery and whom no doubt she hoped to marry, and for the benefit of her then and any other children. That is an entirely different state of affairs from the present case. That document was an effective document and could be perfectly effective in every respect if the marriage continued. It did not depend for its validity on the termination of her marriage to her then husband. It is quite otherwise in the present case. Without making any citations from that case one need only refer to a rather long passage in the judgment of GREER, L.J. (11), to see that the learned lord justice is there saying that it did not necessarily follow by any means from the terms of the document that the marriage would necessarily come to an end, and he goes on to say (12):

> "One can conceive many circumstances which may make it reasonably probable, if not absolutely certain, that at the time the settlement was entered into the marriage would only last for a short time. The husband at the time of the settlement might be in such a state of health that it might be quite certain he could not live for more than nine months or a year, and the fact that the wife settled her property for the very reason that the marriage could not continue after that period could not be urged as a reason why the settlement should not be regarded as a post-nuptial settlement."

The state of affairs is entirely different here. In theory the parties could have become reconciled and the decree might have become rescinded, but that was not the object of the document. The object of the document was to deal with the situation after the marriage had come to an end.

It seems to me that no other conclusion is open to this court on the terms of the document. For those reasons, in addition to what has already been said by my Lords, I agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Alec Woolf & Turk* (for the wife); *Ralph Freeman & Co.* (for the husband).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(10) [1930] All E.R. Rep. 79; [1930] P. 159.
(11) [1930] All E.R. Rep. at p. 85; [1930] P. at p. 175.
(12) [1930] All E.R. Rep. at p. 85; [1930] P. at p. 176.

A

R. v. BAKER.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Veale, JJ.), October 9, 1961.]

Firearms—Unlawful possession of firearms at time of "apprehension" for offence—Conviction of offence other than that for which arrest was made—Offence not specified in Firearms Act, 1937, *Sch.* 3—*Whether there could be conviction of being in possession of firearms contrary to Firearms Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 12), *s.* 23 (2).

B

Before a prisoner can be convicted of an offence under s. 23 (2) of the Firearms Act, 1937*, it must be shown that one of the offences specified in Sch. 3 to that Act has in fact been committed, and committed by the prisoner.

C

The word "apprehension" in s. 23 (2) of the Firearms Act, 1937, means that the apprehension must not only be lawful but must also be for an offence of the nature specified in Sch. 3 to that Act in fact committed by the prisoner.

Appeal allowed in part.

D

[As to possession of firearms when apprehended for a specific offence, see 10 HALSBURY'S LAWS (3rd Edn.) 601, para. 1120.

For the Firearms Act, 1937, s. 23, see 5 HALSBURY'S STATUTES (2nd Edn.) 1111.]

Appeal.

This was an appeal by Henry Baker against his conviction at Brighton Quarter Sessions on June 30, 1961, before the recorder and a jury on one count (count 1) of housebreaking and larceny, contrary to s. 26 (1) of the Larceny Act, 1916, one count (count 2) of burglary and larceny, contrary to s. 25 (1) and s. 13 (a), respectively, of the Act of 1916, and, at a separate trial, on one count (count 3) of being in possession of a firearm, contrary to s. 23 (2) of the Firearms Act, 1937, he at that time being apprehended for arson. At the end of his trial on counts 1 and 2 he had pleaded guilty to a fourth count of carrying an offensive weapon, contrary to s. 1 (1) of the Prevention of Crime Act, 1953, but that plea was not accepted as being alternative to count 3. He was sentenced to eighteen months' imprisonment on counts 1 and 2, the terms to run consecutively, and to twelve months' imprisonment on counts 3 and 4, concurrent, making four years' imprisonment in all. The recorder granted a certificate for leave to appeal on count 3 under s. 3 (b) of the Criminal Appeal Act, 1907, on the ground that a decision was desired whether the appellant was properly charged under s. 23 (2) of the Firearms Act, 1937, as at the time when he had been apprehended he was apprehended for arson and had never been charged with that offence. The appellant was stopped by the police in the early morning of May 26, 1961, at Brighton, when he was in a car. The police officer said to him, "You answer the description of a man suspected of arson at a flat at Brunswick Place, Hove. I am arresting you and taking you to the police station for further inquiries." The appellant was cautioned and replied "All right". He was arrested and taken to the police station. He was not at that time charged by the police officer with committing any offence.

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A. J. D. McCowan for the appellant.

P. A. Harmsworth for the Crown.

I

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was charged at Brighton Quarter Sessions on one count of housebreaking and larceny, on a second count of burglary and larceny, on a third count that he was in possession of a firearm at the time of his apprehension for arson and, on a fourth count, that, anyhow, he was in possession on that occasion of a firearm without lawful authority or reasonable excuse in a public place. He later

* Section 23 (2) is set out at p. 704, letter B, post.

pleaded guilty to that last-mentioned count, but that plea was not accepted as being alternative to the third count. In fact, he was convicted on the third count and sentenced to twelve months on that count and twelve months on the fourth count, concurrent. The sentences on the other two counts do not matter for the purposes of this appeal. Be it observed that the third count was laid under s. 23 (2) of the Firearms Act, 1937, which provides:

> "If any person, at the time of his committing, or at the time of his apprehension for, any offence specified in Sch. 3 to this Act, has in his possession any firearm or imitation firearm, he shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence under this subsection, and on conviction thereof on indictment shall be liable to [imprisonment] for a term not exceeding seven years in addition to any penalty to which he may be sentenced for the first-mentioned offence."

The fourth count, on the other hand, was laid under the Prevention of Crime Act, 1953, which provides, by s. 1 (1):

> "Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable . . . (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine not exceeding £100, or both."

The defence took the point that there could not be a conviction on the third count under the Firearms Act, 1937, unless it was shown that one of the offences specified (1) in Sch. 3 had in fact been committed, and committed by the appellant. On the other hand, it was said by the prosecution that an offence is committed under s. 23 (2), whether or not an offence specified in Sch. 3 has been committed by the accused, provided the apprehension was a lawful apprehension, namely, an apprehension on reasonable grounds of suspecting that he had committed one of those offences. The recorder ruled against the defence submission, and the appellant was, therefore, convicted on the third count. The recorder, however, granted a certificate, and the appeal now comes before the court pursuant to that certificate.

The court has come to the conclusion that the construction put on s. 23 (2) by the defence is the true construction. The other construction results in the absurdity that a man who has committed no offence at all of the nature specified in Sch. 3 might be liable to seven years' imprisonment as opposed to two years, merely because a policeman had reasonable grounds for suspecting that he had committed one of those offences. It would, in the judgment of this court, require very plain words to produce that situation. It seems to this court that, on a natural reading of the subsection, it is providing that possession of a firearm by a person either at the time of his committing one of the offences specified in Sch. 3 or at the time of his apprehension for such an offence committed by him shall attract the higher penalty. Indeed, it seems to this court that assistance for that construction is to be found in s. 23 (1), (2), where, in the second paragraph, it is specifically referring to the apprehension for the purposes of that subsection as lawful apprehension for any other offence committed by him. It seems to this court that "apprehension" in s. 23 (2) must be given the same meaning, namely, it must be lawful and, not only that, but it must be for an offence of the nature specified in Sch. 3 in fact committed by the prisoner.

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(1) Schedule 3 to the Firearms Act, 1937, specifies offences under various enactments which include ss. 1-12 of the Malicious Damage Act, 1861. Sections 1-6 create offences of setting fire to buildings. Arson is itself an offence at common law. See generally 10 HALSBURY'S LAWS (3rd Edn.) 876-878. The appellant was arrested for arson.

(2) Section 23 (1), so far as material, reads: ". . . Where any person commits an offence under this subsection in respect of the lawful apprehension or detention of himself for any other offence committed by him, he shall be liable to the penalty provided by this subsection . . ."

A In these circumstances, the court has come to the conclusion that the learned recorder was wrong in ruling on the matter as he did, and that the conviction on the third count must be quashed. As I have already said, the appellant pleaded guilty to the fourth count. The fourth count is an offence which carries a sentence of up to two years' imprisonment. The appellant was sentenced to only twelve months on that count and, accordingly, that sentence and also the conviction and B sentence on counts 1 and 2 stand, so that, in fact, there is no practical difference to the appellant at all.

Appeal allowed in part.

Solicitors: *Bosley & Co.*, Brighton (for the appellant); *Town clerk*, Brighton (for the Crown).

C [*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

R. *v.* MALES.

D [COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Slade and Veale, JJ.), October 5, 1961.]

Criminal Law—Attempt—Merger—Indictment charging attempt—Conviction of attempt when evidence showed full offence (felony of housebreaking) committed—Whether conviction of the misdemeanour, the attempt, permissible—Criminal Procedure Act, 1851 (14 *&* 15 *Vict. c.* 100), *s.* 12.

E The appellant was convicted on indictment of a misdemeanour, viz., attempting to break and enter a dwelling-house with intent to steal therein. The evidence showed that there had been the actual felony, viz., housebreaking. On appeal,

Held: by virtue of s. 12* of the Criminal Procedure Act, 1851, the appellant was not entitled to be acquitted of the attempt, although the evidence F showed that the full offence had been committed.

Rogers v. *Arnott* ([1960] 2 All E.R. 417) distinguished.

Per CURIAM: it may well be that any principle of merger which exists as between misdemeanour and felony does not exist as between misdemeanour and misdemeanour; that is to say, an attempt which is a misdemeanour will not merge in the complete offence, if that also is a misdemeanour (see G p. 708, letter F, post).

Appeal dismissed.

[As to the merger of an attempt which is a misdemeanour in the felony of the full offence, see 10 HALSBURY'S LAWS (3rd Edn.) 306-309, para. 567; and for cases on the subject, see 14 DIGEST (Repl.) 112, 113, *776-786.*

For the Criminal Procedure Act, 1851, s. 12, see 5 HALSBURY'S STATUTES H (2nd Edn.) 716.]

Cases referred to:

R. v. *Button*, (1848), 11 Q.B. 929; 18 L.J.M.C. 19; 12 L.T.O.S. 309; 13 J.P. 20; 3 Cox, C.C. 229; 116 E.R. 720; 15 Digest (Repl.) 1200, *12,188.*

R. v. *Evans*, (1833), 5 C. & P. 553; 1 Nev. & M.M.C. 374; 172 E.R. 1096; I 15 Digest (Repl.) 1250, *12,820.*

R. v. *Meal*, (1848), 11 L.T.O.S. 250; 3 Cox, C.C. 70; 15 Digest (Repl.) 1127, *11,253.*

R. v. *Simpson and Kerrison*, (1851), 3 Car. & Kir. 207n.; 15 J.P. 246; 175 E.R. 523; 14 Digest (Repl.) 113, *784.*

Rogers v. *Arnott*, [1960] 2 All E.R. 417: [1960] 2 Q.B. 244; 124 J.P. 349; 44 Cr. App. Rep. 195; [1960] 3 W.L.R. 73; 3rd Digest Supp.

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* Section 12 is set out at p. 706, letter I, to p. 707, letter A, post.

Appeal. A

This was an appeal by Joven Males against his conviction at Middlesex County Sessions on May 2, 1961, before the deputy chairman and a jury of attempting to break and enter a dwelling-house by night with intent to steal therein. He was placed on probation for three years. The deputy chairman granted a certificate for leave to appeal under s. 3 (b) of the Criminal Appeal Act, 1907. The facts appear in the judgment of the court. The authority, statutes and cases enumerated below were cited in argument in addition to those in the judgment*. B

M. D. L. Worsley for the appellant.
R. D. L. Du Cann for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: At about 3 a.m. in the morning of Apr. 28, 1961, the licensee of a public house was clearing up the bar when he heard a noise and saw a piece of board which had been nailed over a broken glass pane in the door being pushed in and a hand coming in and apparently reaching for the bolt. He ran out, and finally overtook the appellant in his car, and kept him under observation until the police arrived. According to the police, the appellant said: "I was only looking for somewhere to sleep". In evidence, he denied that he had tried to get into the public house or told the police that he was only looking for somewhere to sleep. It appears, therefore, that the evidence at the trial, if accepted, as it was, showed that there had been an actual housebreaking and not merely an attempted housebreaking. The point in this appeal is whether the appellant could properly be convicted of the offence charged, that is, the attempt, having regard to the fact that the evidence showed he had committed the complete offence of housebreaking. Let me say at once that the court is indebted for the argument of counsel on what is quite an interesting point of law, though not of very great importance to this particular appellant, and if, in giving my judgment, I do not refer to all the cases that have been cited before us *, it is in no way out of disrespect to counsel's argument. C D E

It is sufficient, in the opinion of the court, to start with the decision of the Divisional Court in *Rogers* v. *Arnott* (1). In that case, the Guildhall magistrates' court had found a prisoner not guilty of attempted stealing since the evidence adduced showed that he had committed the complete offence of larceny. On appeal to the Divisional Court, it was accepted that a man charged with an attempt could defend himself by proving, if he could, that he had committed the complete offence. It is, perhaps, unnecessary to consider what is the principle behind that. It may be said that the two offences, the attempt and the complete offence, are mutually exclusive and that, as it has been said in an American case (2), failure is the essence of the one, namely, the attempt, and success is the essence of the other, namely, the complete offence. It may be, on the other hand, on the basis of some notional merger whereby in contemplation of law the attempt merges in the full offence. That, as it seems to this court, is the general principle at common law; but it is said that, unlike *Rogers* v. *Arnott* (1) where the matter under consideration was a decision of justices, this is the case of a trial on indictment, and that s. 12 of the Criminal Procedure Act, 1851, covers the point and enables the court to convict of the attempt even though the evidence shows that the full offence has been committed. Section 12 provides as follows: F G H

> "If upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; I

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* 2 HALE'S PLEAS OF THE CROWN (1736) 301, 302; [1961] Crim. L.R. 436—Article: "Success and failure in Criminal attempts"; Larceny Act, 1916, s. 27 (1); *R.* v. *Higgins*, (1801), 2 East, 5; *R.* v. *Anderson*, (1843), 2 Mood. & R. 469; *R.* v. *Shott*, (1851), 3 Car. & Kir. 206; *R.* v. *Bulmer*, (1864), Le. & Ca. 476; 9 Cox, C.C. 492; *R.* v. *Garland*, [1910] 1 K.B. 154. (1) [1960] 2 All E.R. 417; [1960] 2 Q.B. 244; 44 Cr. App. Rep. 195.
(2) *Commonwealth* v. *Crow*, (1931), 303 Penn. 91.

A and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour."

B Applying that section to the facts of this case, one can read the first few lines of the section in this way:

> "If on the trial of any person for any attempted housebreaking it shall appear that the facts given in evidence amount in law to housebreaking, such person shall not by reason thereof be entitled to be acquitted of such attempted housebreaking."

C Read in that way, it seems to this court that that section says in very clear terms that a prisoner in circumstances such as these can be convicted of the offence. Moreover, when one considers the mischief aimed at by the Act, it seems to this court that that is really the only interpretation that can be put on those words.

D By 1851, the criminal law was quite clearly in disrepute. The preamble of the Act begins with these words:

> "Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case . . ."

E If one looks at the cases, it becomes clear that between 1831, at any rate, and the passing of this Act, there were a great number of cases in which prisoners had, contrary to the proper administration of the law, escaped conviction. Thus, at that time, to give one illustration, a jury could only give an alternative verdict of the same quality, if I may use that word. If a man had been charged with felony, the jury could not convict him of the attempt, which was the misdemeanour. Equally, it is clear that, if charged with the attempt, the misdemeanour, and

F the full offence was proved, he was entitled to be acquitted. Indeed, one has only to look at *R.* v. *Meal* (3) decided in 1848, to show the position that was liable to arise. In that case, the prisoner had been charged with burglary. It was not shown that he had actually entered, although the attempt was plain. Accordingly, he had to be acquitted of the burglary and could not be convicted of the attempt. Another bill was then preferred against the prisoner alleging the misdemeanour of

G an attempt, and on the trial of that, as the evidence came out, it was shown that he had actually entered, and, accordingly, again he had to be acquitted. A somewhat similar situation arose in *R.* v. *Simpson and Kerrison* (4). It is unnecessary to refer to the facts. At the same time, there were a number of cases in which a misdemeanour was alleged and where the evidence showed that, in the course of committing that misdemeanour, a felony had been committed. An

H illustration of that was *R.* v. *Evans* (5), decided in 1833, where the charge was one of false pretences, a misdemeanour, and where it turned out that those false pretences had been caused by the felonious uttering of a forged document, which was a felony. It was held in that and other cases that, in such a situation, there was, as it were, a notional merger of the misdemeanour and the felony, and, once it turned out that a felony had been committed, the prisoner was entitled to be

I acquitted on the charge of the misdemeanour. Accordingly, looking at the matter as one of history, it would seem quite plain that it was that sort of mischief which was being aimed at by the legislature when s. 12 of the Act of 1851 was passed. It is further to be observed that the court sees all the more reason to give the section what seems to them to be its natural interpretation when one considers the inconvenience that would otherwise be caused. It would be difficult for the

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(3) (1848), 11 L.T.O.S. 250. (4) (1851), 3 Car. & Kir. 207n.
(5) (1833), 5 C. & P. 553.

prosecution to say, or to be able to say, whether there had been merely an attempt resulting in failure, or whether the prisoner had succeeded in committing the full offence and, further, this interpretation causes no hardship to the prisoner. A

Counsel for the appellant has advanced a number of points in favour of giving s. 12 a more limited construction. He points, in the first place, to s. 9 of the Act (6), which is dealing with the other mischief to which I have referred which existed at that time, namely, that a jury on a charge of felony could not give an alternative verdict of the misdemeanour, the attempt. Section 9 deals specifically and only with that situation. He says, accordingly, that, if it was to be provided that a prisoner could be charged with the attempt notwithstanding that the full offence was proved, that was the natural place to legislate to that effect, dealing with attempts from both points of view. He suggests that s. 12 should be limited to cases like *R.* v. *Evans* (7) and a number of other cases to which I need not refer but which in fact are referred to in *R.* v. *Button* (8), the sort of case where the misdemeanour of false pretences was alleged and it turned out in the course of carrying out those false pretences that a felony was committed. He suggests that s. 12 applies, and applies only, to such a case. This court, however, feels that there is no reason for giving a limited effect to the plain words in s. 12; indeed, it may well be that s. 12 appears in the form it does and not in, or as a subsection of, s. 9, for the very reason that it is covering both types of case, not only a case such as occurred in *R.* v. *Evans* (7) but also all cases of attempts. B C D

Finally, he raises an argument to show the absurdity which would result if the section was given that meaning. His argument, as I understand it, is that s. 12 is only dealing with attempts to commit felonies, and he says, accordingly, that, if the attempt was an attempt to housebreak and housebreaking in fact occurred, on this construction of the section the person could be convicted, whereas, if the attempt alleged was an attempt to obtain goods by false pretences, he could not be convicted if he showed that he had committed the full offence of obtaining goods by false pretences, because the latter also is a misdemeanour. This court is unable to give effect to that argument. It is unnecessary to decide it, but it may well be that any principle of merger which exists as between misdemeanour and felony does not exist as between misdemeanour and misdemeanour; in other words, that an attempt, a misdemeanour, will not merge with the complete offence of the misdemeanour. This court has come to the conclusion that there is no reason to give the words of s. 12 other than their ordinary and natural meaning. Accordingly, the court is satisfied that the conviction was right, and that this appeal should be dismissed. E F

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(6) Section 9 reads: " . . . If on the trial of any person charged with any felony or misdemeanour, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanour for which he was so tried." (7) (1833), 5 C. & P. 553.

(8) (1848), 11 Q.B. 929; 3 Cox, C.C. 229. These cases are cited in 11 Q.B. at pp. 934-947 and 3 Cox, C.C. at pp. 231-240.

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HILDER v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD.

[QUEEN'S BENCH DIVISION (Ashworth, J.), July 11, 12, 20, 1961.]

Occupier—Negligence—Children permitted to use land for play with a football—Land abutting on highway and separated only by low wall—Motor cyclist on highway injured as result of football kicked over wall onto highway by child—Whether occupier liable.

B

Road Traffic—Negligence—Contributory negligence—Motor cyclist not wearing crash helmet—Whether contributory negligence.

The defendants were the owners and occupiers of factory premises which included a piece of open grassland called the Green, one side of which adjoined a busy highway and another side of which adjoined a narrow lane. Children up to ten or eleven years of age had permission to play on the Green and to the knowledge of the defendants regularly played with a football. Two boys in particular practised kicking at goal using a poplar tree bordering the lane as one goal post and a stick stuck in the ground as the other and kicking in the direction of the highway. The only barrier between the goal and the highway was a wall three feet two inches high on the Green side and four feet high on the pavement side. From time to time the ball went over the wall and had to be retrieved from the highway. On Feb. 23, 1959, while the two boys were so playing the ball went over the wall causing a passing motor cyclist to fall and sustain a fractured skull from which he died. The motor cyclist was not wearing a crash helmet; at the date of the accident the Highway Code contained no advice that motor cyclists should always wear crash helmets. In an action by his widow for damages,

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Held: (i) a reasonable man, being the occupier of the Green, would have come to the conclusion that, as a result of the children's playing with a football, there was a risk of damage to persons using the road and that the risk was not so small that he could safely disregard it and refrain from taking steps to prevent possible injury (see p. 712, letter C, post); therefore, as the defendants had taken no such steps, they were liable for negligence.

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Dicta of LORD REID in *Bolton* v. *Stone* ([1951] 1 All E.R. at p. 1086) and of LORD SOMERVELL OF HARROW in *Cavanagh* v. *Ulster Weaving Co., Ltd.* ([1959] 2 All E.R. at pp. 751, 752) applied.

(ii) failure to wear a crash helmet was not, at the time of the accident, contributory negligence (see p. 710, letter G, post).

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[As to duty of occupier of premises adjoining highways, see 28 HALSBURY'S LAWS (3rd Edn.) 72, para. 73; and for cases on the subject, see 36 DIGEST (Repl.) 17, 18, *78, 79.*]

Cases referred to:

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Bolton v. *Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 36 Digest (Repl.) 18, *79.*

Carmarthenshire County Council v. *Lewis*, [1955] 1 All E.R. 565; [1955] A.C. 549; 119 J.P. 230; [1955] 2 W.L.R. 517; 3rd Digest Supp.

Cavanagh v. *Ulster Weaving Co., Ltd.*, [1959] 2 All E.R. 745; [1960] A.C. 145; [1959] 3 W.L.R. 262; 3rd Digest Supp.

I

Morris v. *West Hartlepool Steam Navigation Co., Ltd.*, [1956] 1 All E.R. 385; [1956] A.C. 552; [1956] 1 W.L.R. 177; 3rd Digest Supp.

Action.

The plaintiff, Mrs. Kathleen Hilder, as administratrix of the estate of her husband, Sidney George Hilder, claimed damages against the defendants, Associated Portland Cement Manufacturers, Ltd., under the Fatal Accidents Acts, 1846 to 1908, for negligence and nuisance. The defendants were the owners and occupiers of premises known as Johnson's Cement Works at Stone in the county of Kent. Included in these premises was a piece of open grassland called

the Green. The Green was bounded on the east by a public highway known as King Edward Road, on the south by a narrow lane known as Gasworks Lane, on the west by the factory buildings and on the north by an entrance to the factory. The sides facing King Edward Road and Gasworks Lane were planted with poplar trees about eight feet apart. On the King Edward Road side was a low wall three feet two inches high on the Green side and four feet high on the pavement side. King Edward Road was a tarmacadam road with a considerable volume of traffic. In about 1955, the defendants granted permission for young children of not more than ten or eleven years old to play on the Green. Older youths and grown men were forbidden to play there. Playing with a football on the Green was a regular form of amusement for the young boys living in the neighbourhood and, in particular, for two boys, Roger McVeigh and Leon Wood, aged nine years and 10¾, respectively. After school hours they practised kicking at goal, the goal posts consisting of a poplar tree and a stick stuck in the ground. At first they kicked towards Gasworks Lane. As a result of over-kicking into a private garden, they moved the stick out into the Green, still retaining the poplar tree as the other goalpost, but kicking in the direction of King Edward Road. The distance between the improvised goal and the road was a little over fifteen yards and, apart from the trees, the only barrier between the goal and the road was the wall on the Green side. On Feb. 23, 1959, these two boys were practising kicking. The plaintiff's husband was riding a light-weight motor cycle along King Edward Road. He was not wearing a crash helmet. He was travelling slowly on his correct side of the road with the wall on his left separated from the carriageway by a pavement six feet ten inches wide, when the ball came over the wall just in front of him causing him to have an accident, as a result of which he sustained a fractured skull from which he died.

F. W. Beney, Q.C., and *A. M. Skeffington* for the plaintiff.

R. B. Gibson for the defendants.

Cur. adv. vult.

July 20. **ASHWORTH, J.**, read the following judgment in which he stated the facts, and, having found that the ball went over the wall from time to time and had to be retrieved from the road, continued: It is convenient to dispose of the issue as to a crash helmet at once. Although the Highway Code (1) now in force does contain the words: "Motor cyclists should always wear properly fitting protective helmets", no such advice appeared in the edition current in February, 1959, and there are not yet any statutory regulations under which helmets are compulsory. I was informed that, in an unreported case, HAVERS, J., declined to hold that failure to wear a helmet was contributory negligence on the part of a motor cyclist, and I respectfully follow that decision. Moreover, in the present case, having regard to Mr. Hilder's slow speed and relatively low height off the ground, I am by no means certain that, if he had been wearing a helmet, his skull would not have been fractured. Accordingly, if this claim succeeds, it succeeds in full. [HIS LORDSHIP referred to the evidence of witnesses for the defendants and continued:] On behalf of the defendants, reliance was naturally placed on the decision of the House of Lords in *Bolton* v. *Stone* (2) in which the plaintiff, who had been hit by a cricket ball when standing in the highway outside her house, failed in her claim for damages against the members of the cricket club from whose ground the ball had been hit. In that case, LORD REID said (3):

> "In my judgment, the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger."

(1) Revised, 1959.

(2) [1951] 1 All E.R. 1078; [1951] A.C. 850.

(3) [1951] 1 All E.R. at p. 1086; [1951] A.C. at p. 867.

A For the plaintiff, it was contended that, if that test were applied to the facts of the present case, the plaintiff's claim ought to succeed. But it was further contended that the decision of the House of Lords in *Carmarthenshire County Council* v. *Lewis* (4) afforded even stronger support to her case. In *Lewis's* case (4), the county council were held to have been negligent in not taking effective steps to prevent a little boy just under four years old from wandering B onto a highway out of school premises. *Bolton* v. *Stone* (5) was cited, and LORD REID dealt with the matter (6):

> "Then *Bolton* v. *Stone* (5) was cited, and it was said that, although injury to the driver of a vehicle in the street might be foreseeable as a possible consequence of the escape of the child, it was not reasonably probable and, therefore, the appellants are not liable. But, in my view, *Bolton* v. *Stone* (5) C establishes that, if an event is foreseeable, the antithesis of its being reasonably probable is that the possibility of its happening involves a risk so small that a reasonable man would feel justified in disregarding it, and I cannot believe that, if anyone had realised that the result of having a gate so easy to open might be a serious accident in the adjoining road, he would have thought it right to disregard that risk and do nothing."

D Although the difficulty of remedial measures was said by LORD REID in *Bolton* v. *Stone* (7) to be irrelevant on the issue of liability, it is, perhaps, worth stating that, in the present case, it would have been a simple matter to fix wire netting along the low wall separating the Green from King Edward Road, so as to prevent a football from going over the wall unless it was kicked with quite exceptional E force. As an alternative, it occurred to me during the trial that the boys might well have been told to kick in the opposite direction; that is to say, away from the road and not towards it. My impression of the two boys, McVeigh and Wood, is that, if any such instructions had been given, they would have complied with them.

It was also contended for the defendants that, as the negligence alleged against F them was an omission rather than a commission, the correct approach to the issue of liability was by way of what has been termed the Dunedin formula (8), and reference was made to *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.* (9). It was argued that, in the absence of evidence as to the general practice (and such as there was favoured the defendants rather than the plaintiff), I could only find in the plaintiff's favour if the omission were (10) "of a thing G which was so obviously wanted that it would be folly in anyone to neglect to provide it". For the plaintiff, it was contended that the Dunedin formula had not been applied to any case except a claim by an employee against his employer, but that, in any event, even if the formula were applicable, the defendants were liable. For my part, I prefer respectfully to follow the lead given by LORD SOMERVELL OF HARROW (with whom LORD TUCKER and LORD JENKINS agreed) in *Cavanagh* v. *Ulster Weaving Co., Ltd.* (11), and ask myself whether the H defendants are shown to have failed to take "reasonable care in all the circumstances". LORD SOMERVELL there says:

> "I suggest with all respect that courts of first instance, whether judge and jury or judge alone, will proceed more satisfactorily if what I have called the normal formula—that is reasonable care in all the circumstances— I is applied whatever the circumstances . . . In my view, it would be unfortunate if courts had to consider what amounted to folly. I do not pretend

(4) [1955] 1 All E.R. 565; [1955] A.C. 549.
(5) [1951] 1 All E.R. 1078; [1951] A.C. 850.
(6) [1955] 1 All E.R. at p. 572; [1955] A.C. at p. 565.
(7) [1951] 1 All E.R. at p. 1086; [1951] A.C. at p. 867.
(8) See *Morton* v. *William Dixon, Ltd.*, 1909 S.C. 807 at p. 809.
(9) [1956] 1 All E.R. 385; [1956] A.C. 552.
(10) Per LORD DUNEDIN in *Morton* v. *William Dixon, Ltd.*, 1909 S.C. at p. 809.
(11) [1959] 2 All E.R. at pp. 751, 752; [1960] A.C. at pp. 166, 167.

to have considered every gloss on 'reasonable care' which may from time to time have been cited as helpful but, speaking for myself, I think the fewer the formulae the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those in another."

As it seems to me, this approach to the problem is of general application, whether the allegedly negligent defendant is an employer or an occupier of land or a driver of a vehicle, and has the great advantage of simplicity.

In the present case, the relevant circumstances include the situation of the Green and, in particular, the existence of King Edward Road along one side, the amount of traffic using the road, the ages of the children using the Green, the nature of their amusements and the frequency with which the Green is used. A reasonable man in the position of the defendants would, in my view, consider all these circumstances, and, in addition, would consider, first, whether there was any risk of damage to persons using the road as a result of the children's activities; and secondly, whether that risk (if any) was so small that he could rightly refrain from taking steps to prevent the danger. If he considered the matter in this way, he would be acting in accordance with the test laid down by LORD REID in *Bolton* v. *Stone* (12). In my judgment, a reasonable man would come to the conclusion that there was a risk of damage to persons using the road and that risk was not so small that he could safely disregard it. While it is true that a football itself is unlikely to damage a person or vehicle on the road in the way that might occur with a cricket ball or a golf ball, I think that the sudden appearance of a football in front of a cyclist or motor cyclist is quite likely to cause him to fall or to swerve into the path of another vehicle, and in either event sustain serious injury. This conclusion has been reached by me after careful consideration of the whole of the evidence, but I am fortified by the evidence given by the defendants' witnesses, to which I have already referred.

Accordingly, I find that the defendants failed to take reasonable care in all the circumstances, and that this failure unhappily resulted in Mr. Hilder's death. The claim in negligence, therefore, succeeds.

There was also a claim that the defendants were liable in nuisance, but in regard to this claim I find myself in considerable difficulty having regard to the speeches delivered in *Bolton* v. *Stone* (12). The report contains a full summary of the argument on the issue of nuisance, but in two of the speeches it is said that counsel conceded that, if the case on negligence failed, the claim in nuisance must fail, too. On the other hand, LORD RADCLIFFE (13) did not refer to the concession, but said:

> "I agree with the others of your Lordships that, if the respondent cannot succeed in negligence, she cannot succeed on any other head of claim."

There is, I understand, some ground for supposing that the extent of counsel's concession may have been misunderstood: but, however that may be, counsel for the plaintiff made it abundantly plain that he was not making any similar concession. For my part, having regard to my decision on the issue of negligence, I do not feel constrained to give any decision on the issue of nuisance, more particularly as I have striven to state the facts fully so that if hereafter a decision on that issue becomes necessary the material for it will be available.

[HIS LORDSHIP awarded £4,035 damages, which included £57 for funeral expenses.]

Judgment for the plaintiff.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Neil Maclean & Co.* (for the defendants). [*Reported by* KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

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(12) [1951] 1 All E.R. 1078; [1951] A.C. 850.
(13) [1951] 1 All E.R. at p. 1087; [1951] A.C. at p. 869.

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Re PAULING'S SETTLEMENT TRUSTS. YOUNGHUSBAND *v.* COUTTS & CO.

[CHANCERY DIVISION (Wilberforce, J.), May 30, 31, June 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, July 6, 1961.]

B *Trust and Trustee—Breach of trust—Consent—Nature of consent—Requisites to disentitle beneficiary from suing for breach—Invalid exercise of power of advancement—Whether action statute-barred—Whether trustee entitled to relief—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6 *c.* 21), *s.* 19 (2) *proviso—Trustee Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 61.

Trust and Trustee—Powers of trustee—Advancement—Exercise—Validity of
C *particular exercises of power.*

Where the consent or concurrence of a beneficiary in whose favour a power of advancement has been exercised, but in circumstances which make the exercise a breach of trust, is relied on as a defence to an action by him for that breach, the court has to consider all the circumstances of his consent or concurrence with a view to seeing whether it is fair and equitable
D that he should sue the trustees; but it is not necessary for the purpose of protecting the trustees either that the beneficiary should have known that it was a breach of trust in which he was concurring, if he fully understood in what he was concurring, or that the beneficiary should himself have benefited by the breach of trust (see p. 730, letter G, post).

Principle stated by LORD ELDON, L.C., in *Walker* v. *Symonds* ((1818), 3 Swan. at p. 64), *Evans* v. *Benyon* ((1887), 37 Ch.D. 329), and observations
E of LINDLEY, L.J., in *Re Somerset, Somerset* v. *Earl Poulett* ([1894] 1 Ch. at p. 265) and in *Chillingworth* v. *Chambers* ([1896] 1 Ch. at p. 699) considered.

By cl. 11* of a marriage settlement made in 1919 the trustees of the settlement, a bank, were empowered with the written consent of the wife, who was entitled to a life interest, to raise any part or parts not exceeding
F in the whole one-half of the expectant or presumptive or vested share of any child of the marriage in the trust property and "to pay the same to him or her for his or her own absolute use or to pay or apply the same for his or her advancement or otherwise for his or her benefit in such manner as the trustees shall think fit." There were four children of the marriage. The family were a united family who, at material times, lived at a higher scale
G than they could afford. The father was the principal figure. There was a current account in the mother's name with the same bank as were trustees of the settlement, and on this account the father had power to draw. The account was continuously overdrawn in about £2,000 or more from September, 1948, until August, 1950. At the material time the children knew that their parents were in financial difficulties. There were many exercises of the
H power of advancement, some thirty-four being the subject of dispute. There developed a pattern of advances being made in favour of a child or children, who were often separately advised, the sums advanced being in one case paid to purchase property conveyed to the parents or being paid into the mother's current account or being used to pay off moneys owed by them on security, the children concurring in the transactions. In September, 1948,
I a sum of £1,000 was raised out of the trust funds by the bank by way of advance to two sons, Francis (who had attained twenty-one years in 1941) and George (who had attained twenty-one years in 1946), at the suggestion of the father. In May, 1949, a sum of £2,000 was so advanced. Both these were paid by the bank into the mother's current account with the bank, the sons consenting in writing (the consents being written in the father's handwriting and signed by the sons), but without separate advice on those

* The material terms of cl. 11 are set out at p. 716, letter G, post.

occasions, though there had been separate advice regarding previous advances, e.g., an advance of £2,600 in September, 1948, which was applied by the bank in discharge of a mortgage to the bank on the mother's life interest under another trust, the sons concurring in this application. The £1,000 was, so far as the bank were aware, for the purchase of furniture for a house in the Isle of Man (the family house) to be purchased for the sons out of other advances; in fact, however, the house was ultimately conveyed into the names of the parents on the bank's direction at the father's instance, but at the time of the advance of £1,000 the proposal for conveying the house into the parents' names had not been made to the bank, who were legally advised that the advance of the £1,000 was proper. As regards the £2,000, the bank knew that it was intended that the money should be paid into the mother's account, which was overdrawn, and that some part of the amount was to be spent on improvements to the house, they (the bank) allowing the mother to increase her overdraft back to its former figure.

On June 18, 1951, the father approached the bank with a view to advances being made in favour of the youngest son, Anthony, who had attained twenty-one years on June 15, 1951, and was serving with his regiment in Germany. A solicitor's letter giving separate advice was written to him. On July 11, 1951, £2,000 was raised by way of advance for him from the trust fund; of this sum £1,000 was paid into the mother's bank account, which was then in credit, and the remainder was used to repay £1,000 which a daughter had borrowed and of which £700 had been paid to the mother. Four further advances in Anthony's favour were made subsequently, the total of all the advances being £6,500. Some part of these, though paid into the mother's account, was spent by or on Anthony.

In an action against the bank, brought by the four children for breach of trust, each plaintiff sought only to enforce such breaches of trust as were alleged in respect of advances made on his account.

Held: (i) the payment of £1,000 for furniture, etc., raised by way of advance for Francis and George, into their mother's overdrawn account at their direction, was not in the circumstances a breach of trust (see p. 728, letter H, to p. 729, letter A, post).

(ii) as regards the £2,000 raised by way of advance for Francis and George, the exercise of the power of advancement was a breach of trust, as the bank had not satisfied themselves that the money was to be used for the benefit of the sons and knew that it was to be paid into the mother's current account, then overdrawn (see p. 729, letter A, post); but the consent of Francis and George thereto precluded them, in the circumstances, from making the bank liable for the breach of trust (see p. 732, letter C, post).

(iii) the advances, amounting in all to £6,500, for Anthony were breaches of trust, and, as in fact his consent was uninformed and was blindly given, it did not preclude him from making the bank liable for the breaches of trust; but the amount of the sums paid by his parents out of the advances either to pay his debts or otherwise to his credit must be deducted in ascertaining the bank's liability (see p. 734, letter I, and p. 735, letter D, post).

Raby v. *Ridehalgh* ((1855), 7 De G.M. & G. 104) applied.

(iv) the plaintiffs had a future interest within the proviso to s. 19 (2) of the Limitation Act, 1939, which did not fall into possession when invalid advances were made; accordingly the plaintiffs' rights were preserved by the proviso (see p. 735, letter G, post).

(v) although the bank acted honestly, they did not act reasonably in relation to the matters mentioned at (iii) supra, nor ought they to be excused; accordingly, relief could not be granted under s. 61 of the Trustee Act, 1925 (see p. 736, letters E and F, post).

A [As to the exercise of power of advancement, see 21 HALSBURY'S LAWS (3rd Edn.) 177-180, paras. 384-391; and for cases on the subject, see 28 DIGEST (Repl.) 598-605, *1101-1156*.

As to consent to breach of trust, see 33 HALSBURY'S LAWS (2nd Edn.) 319, para. 555; and for cases on the subject, see 43 DIGEST 998-1005, *4392-4465*.

As to relief to trustees for honest and reasonable conduct, see 33 HALSBURY'S B LAWS (2nd Edn.) 317, para. 553; and for cases on the subject, see 43 DIGEST 995-997, *4363-4382*.

As to the limitation of time in relation to actions to recover trust property, see 24 HALSBURY'S LAWS (3rd Edn.) 279, para. 550.

For the Limitation Act, 1939, s. 19, see 13 HALSBURY'S STATUTES (2nd Edn.) 1179; and for the Trustee Act, 1925, s. 61, see 26 ibid., 141.]

C Cases referred to:

Chillingworth v. *Chambers*, [1896] 1 Ch. 685; 65 L.J.Ch. 343; 74 L.T. 34; 43 Digest 1012, *4523*.

Crawshay, Re, Hore-Ruthven v. *Public Trustee*, [1948] 1 All E.R. 107; [1948] Ch. 123; [1948] L.J.R. 586; 2nd Digest Supp.

Evans v. *Benyon*, (1887), 37 Ch.D. 329; 58 L.T. 700; 43 Digest 1002, *4432*.

D *Garnett, Re, Gandy* v. *Macaulay*, (1884), 50 L.T. 172; *on appeal* C.A., (1885), 31 Ch.D. 1; 24 Digest (Repl.) 834, *8270*.

M'Mackin v. *Hibernian Bank*, [1905] 1 I.R. 296; 25 Digest 262, *q*.

Molyneux v. *Fletcher*, [1898] 1 Q.B. 648; 67 L.J.Q.B. 392; 78 L.T. 111; 43 Digest 959, *3989*.

Raby v. *Ridehalgh*, (1855), 7 De G.M. & G. 104; 3 Eq. Rep. 901; 24 L.J.Ch. E 528; 25 L.T.O.S. 19; 44 E.R. 41; 43 Digest 1014, *4544*.

Somerset, Re, Somerset v. *Poulett* (*Earl*), [1894] 1 Ch. 231; 63 L.J.Ch. 41; 69 L.T. 744; 43 Digest 1014, *4542*.

Topham v. *Duke of Portland*, (1863), 1 De G.J. & Sm. 517; 32 L.J.Ch. 257; 8 L.T. 180; 46 E.R. 205; *affd.* sub nom. *Portland* v. *Topham*, (1864), 11 H.L. Cas. 32; 34 L.J.Ch. 113; 10 L.T. 355; 11 E.R. 1242; 11 F Digest (Repl.) 413, *667*.

Vatcher v. *Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, *865*.

Walker v. *Symonds*, (1818), 3 Swan. 1; 36 E.R. 751; 43 Digest 998, *4394*.

Action.

G This was an action by the plaintiffs, Francis Younghusband, George Younghusband, Ann Broadbent and Anthony Younghusband, who between them were absolutely entitled to the capital of the trust fund of a marriage settlement, against the defendant bank, Coutts & Co., the trustees of the settlement, claiming that thirty-four payments totalling £29,160 which had been made between 1948 and 1952 out of capital by way of purported advancement of the plaintiffs were invalid and were breaches of trust and that the bank were liable to restore H that sum to the trust funds. The marriage settlement was made in 1919 on the marriage of Miss Violet Pauling and Commander Francis Younghusband, and the plaintiffs attained their majority on the following dates: Francis, Oct. 15, 1941; George, Oct. 11, 1946; Ann, Mar. 24, 1949; Anthony, June 15, 1951, were the children of the marriage.

The facts appear in the judgment.

I *J. L. Arnold, Q.C.*, and *D. C. Potter* for the plaintiffs.

Sir Milner Holland, Q.C., and *R. Cozens-Hardy Horne* for the trustees, the bank.

Cur. adv. vult.

July 6. **WILBERFORCE, J.**, read the following judgment: This action relates to the administration of the trusts of a marriage settlement made in 1919 on the marriage of Miss Violet Pauling to Commander Francis Younghusband, of which the defendant bank, Coutts & Co., were and at all material times have

been the trustees. The plaintiffs are the four children of the marriage, and they are between them entitled to the capital of the trust fund or so little of it as is left. The general nature of their claim against the bank is that sums totalling £29,160 have been raised out of the trust capital and paid away by way of purported advancements, that these advancements were invalid and were breaches of trust, and that the trustees are liable to replace the amount of them in the capital of the trust fund. It is right that I should say at once that there is no suggestion that the bank have acted dishonestly or that they have made any profit out of the transactions which are impeached. If the bank have erred, their error has consisted in a failure to appreciate or, if they appreciated, to act up to the standard of care required of them as trustees, and more particularly in a lack of firmness in the face of the importunities of Commander Younghusband, the husband of the tenant for life and the father of the plaintiffs, to raise money out of the settlement. The bank, on their side, are entitled to ask that a claim such as that which the plaintiffs are making, which is that the bank shall replace in the trust money which the plaintiffs' family has had and spent, either in supporting the standard of life of the family as a whole or, in some cases, on the plaintiffs themselves, should be scrutinised with some care.

The trusts of the settlement may be shortly described. After reciting that the wife was entitled to certain investments—and I underline that the settlement was entirely of the wife's fortune—and after certain administrative clauses, the settlement, by cl. 5, provides that the trustees may during the life of the wife raise sums not exceeding £10,000 and pay the same to the wife for her absolute use and benefit. That power was exercised in full at some time prior to the date of the transactions complained of in the action. Then in cl. 6 the income of the trust fund is to be paid to the wife for life without power of anticipation. Then after her death there is a provision for an annuity to the husband of £500 a year. Then in cl. 7 there is a power for the wife by will or codicil to appoint an interest to a surviving husband. Clause 8 contains the trusts of capital, which are of the character usual in a marriage settlement. There is a power to appoint to children or issue of the wife whether by the marriage then intended or any future marriage, and in default of appointment the capital goes to the child or children of the wife, again whether by the marriage then intended or a future marriage, who shall attain twenty-one years, or being female, marry under that age. Then in cl. 11 comes the clause of which the bank have made use in this case. I will read the relevant part in full:

> "It shall be lawful for the trustees at any time or times after the death of the wife or in her lifetime with her consent in writing to raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any child or more remote issue of the wife in the said trust premises under the trusts hereinbefore contained and to pay the same to him or her for his or her own absolute use or to pay or apply the same for his or her advancement or otherwise for his or her benefit in such manner as the trustees shall think fit."

There follow certain other administrative clauses, and I need only refer in part to cl. 14, which enables the bank at any time during the life of the wife with her consent in writing to expend a sum not exceeding £10,000 in purchasing a house, with the limitation that the house and the premises should be situated in England, Wales, Scotland or Ireland. That is all I need mention of the trusts of the marriage settlement.

Now the advances in question were made in purported exercise of the power conferred by cl. 11, and before considering what was done by the bank it is necessary to construe the clause and to state the principles of law which apply to its operation. There are two separate branches or limbs of the power: the first is to pay whatever is raised to the beneficiary for his or her own absolute

A use; the second is to pay or apply the same for his or her advancement or otherwise for his or her benefit—this being the usual formula found in advancement clauses. There was some discussion whether the words "in such manner as the trustees shall think fit", which follow the second limb, apply to both limbs or only to the second, but in my judgment it makes little, if any, difference which of these alternatives is correct: each part of the power is a fiduciary power which B requires a bona fide and conscious exercise of the trustees' discretion and the words in question merely draw attention to this.

It is, in fact, under the first limb that most, if not all, of the purported advancements were made, and it can be accepted that by reason of its existence the bank may have a somewhat wider field open to them than do trustees who are confined to the statutory power of advancement. But it is, I repeat, a fiduciary C power: the bank must on each occasion consider whether it is opportune to exercise it; they are not bound by technical considerations relevant to advancement, nor in my judgment is it necessary that they should be able to identify and state any specific benefit which exercise of the power will confer. But there are definite limitations on their powers. First, they must consider the circumstances as they exist at the time when they are proposing to exercise the power D and as they relate to the actual person to be advanced. Secondly, they must in exercising this part of the power pay the money that they decide to raise to the beneficiary for his or her own absolute use. Normally this would mean that the money must be paid to the beneficiary in such a way that he is free to dispose of it as he wishes; there might, in addition, be cases where payment on the order of a beneficiary to (say) a creditor would be justified. A payment E of which it was never contemplated that the beneficiary would ever have the use or disposal, or, putting the same point another way, a payment which from the start it was foreseen would be at the disposal of another person, would not, in my judgment, be justified under this head; it would have to be brought under the second heading as an application for his advancement or benefit. A payment as to which the trustees never had the circumstances or requirements F of the advanced beneficiary in mind would not be a valid payment under this power at all.

A number of authorities was cited to me in support of one or other argument on the scope of the power. Among the most helpful, to my mind, is *Mclyneux* v. *Fletcher* (1). The power there was to apply sums in or towards the advancement in life of the testator's children, with power to pay the money to a daughter G although her share was settled. In one case, money was advanced by the trustees knowing that it was to be used for payment of the debts of the husband of a daughter. There was a formal request by the daughter for the money to be so advanced, but it was held that the advances were not within the power. KENNEDY, J., referred in his judgment (2) to the well-known case of *Portland* v. *Topham* (3), an authority on a power of appointment and, I think, generally H that the principles which govern the due exercise of powers of appointment, requiring such powers to be exercised genuinely for the purposes for which they were created, apply in this analogous field. In the latter case LORD WESTBURY, L.C., said (4) that the donee of the power must act with an entire and simple view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object which he may I desire to effect in the exercise of the power. In fact, it was found that the intended donee had been made use of "as an instrument, an agent, wholly unconscious of the real character of the donation" (per LORD ST. LEONARDS (5)) and for that reason the appointment was bad. It is interesting to see that LORD CRANWORTH (6) contrasted with that what might have happened if the appointor

(1) [1898] 1 Q.B. 648. (2) [1898] 1 Q.B. at p. 654. (3) (1864). 11 H.L. Cas. 32.
(4) (1864), 11 H.L. Cas. at p. 54. (5) (1864), 11 H.L. Cas. at p. 56.
(6) (1864), 11 H.L. Cas. at p. 55.

had said: I cannot do what I want by an appointment, but I shall appoint the whole to you, the donee. "Make it entirely your own; you may spend it all yourself, or you may accumulate one-half if you think fit" (this was what the appointor wanted). In that event, LORD CRANWORTH thought (6) that a valid disposition could have been made.

Some of the issues in this case depend on whether the advances made come within one or other of these formulations. I may refer to one modern case, that is *Re Crawshay, Hore-Ruthven* v. *Public Trustee* (7). One of the questions in that case being whether an appointment was a fraud on a power of appointment, COHEN, L.J., in his judgment (8), referred to the well-known observations of LORD PARKER OF WADDINGTON in *Vatcher* v. *Paull* (9) that an appointment would be invalid if made with the intention to secure a benefit for a non-object of the power and that:

> ". . . a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power."

COHEN, L.J., continued (10):

> "A difficulty, however, arises in determining what, short of a bargain, establishes such purpose and intention. On the one hand, if the appointor appoints to an object of the power, hoping that the appointee will so dispose of the appointed property as to benefit a non-object, but intending to benefit the object whatever disposition he may make of the appointed property, the appointment will be valid, but, if he makes the appointment to an object with the belief that the object will be subject to strong moral suasion to benefit a non-object, which suasion the object would, in the appointor's opinion, be unable to resist, the appointment would, we think, be invalid as a fraud on the power."

Again, one of the test questions here, in relation to many of the advances, may be whether they were made with the knowledge that the person advanced was, or had been, under strong moral suasion which he or she could not, in the opinion of the bank (I stress these words), resist, to make them over to another person. This last case, and also the passage to which I have referred from *Molyneux* v. *Fletcher* (11), raise other important questions which it is convenient to mention at this stage. These relate to the legal consequences of a request, or consent, by the beneficiary concerned, for or to the advances made by the trustee. Where, as happened in relation to three out of the four children of Mrs. Younghusband, the bank made the payment not to the child but to another person, in fact, to Mrs. Younghusband or to Commander Younghusband, there are two ways in which the payment may be regarded. First, it may be regarded as a payment to the beneficiary himself which he then makes over to his mother; or secondly, it may be regarded as a payment to the mother made with the concurrence of the beneficiary. In the first case, the payment is prima facie valid, unless the conditions indicated by COHEN, L.J., apply to render it invalid. In the second case, the payment is a breach of trust, but the concurring beneficiary may, by reason of his concurrence, be disabled from suing the trustees in respect of it (cf. *Molyneux* v. *Fletcher* (12)). In either case it will become necessary to investigate the nature or quality of the consent given: was it given freely; was the child concerned emancipated from parental influence; was separate advice required, and if it was given, was it adequate to impart to any consent given the necessary quality of freedom? There is no need to discourse at any length on the legal principles applicable to this aspect of the case, but I think that it is worth while to refer to one decided case for a guiding statement of principles,

(6) (1864), 11 H.L. Cas. at p. 55. (7) [1948] 1 All E.R. 107; [1948] Ch. 123.
(8) [1948] 1 All E.R. at p. 114; [1948] Ch. at pp. 134, 135.
(9) [1915] A.C. at p. 378. (10) [1948] 1 All E.R. at p. 114; [1948] Ch. 135.
(11) [1898] 1 Q.B. at p. 654. (12) Compare [1898] 1 Q.B. at p. 655.

A that is the Irish case of *M'Mackin* v. *Hibernian Bank* (13). In that case a mother and her daughter had interests in property arising from an intestacy and the mother was indebted to a bank. At an interview with the bank, the daughter, just of age, expressed her willingness to join in a promissory note, and she later did so. The bank manager explained to the daughter that she would be liable for the value of the note and that if her mother did not pay the bank would look B to her, and she replied that she understood all that. She had no separate advice. BARTON, J., decided that she was not bound by the consent, and in his judgment he said this (14):

> "It is quite true that young persons (male or female) upon coming of age obtain capacity to sign notes and to execute mortgages, and that they may render themselves liable by so doing. But it is not correct to suppose C that, as soon as the clock has struck the hour of technical legal emancipation, the young person is discharged from all protection of the law. The law recognises that a young person, living with or under the influence of a parent, is likely to remain for some time under parental dominion, and is at an impressionable age, when gratitude, affection, and respect for a parent are fresh and strong, while knowledge and experience of the stress and struggle D and varied obligations of human life have yet to be acquired. The law protects young persons under such circumstances and at such an age, not by curtailing their capacity to deal with others, but by binding the consciences of those who deal with them."

Dealing with independent professional advice, BARTON, J., says this (15):

> E "Such independent advice must be a reality, not a sham; it must be a shield for the young person, not a mere cloak to cover up the transaction."

Finally, referring to the bank manager's advice, BARTON, J., says that the bank manager was not a proper person to give advice, and continues:

> "It is grotesque to suggest that the bank manager was on that occasion F seriously asking the girl to pause and consider her position before signing the notes. Besides, she practically knew nothing about her rights, while he knew everything from the most direct and reliable source. Under the circumstances any such explanation by him was merely perfunctory . . ."

Many of these observations touch closely on some of the facts in the present case. This is all that I propose to say of the advancement clause in general G terms. I shall return to it when discussing the manner of its application.

I now come to the facts of the present dispute. These are unusually detailed, both because there were thirty-four individual cases in which the power of advancement was exercised and because each case is individually documented in letters or memoranda kept by the bank. I will endeavour, first, to state such facts as establish the general background.

H The four plaintiffs are the children of Commander and Mrs. Younghusband's marriage. The dates of their attaining their majority are as follows: Francis, Oct. 15, 1941; George, Oct. 11, 1946; Ann, Mar. 24, 1949; Anthony, June 15, 1951. They and their parents were a united family, not merely to the extent that they did not disagree, but that they were agreed as to the style and standard of life which they desired to maintain and that to a large extent they acted I together for its attainment. Something can be said of the various personalities. The principal figure was Commander Younghusband. He did not appear as a witness, but he was generally agreed by witnesses on both sides to be a man of vigorous and gay personality, who acted as "leader of the ship" and who was the motive force in all the transactions to be later described. On the other hand, the impression made on me from seeing his children—and this was confirmed by the bank's officer who saw him frequently and, on occasions, with two of his

(13) [1905] 1 I.R. 296. (14) [1905] 1 I.R. at p. 304. (15) [1905] 1 I.R. at p. 305.

children—was that he did not dominate his sons and daughter to the extent that they had no wills of their own. They were content as one would expect, to follow where he led in financial matters, but in general they seem to have inherited a fair share of his active personality. His financial difficulties, which became noticeably acute in 1948, increased as the years went on. He was—I think in 1950—made bankrupt in the Isle of Man and has since withdrawn to South Africa. Mrs. Younghusband, who, too, did not appear as a witness, evidently allowed her husband to take the initiative, at least externally, and to me she remains a rather shadowy figure. She appears in this case mainly as the person whose consent was necessary to any exercise of the power of advancement of the children.

The three younger children gave evidence before me. [His Lordship referred to facts leading to the parties' decision that the eldest son, Francis, should not be called as a witness and that no comment should be made on his absence. After intimating that that decision was a proper one, and that Francis had never been seen by any official of the bank, though he had been seen on three occasions by solicitors, being the solicitors who gave independent advice to the sons, His Lordship continued:]

The second son, George, was about twenty-two when the first advance was made. He is a man of distinct and obvious intelligence and quickness of apprehension. After a period of national service, he went to Cambridge University in October, 1946, where he was financed by a government grant. After a short period of employment in Liverpool in 1949 he was admitted to the Middle Temple in 1950 and passed his examinations for the Bar in December, 1951. He was called to the Bar in February, 1953, read in commercial and tax chambers and obtained employment in the Inland Revenue Department in April, 1953. As will be seen, he has from then on taken the most active part of the four children in relation to their financial affairs, and ultimately the present proceedings.

The third child, Ann, was just twenty-one when the first advance to her was made. She has had a university education at Oxford, where she obtained a good degree. She not only is a person of natural intelligence, with considerable powers of accurate self-expression, but also has her own sense of values and possesses a determined character and will—"imperious" was an adjective used, I thought on insufficient material, by the bank's trust officer. I have the impression that sometimes she found difficulty in reconciling her own moral standards with the loyalty she felt to the family, as a whole, and it may be that she was less convinced of the merits of the family's way of life than the others. She married in 1952 and is now Mrs. Broadbent.

The fourth child, Anthony, is of a rather different type. After passing through Sandhurst he was commissioned in the Royal Horse Guards and his twenty-first birthday, immediately after which the first advance in his favour was made, found him serving with his regiment in Germany. While of a less intellectual type than his brother and sister, he would have no difficulty in understanding and dealing with business matters. As befits an officer in a distinguished cavalry regiment, he was well able to spend money and, without any excessive extravagance, he undoubtedly got through a good deal of it in the early years of his majority. He married in 1953 and has children.

Reverting to the family, as a whole, for ten years before the first of the advances they had been living in Gloucestershire at a house called Clifford Manor. This was a considerable establishment at which the family lived well, with servants, horses and other amenities. The children were brought up in this atmosphere and in the consciousness that the family was perpetually hard up for money. It seems to have had no free capital resources, and its income was derived from the wife's marriage settlement trust fund and from some other small family trusts.

In 1947 financial difficulty turned into crisis. Clifford Manor was sold in the spring and (this is said to be material) the furniture was stored and known to be stored by the bank. Commander and Mrs. Younghusband went to the United

A States of America, where the commander had obtained employment, leaving the family behind to pursue their education and spend their holidays with relations and friends. But before the end of the year the commander—for whatever reason—had given up any idea of establishing himself permanently in the United States and had formed the idea of settling in the Isle of Man for the sake of its climatic and fiscal attractions. Here an unexpected difficulty arose. B Although it was permissible under the trust of the marriage settlement to invest in real property (16) (and indeed Clifford Manor had been bought under this power) it appeared that the purchase of land in the Isle of Man was not authorised. So legal advice was taken on how this difficulty could be got round. This was an important point in the history of the trust, both because it led to the idea of making use of the power of advancement and also because it seems to have C struck the family as a piece of legal obscurantism that land could be bought in Scotland or Northern Ireland but not in the Isle of Man, and to have put them in a frame of mind in which it was legitimate to get round this absurdity by any method which was technically sound. Thereafter they set out to play what they understood to be the lawyers' game with technical counters. The bank were advised in relation to the trust by an eminent firm of solicitors, the active D partner being a Mr. Fletcher, and on their advice counsel's opinion was sought in October, 1947. In his written opinion, which was put in evidence, after confirming that land in the Isle of Man could not be acquired as an investment, counsel considered whether the power of advancement could be made use of to extract capital with which to purchase a house there. After referring fully to the terms of cl. 11, he advised that under it money could be paid to the two sons, E then of age, for their absolute use, and that the sons could, if so advised, purchase the house. Counsel's advice was that a proper arrangement would be that, once purchased, the house should be settled for the benefit of the sons, but said that this was a matter on which the sons should have separate advice. So far as the bank were concerned, the money would simply be paid to them for their absolute use.

F This opinion was, of course, sent to the bank and a copy was forwarded to Commander Younghusband. Although the name of its author was not at that time so well-known as it has since become, I have no doubt that it was read with attention. There was evidence that it was left lying about at Oakhill Lodge, the house eventually bought in the Isle of Man, and Ann (17) admitted that she had seen it there and read it, probably in 1948. George (18) also admitted G that he saw it and read it at about the same time, and it was sure to have been the subject of general family discussion. It is quite clear that it led directly to the first of the advances of which complaint was made. In the latter part of 1948, the sum of £8,450 was raised from the capital of the trust fund by way of advancement to Francis and George and applied in the purchase of Oakhill Lodge, Douglas, Isle of Man. I shall examine this transaction in detail when I H come to deal with the individual claims [cf. p. 726, letter B, post], but at this stage of general narrative I need only say that the house was conveyed into the names of Commander and Mrs. Younghusband, was soon afterwards mortgaged and later was sold for less than was needed to pay the mortgage debt. It has been totally lost to the trust, and the only respect in which Francis and George derived benefit from the purchase was to the extent that it was used as a family I home.

Two more matters should be mentioned. First the question of separate advice for the sons arose in connexion with the purchase of this house; a similar question was to arise in respect of later transactions. On June 12, 1948, the sons in a written memorandum, drafted it appears by the bank, stated that they had considered counsel's suggestion, but that they fully understood the matter and did not desire to obtain such advice. Secondly, in connexion with this advance,

(16) Cf. p. 716, letter I, ante. (17) The third plaintiff.
(18) The second plaintiff.

the bank made a calculation which showed that the expectant or presumptive share of each child in the trust fund was worth about £14,000, so that the maximum amount which could be advanced was £7,000. This figure of £7,000 was adopted as a yardstick in relation to later transactions, first as a ceiling and later as a target.

Before the purchase of Oakhill Lodge was completed the stage was set for other transactions. The suggestion that cl. 11 of the settlement could be used to extract capital from the settlement opened a new and attractive prospect for Commander Younghusband. On Jan. 23, 1948, he wrote to the bank a letter which contained this passage:

> "As this money can be advanced to our sons unconditionally (which I hadn't realised) wouldn't it be advantageous for all concerned to advance them the full amount possible (£7,000 each, I think you said in a previous letter) and use the balance not needed for the house to pay off, first, the Hodson loan of (I think) £3,000 and secondly, as much as possible for our overdraft of £3,000 ?"

Particularly significant in this letter is the reference to "our overdraft". There was, in fact, at all material times an account in the name of Mrs. Younghusband (on which I think the commander drew) with the bank acting in this respect as bankers, not as trustees. This account during the whole period covered by the advances Nos. 1 to 22 (that is, from September, 1948, to August, 1950) was overdrawn almost throughout to an extent exceeding £2,000. It was also during this period secured by the deposit of shares worth (according to the bank) between £2,600 and £3,400 (the security was, it seems invalid, but the bank did not know this) and was subject to a limit which varied between £3,350 at its highest to £1,000 at its lowest (the exact figures are given in Exhibit "D.1"). On Nov. 17, 1950, this account was closed and the security realised. A new account was opened which during the period of the advances made to Anthony (Nos. 23 to 27) was generally in credit to a small amount. It was this overdraft which the commander was suggesting should be repaid out of "advances" made to the sons. The subsequent history of the trust shows this to be an ever-recurring theme, and the gravamen of the charge against the bank is that, although they knew perfectly well that this was the purpose for which advances were required, and although they knew and were advised that this was an improper purpose, they nevertheless made substantial advances for precisely this purpose, failing thereby to protect the interests of those entitled to the capital of the trust fund. I pause here to say that it is not suggested that the bank, occupying the dual character of trustees and bankers, deliberately looked after their own interests as bankers to the neglect of their duties under the trust; that would be a serious charge, and it is not made. What is said, I think with justification, is that the existence of this continuously overdrawn account had the effect of causing the bank to place too much in the foreground the interest of Mrs. Younghusband and too much in the background their responsibility as trustees to protect the capital of the trust fund and the interests of those who would eventually take the capital. To that extent the bank's dual character was unfortunate, and an impediment to the correct exercise of their judgment.

The bank's first reaction to the commander's proposal was on Jan. 27, 1948, when they wrote as follows:

> "With regard to your suggestion that further moneys be made available to your sons up to the maximum amount which could be used for their advancement at this juncture, we beg to say that we have considerable doubt whether, having regard to the purposes for which the money is required, it would be in order for this course to be adopted. We should not, in any case, agree to take such a step without legal advice, and in view of your pending visit to this country, we think it would be well to leave the matter until you are in London."

A Again on Feb. 2, 1948, they say this:

> "In reply to the second paragraph of your letter, we would say that in our view the payments out of the trust fund suggested in your letter of Jan. 23 would not represent a proper exercise of the powers of advancement of your sons, contained in your marriage settlement, and having regard to your remarks we do not feel justified in incurring the cost of taking legal advice in this connexion. If, however, when you are next in London, you care to mention the matter to the solicitors, we shall, of course, be willing to consider any views they may express thereon."

B

This attitude did not commend itself to Commander Younghusband. On Mar. 3 and 4, 1948, he called on the bank and restated his proposal. The bank remained firm. I quote from the bank's note of the interviews. Referring to Mar. 3, they say this:

C

> "We explained that if the statement in our letter to the effect that the money could be spent by the boys as they liked could be taken out of its context and taken literally, the commander was probably correct, but what we felt was the true position was that we must first of all find out what it is intended that the money should be used for, and then take the instructions of the boys to see that it was in fact paid out for the purposes intended. If the money were actually paid to the boys themselves, we should not be protecting them in any way."

D

A little later they say:

> "We emphasised that we still felt that the payment of money out of the trust to Mrs. Younghusband for the purpose of reducing her indebtedness was not, by itself, in any sense a proper use of our powers, but if, coupled with that, some other proposal could be put before us which would ensure that the boys eventually received proper value in exchange, as well as some immediate benefit, we should probably be prepared to agree, provided that the lawyers confirm the scheme to be in accordance with our powers."

E

F

On Mar. 4, they said this:

> "We pointed out to Commander Younghusband that our main point is that no benefit accrues to the children directly if the loan and overdraft are repaid and it would be necessary for some arrangement to be made to ensure that the capital money used for the repayment would enure to the benefit of the children . . . In general, the main benefit is the increase in the common pool of income available for the family, from which the children are, of course, maintained."

G

Thereupon the bank sought the advice of their solicitors. This was asked on two points: (i) whether advances could be used to pay off what has been called the Hodson mortgage or loan (a mortgage on Mrs. Younghusband's life interest under another trust on which £2,600 was owing); (ii) whether advances could be used to repay the overdraft on the account. The solicitors, through Mr. Fletcher, gave their views at an interview on Mar. 19, 1948. The note of that interview, after recording that Mr. Fletcher drew attention to the terms of cl. 11 and to the fact that they were wider than those found in the usual advancement clause, proceeds:

H

I

> "While on the face of it the authority to pay to the sons for their own absolute use might be taken as enabling them to do what they like with whatever money we choose to pay to them under the clause, Mr. Fletcher took the view that the bank must exercise discretion when contemplating the exercise of the power. In the second place, one of the proposed purposes for which the money was to be paid was the repayment of an overdraft on Mrs. Younghusband's account in our books, and having regard also to the weakness of the security for that overdraft, he felt that, to say the least,

there was considerable doubt whether the bank would be considered to be acting properly in allowing the money to be taken out of the trust by the children for that purpose." A

Later he, Mr. Fletcher, was recorded as saying this:

"On balance, he thought that it was only under the wider powers that we could accede to the commander's request if we were prepared to exercise our discretion, but he was strongly of opinion that before agreeing to the suggestions the sons should be separately advised. We said we knew that it was most unlikely that they would take separate advice, and Mr. Fletcher then said that we should have to consider the matter as if they were being separately advised, and he could not see how any solicitor could advise them to take the money with the sole purpose of handing it to their mother for the repayment of her indebtedness." B C

This was unexceptionable advice, and the bank knew that it was. If the bank later failed to live up to it, it was a clear case of "video meliora proboque, deteriora sequor" (19). I add one further citation on this general aspect of the matter. On July 13, 1948, Mr. Fletcher had another conversation with the bank. The record of that states that Mr. Fletcher called on the bank; that the commander had raised again the question of raising money to be provided by advancement out of the trust for repaying Mrs. Younghusband's overdraft in the books; "What are our reactions?" Then the memorandum says: "Told we didn't like it at all, particularly as our overdraft is not fully covered by the security"; and D

"Mr. Fletcher did not want to spend time thinking about the matter again if we were going to turn the suggestion down anyway, and we explained that we should have to turn it down unless we were advised quite categorically that we were in order in advancing the boys for the purpose of repaying Mrs. Younghusband's overdraft. He thought he would see Farrers before going into the question further . . . Mr. Burrell [a partner in Farrer & Co.] confirms that it is not a proper advancement." E

I now return to specific matters. On Sept. 13, 1948, the bank, having raised £2,600 out of the trust fund by way of advance to Francis and George, applied this money in discharge of the Hodson loan. In relation to this matter the sons had separate advice, and they received a benefit in the form of certain life policies on Mrs. Younghusband's life. The transaction in the form in which it was carried out was an unsatisfactory one from their point of view, but the issue, as regards the bank, is whether they should be held liable to replace the money having regard to the advice given to the sons. It has further to be considered whether the advice given on this occasion, though directed to a particular transaction, had the effect of informing the sons generally as to their position under the settlement (19a). F G

There were two further advances made to Francis and George in this series of advances, namely, of £1,000 on Sept. 13, 1948, and of £2,000 on May 13, 1949. Both of these sums were paid directly into the overdrawn current account. The first of these sums was supposedly advanced to enable furniture to be bought at Oakhill Lodge, though in fact hardly any furniture was bought or was needed. The second was supposedly advanced for "improvements etc." to Oakhill Lodge. The sons agreed in writing to each of these sums being paid into Mrs. Younghusband's account, but received no separate advice about them. As the result of these transactions £14,050 had been raised by way of advancement of the two elder sons, thus exhausting the amount which could be raised for them. H I

The next child to attain twenty-one was Ann. Shortly before her twenty-first birthday, which was on Mar. 24, 1949, the commander was planning advances for her. On June 3, 1949, a sum of £2,986 1s. 9d. was raised and paid into Ann's

(19) Ovid's Metamorphoses, Bk. 7, 20.

(19a) Cf. p. 726, letter D, post.

A account. It is to be noted that in her case, and in her case alone, was money paid into the account of the beneficiary advanced, although George and Ann, at any rate, had their own accounts at the bank. This sum was then applied by her in the purchase of a house at 28, Gunter Grove, Chelsea. The house was conveyed to her, and though it was for a period used as the common family house in London, it was legally hers and when it was sold she retained the pro-
B ceeds of sale. She received in connexion with the purchase separate advice, the purport of which is contained in an important solicitors' letter to which I shall return. No complaint is made about this advance.

There followed, from Aug. 26, 1949, to Aug. 21, 1950, sixteen further advances for Ann's benefit. These can be divided into two groups. The first consisted of payment for work and improvements done at 28, Gunter Grove. Nine advances
C and part of a tenth were made for this purpose, totalling £1,803 12s. 8d., and no complaint is made with regard to them. The remainder were transferred, in most cases on the same day on which they were paid to Ann's account, either to Commander Younghusband or into the mother's overdrawn account, in some cases purportedly for the purchase of furniture at 28, Gunter Grove. Ann consented to all these transfers being made. These payments exhausted the £7,000
D capable of being raised for Ann.

The fourth child, Anthony, attained twenty-one on June 15, 1951. He was at that time serving with his regiment in Germany. The commander lost no time in setting the machinery in motion. On June 18, he called on the bank and told them that he wanted £2,000 raised. A solicitor's letter was to be written giving "separate advice" and thereupon the money was to be raised. A letter was duly
E written on June 22, 1951, by the same firm as that which had advised Ann. I shall have to consider its terms and its adequacy later. Shortly after, on July 11, 1951, £2,000 was raised. Of this £1,000 was paid into the joint account (then in credit) and the remainder was used to repay £1,000 which Ann had borrowed on 28, Gunter Grove and of which she had advanced £700 to Mrs. Younghusband. Thereafter, between Aug. 3, 1951 and Feb. 7, 1952, four further advances totalling
F £4,500 were made, supposedly to Anthony, but in fact each was paid directly into the joint account, no reason being shown in relation to any of them why or how it was required for any purpose connected with the interests of Anthony. In fact there is no doubt that a considerable portion of these advances was spent directly on, or by Anthony, himself. However, Anthony seeks replacement of the total of the advances, £6,500, to capital, and though given an opportunity
G in the witness-box to consider the propriety of such a claim, to money which he had enjoyed and spent, maintained that he had a perfect right to it.

The transactions that I have summarised brought the sums advanced to each child up to or near the original limit of £7,000 fixed by the bank in 1948. However, a further calculation was made by the bank which showed that there was a margin available for further advances, and after 1952 eight further advances were made:
H four to Francis totalling £2,475, two to George totalling £1,425 and two to Ann totalling £1,450. All these were credited directly to the joint account, except one which was paid to Commander Younghusband, without any reason being stated which would connect them with a benefit conferred on a child. Each child, however, consented to the advance and to its application in writing, and each child was by then well over twenty-one.

I It has been necessary to give this general introduction because the advances made during the six years in question form part of a series of a pattern. It would be wrong to look at each one in isolation, just as it would be wrong to consider the advances made to any one child without having in mind those made to the others. I am quite satisfied on the evidence that the three younger children were at all times familiar with the general financial situation of the family, and in particular of the inadequacy of income to provide for their requirements, and that each child knew not only of the advances which he or she received, but of the advances which were made to each of them; that these advances were going into

the mother's account, and that the mother's account was the source of the family's finances. A

[His Lordship, having stated that, since the relevant events had taken place over seven years earlier, he preferred to base his findings on the considerable body of documentary evidence rather than on oral testimony, considered (i) the advance of £8,450 in favour of Francis and George (see p. 721, letter G, ante), and (ii) the payment by the bank on Sept. 13, 1948, of £2,600 to discharge the Hodson mortgage (see p. 724, letter F, ante). As regards (i), His Lordship found that the £8,450 had been paid to purchase a house in the Isle of Man, the money being applied in payment of the deposit, and of the balance of the purchase price to the solicitors for the vendor, that sum being paid pursuant to a written authority signed by Francis and George, and that in causing the house to be conveyed into the names of Commander and Mrs. Younghusband " the bank acted entirely on the commander's instructions "; which apparently were orally given, " and without any authority from the sons or knowledge of the sons "; accordingly, His Lordship held that the payment of the £8,450 was a breach of trust. As regards (ii), His Lordship found that, although the transaction was unsatisfactory in a number of respects, Francis and George had had separate legal advice with regard to it and that the documents were approved by solicitors acting for them, and he accordingly held that the bank were protected in respect of that transaction. His Lordship continued:] B C D

(iii) Advance of £1,000 on Sept. 13, 1948. On June 3, 1948, the bank wrote to Mr. Fletcher asking for advice whether they could properly advance further sums up to the limit of the power " for the purchase of furniture, carpets etc. for use in the house which the sons propose to purchase ". It may be assumed that this was Commander Younghusband's suggestion at the time. Mr. Fletcher advised that this would be proper, and suggested that Messrs. Farrer & Co. might advise Francis and George on this matter. On Aug. 18, 1948, the commander sent to the bank a " chit " signed by the sons, in effect authorising £1,000 to be paid to Mrs. Younghusband's account. The document in question, made out in the commander's handwriting, stated that the sons approved of the transfer of £1,000, to be raised, to Mrs. Younghusband's account. The sons signed a receipt for the money and on Sept. 13, £1,000 was paid by the bank into Mrs. Younghusband's account, then overdrawn by about £3,000. It is right to say that at this time, September, 1948, the bank had not yet been told that the house in the Isle of Man was to be conveyed to the commander and his wife, so that the proposal which had been put to them that the £1,000 should be used to buy furniture for it was not on the face of it open to objection. I do not think that the bank were under any duty to inquire as to the value of the furniture in store; this belonged to the parents, whereas the £1,000 was to be used to buy furniture for the sons. I will consider the plaintiffs' claim for replacement of this sum together with the next following item. E F G

(iv) Advance of £2,000 on May 13, 1949, to Francis and George in equal shares. This sum was paid directly into Mrs. Younghusband's account, the account being overdrawn at the time of payment. The claim for its replacement raises issues of some difficulty which require, I fear, a lengthy examination. I have already referred in the general narrative to Commander Younghusband's proposal, which he made in January, 1948, that advances should be made to each of the elder sons up to the maximum of £7,000 and, so far as not needed for the purchase of the house in the Isle of Man, used to pay off the overdraft, and to the bank's initial reaction to this proposal. The proposal was dropped for the time being, but on Dec. 9, 1948, Mrs. Younghusband signed a memorandum written in the commander's handwriting requesting the bank to raise the £2,000 (approximately) still available for advance to the elder sons. This sum, it was said, would be applied to " improvements etc." to Oakhill Lodge and should when available be paid into the current account. On or about Dec. 10, 1948, the two sons signed and sent H I

A to the bank a memorandum, also written in the commander's handwriting, requesting the bank to pay into Mrs. Younghusband's current account the (approximate) £2,000 which she wished to be raised. The bank were not happy about these transactions and on Dec. 16, 1948, they wrote to the trust solicitors asking for advice. Referring to the £2,000 (approximately) to be raised, the letter said:

B "The intention is that if this money is raised out of the trust fund it shall be placed to the credit of Mrs. Younghusband's account to reduce the overdraft ostensibly as a temporary measure."

The word "ostensibly" indicates some scepticism on the question whether the £2,000 would actually be spent on improvements. The letter continued that the bank were and remained averse to making any advancement for the purpose C of repaying the overdraft and asked for advice, particularly as the two sons had not received any separate advice.

On Dec. 23, 1948, the solicitors wrote giving their advice. They first expressed agreement with the views contained in the bank's letter. They pointed to the difficult position the bank were in through being both trustees and bankers, and continued:

D "It might, in our view, render the bank liable to severe criticism if an advance were made for the benefit of the two sons in the knowledge that it was to be used to pay off their mother's overdraft with you. Subject to what we have said, in our opinion, this is a matter for the bank's discretion. Our own view is that if you feel you want to help them it is a question of granting banking facilities, rather than a matter for assistance from you as E trustees."

On Dec. 29, 1948, the bank conveyed the purport of this advice to the commander, who was so far from being dismayed by it that he immediately asked for the whole £2,000 to be raised. He said that £500 had been spent on the house, and he intended to proceed at once with further purchases for and improvements of the property. F The bank remained firm. On Jan. 4, 1949, they wrote a sound enough letter saying that they did not see that the purposes for which the £2,000 was needed were proper, since the house was Mrs. Younghusband's (in fact it was in joint names), and if the money were spent on the house Mrs. Younghusband would get the benefit. They stated that they considered that the sons should have some compensation and should have separate advice. This letter provoked a telephone G call from the commander from the Isle of Man—its effect is recorded at length by the bank; clearly the commander was approaching desperation in his need for money. The bank reaffirmed their opinion that they must know precisely what the £2,000 was required for, and the commander replied that £500 was needed to pay bills incurred in the maintenance of the boys (a different version from that given in December). The other £1,500 was said to be for a car for family use, a H tennis court and other improvements to the house. The bank said that improvements could not come under the advancement clause, as the house belonged to Mrs. Younghusband, and the commander then asked whether it would be all right if the house was conveyed to the boys: "They would do anything necessary to make it possible for the money to be provided." It was finally arranged that the commander would send the bills that then required to be paid. In fact no such I bills were ever sent. On Jan. 11, 1949, the bank wrote to the commander saying that before they could exercise the power of advancement any further they must know (1) the purpose for which the money was required; and (2) the nature of the benefit the sons were to receive.

Nothing more happened on this particular matter for three months. On Apr. 22 and 23, 1949, the commander, on visits to the bank, reverted to the question of raising £2,000. He said that he would like to take back to the Isle of Man a form for his sons to sign in which the bank could incorporate whatever they thought necessary, or instructions about what they had to say. His sons would

sign whatever was necessary. The writer of the bank's memorandum added an exclamation mark—as well he might. However, the bank did prepare a memorandum and gave it to the commander and in due course it came back signed by the sons. Its wording was certainly such as—on paper—to cover the bank. In it the sons authorised the bank to raise £2,000 and to transfer it to Mrs. Younghusband's account. There followed this sentence:

> "We fully appreciate that the money in question has been or is being used for the purpose of making improvements to the property in the Isle of Man belonging to Mrs. Younghusband."

Before attempting to reach a conclusion on this transaction, I must refer to some of the oral evidence given on behalf of the bank.

Mr. Laycock, who was the manager of the trust department from 1947 to 1954, said that the bank were aware of the extravagant scale of living of the Younghusband family and that the account of Mrs. Younghusband was constantly overdrawn. The family's standard of living was on a higher scale than they could afford, but since the children as they came of age wished this to be maintained, and the bank were not benefited, they thought it reasonable to comply with their wishes. The comment to be made on this is that this approach clearly was not adopted by the bank in relation to the £1,000 and £2,000 advances to Francis and George. Mr. Laycock could not remember seeing either of the sons (though he did see George and the commander in June, 1948), and Mr. Campling, who during the relevant period was the section officer handling the Younghusband trust, only saw George once, in 1948 or 1949, at an unrecorded interview. They had no reason at this stage, other than the bare memorandum and receipt, to suppose that the sons wished an extravagant scale of living to be maintained out of their capital, and the whole correspondence shows that, until their resistance finally crumbled, they were taking the position that unless some purpose, beneficial to the sons, for the advances could be shown, no proper case for the exercise of the power arose.

Mr. Campling said that when documents relating to the trust were written out by the commander for others to sign he considered that care had to be taken to see that those concerned knew what they were doing. With regard to the £1,000 and £2,000 advances, he assumed without inquiry that the whole £1,000 had been spent on the purpose for which it was advanced by the time the £2,000 was applied for; and though he (wrongly) considered that the separate advice the sons had received over the Hodson loan covered the £1,000 advance (see his letter (20) of Jan. 4, 1949); and though he stated in the witness-box that he thought that, the sons having once received separate advice, as they had, they must be taken to know the position and the bank were thereafter under no duty of care, it is clear in fact from his letter (20) at the time that he himself thought that the £2,000 was a new and independent matter on which fresh advice was required. He never asked for any bills for expenditure to be met from the £2,000 and never saw any bills or inquired precisely how much had been spent.

How, then, does this matter stand with regard to these advances? As to the £1,000, the purpose for which it was required was, on the face of it, a proper purpose, on the assumption which was then valid, that the house was to be bought for the sons. The normal course would no doubt have been for the money to have been paid to the sons themselves for them to expend on the furniture, but I do not consider that the bank acted wrongly in taking the sons' directions to pay the money into the mother's account. The point was made that as the account was overdrawn at the time the payment into it would do nothing more than reduce the overdraft and would not make the money available to be used for the purpose for which it was advanced; but the bank satisfied me that on occasions such as this they always allowed the overdraft to be restored to its

(20) See p. 727, letter F, ante.

A former figure, so that the money could have been used. In my judgment, therefore, this payment was not a breach of trust.

As to the £2,000, the case is otherwise. The bank did, in effect, know that the money, immediately it was "received" by the sons, was going straight into the mother's account, and they took no adequate steps to satisfy themselves that it was to be used in any way for expenditure on the sons. On the contrary, such B explanations as the commander gave showed clearly that it was simply going into the mother's account and that some part of it was to be spent on improvements to her house. In my judgment, applying the principles which I have already stated, this was not an adequate exercise of the bank's fiduciary power and the advance was made in breach of trust.

Now I have to consider whether the sons can make the bank liable for this C breach of trust, in view of the fact that they consented to it. I should say here that the plaintiffs by their counsel expressly disclaimed any desire on the part of any of the plaintiffs to claim replacement of any sums other than those purportedly advanced to him or her, so that I am faced squarely with the question whether the consent of Francis and George prevents them from suing the bank in respect of these two advances purportedly made to them. I take as a starting D point the statement of the law in UNDERHILL ON TRUSTS AND TRUSTEES (11th Edn.) at p. 581:

> "A beneficiary who has assented to, or concurred in, a breach of trust . . . cannot afterwards charge the trustees with it: Provided (a) that the beneficiary was sui juris at the date of such assent . . .; (b) that he had full knowledge of the facts, and knew what he was doing and the legal effect E thereof, and has had or retains the benefit of the breach; (c) that no undue influence was brought to bear upon him to extort the assent . . ."

Apart from the question of undue influence in relation to Francis and George, which I will deal with in a moment, I am concerned with proviso (b) and mainly with the extent of the knowledge which the beneficiary must have. It is enough that he knows what he is doing and the legal effect of that, or must he know that F what he is concurring in is a breach of trust? This is a matter of some difficulty on the authorities.

As a general statement of principle, I take the well-known passage from the judgment of LORD ELDON, L.C., in *Walker* v. *Symonds* (21):

> "It is established by all the cases, that if the cestui que trust joins with the G trustees in that which is a breach of trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees: but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it H is on the one hand, to secure the property of the cestui que trust; and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude."

What is involved in "knowing the circumstances"? An answer to this question in apparently clear terms was given by the Court of Appeal in *Evans* v. *Benyon* (22). The Court of Appeal there decided in plain terms that a person who had I concurred in a distribution in breach of trust could not afterwards sue the trustees in respect of it, even though at the time of distribution he did not know that he was interested or that the division was a breach of trust. "A court of equity ought not to sanction any such claim . . .", said COTTON, L.J. (23)—rather suggesting, as LORD ELDON said, that the court had to look at all the circumstances. As an example of cases where the beneficiary was considered not to have the

(21) (1818), 3 Swan. at p. 64. (22) (1887), 37 Ch.D. 329.
(23) (1887), 37 Ch.D. at p. 344.

requisite knowledge, there is *Re Garnett, Gandy* v. *Macaulay* (24), a case of a release: there the beneficiary did not know the value of the trust fund and thought it to be worth much more than it was. In support of a contention that the beneficiary must actually know that the matter concurred in was a breach of trust I was referred to *Re Somerset, Somerset* v. *Earl Poulett* (25). There the question was whether the interest of a beneficiary could be impounded under s. 6 of the Trustee Act, 1888 (26), on the ground that he had consented in writing to an improper investment. It is to be noted that the section specifically refers to consent to a breach of trust, and what was decided was that it was not enough to consent to a transaction which, if improperly carried out, might amount to a breach of trust (per LINDLEY, L.J. (27)). The lord justice adds (27):

> "If a cestui que trust instigates, requests, or consents in writing to an investment not in terms authorised by the power of investment, he clearly falls within the section; and in such a case his ignorance or forgetfulness of the terms of the power would not, I think, protect him—at all events, not unless he could give some good reason why it should, e.g., that it was caused by the trustee."

There appears to be nothing in this passage which is contrary to the views of LORD ELDON and COTTON, L.J., in the cases cited (28).

Then there is *Chillingworth* v. *Chambers* (29), also a decision of the Court of Appeal, including LINDLEY, L.J. The actual question raised was one of contribution between co-trustees, one of the trustees being a beneficiary; but the same principles were held to apply as govern the right of a concurring cestui que trust against a trustee. LINDLEY, L.J., after referring (30) to *Walker* v. *Symonds* (31) and *Evans* v. *Benyon* (32) says (33):

> "Suppose a cestui que trust in remainder to induce his trustees to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in, if some other cestui que trust compels them to make the loss good?"

It is to be noted that the learned lord justice here refers to the remainderman "inducing" the breach.

The result of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust.

What then was the value or quality of the sons' consent to this particular advance? At this point I leave out of account any special factor which may be created by Francis's health and mental condition. At the time (September, 1948) Francis was nearly twenty-eight and George nearly twenty-three; George had performed his national service and was in his last term at Cambridge University; he had started there in 1946. He is, as I have said, of more than average, indeed, of high, intelligence. In October, 1947, when his parents were in the United States of America, he was acting as their intermediary in correspondence with the bank about their tax affairs, showing himself a competent man of business. He was, I have no doubt, aware of the circumstances which led to the taking of

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(24) (1885), 31 Ch.D. 1. (25) [1894] 1 Ch. 231.
(26) The Trustee Act, 1888, s. 6, has been replaced by the Trustee Act, 1925, s. 62; 26 HALSBURY'S STATUTES (2nd Edn.) 144. (27) [1894] 1 Ch. at p. 265.
(28) See p. 729, letters G to I, ante. (29) [1896] 1 Ch. 685.
(30) [1896] 1 Ch. at p. 699. (31) (1818), 3 Swan. 1. (32) (1887), 37 Ch.D. 329.
(33) [1896] 1 Ch. at p. 700.

A counsel's opinion in 1947 and had seen this opinion. The opinion not only referred in pretty plain terms to the scope of cl. 11 of the settlement, but gave a description of the mechanism needed to get money out of the settlement, namely, by an advance to the adult sons which they might or might not freely decide to dispose of in a particular way. George said, that from March, 1948, he had known that each of the children would have £7,000 when aged twenty-one. The others had known B too. Everyone knew that their parents were financially in an extremely bad way. In June, 1948, George had, with Francis, seen Mr. Burrell (34) about the Hodson loan. I accept, as Mr. Burrell himself stated in a letter written in 1954 that Mr. Burrell's advice related only to the Hodson loan and not to other moneys, but the purpose of the advice, as George agreed, was to inform him that money advanced was his to deal with as he pleased and, as again George agreed, C he regarded all dispositions of the £7,000 or so advanced to him as standing on the same footing, and the knowledge he obtained from Mr. Burrell applied to all these sums: it was all his money. George said, and I believe him, that he was not greatly interested in this advice: he had been told by his father that he "could put the money on a horse", and he regarded the consultation with Mr. Burrell as a tedious formality, the object of which was to assert the same proposition. D He said in the witness-box that he must have known the money was going into his mother's account and that this was overdrawn; he realised that he was legally free to dispose of the money as he liked, but thought he was under a strong moral obligation with regard to it. (I recollect the passage in *Re Crawshay* (35).) He did not, in relation to the £2,000 advance, say that he agreed to the advance on any mistaken assumption as to the ownership of Oakhill Lodge E (if he had, I should regard this as decisive in his favour); on the contrary, he clearly regarded this advance exactly as he regarded the others, as a transaction the result of which was going to be to transfer money to his mother's account.

I hold, therefore, (a) that George was at this point, and a fortiori later, emancipated from parental control to the extent that his consent to the transfer of these sums was voluntary and not subject to undue influence; (b) that he understood F that he was handing over money advanced to him from the settlement and that he was absolutely free not to hand it over: (c) that he knew that the money was going into the joint banking account of his parents, out of which payments for the family as a whole were made. George was at pains to emphasise in his evidence that he did not know what a settlement was until he had embarked on his reading for the Bar, and that even then he did not appreciate the nature of G an advancement. While, however, I am prepared to accept that he did not until much later acquire a lawyer's understanding of the precise effect of the making of the advances on his interests and expectations under the settlement—as, for example, that they would ultimately have to be brought into hotchpot—I think that by this time he had sufficient understanding as a layman beneficiary to be able to appreciate to what he was consenting. Of course, Mr. Burrell did H not go through the settlement with him clause by clause, or attempt to advise him in terms of technicality—solicitors giving separate advice would not and should not attempt any such thing—but he explained enough, so I find on the evidence, to enable George to regard the transaction for what it was, namely, as a payment to him by the bank under the advancement clause which he was voluntarily transferring to his parents to get them out of financial difficulties.

I I can deal at this point with the case of Francis, and what follows applies to all the advances made to or for him. He was a man well over the age of twenty-one at the date of the earliest of these advances, and there is no material on which I should find that he was under the parental influence; indeed, such evidence as there is suggests that he spent more of his time away from his parents—in fact,

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(34) Mr. Burrell was the solicitor who gave independent advice concerning the advancements, where such advice was given.

(35) [1948] 1 All E.R. at p. 114; [1948] Ch. at p. 135; see p. 718, letter D, ante.

with his grandmother—than the others. He was able to receive a university education, and again there is no material on which I can find that he was lacking in the capacity to understand what he was doing; on the contrary, such evidence as there is, from Mr. Burrell, is that, although less quick than his brother George, he apprehended what was said. Certainly there is no shadow of a suggestion that the bank knew anything about any weakness of his, either mental or physical. The furthest that I can go with regard to him is to accept that he was not brought into family discussions to the same extent as the others: George said in terms, and I believe him, that he did not explain or discuss matters relating to the trust to or with Francis, as it would have been useless. So that I would not be willing in his case to assume that, because George or Ann or Anthony knew what was being done or planned, this was necessarily part of his knowledge. But, without making any such assumption, I must come to the conclusion, on the state of the evidence, that his consent to this advance—and the same applies to those made later, in 1953 and 1954—was a valid consent so as to prevent him from holding the bank liable for a breach of trust to which his consent related. I hold, therefore, that the plaintiffs cannot call the bank to account for these advances of £1,000 and £2,000.

[His Lordship then considered (v) advances made to Ann. These were made, except in two instances, between June 3, 1949 and Aug. 21, 1950. They fell into three groups: (a) for the purchase of 28, Gunter Grove: £2,986; (b) for improvements to that property or retained by Ann for her own use: £1,803; and (c) others: £5,260. Complaint was made only in respect of (c), but advances under (c) must be viewed against the background that in June, 1949, 28, Gunter Grove had been purchased in Ann's name out of money advanced to her and that other advances, which were not now challenged, were being made over the period for work and improvements to that property, and that this series of advances to Ann, who attained the age of twenty-one on Mar. 24, 1949, differed from the other advances in that they were all passed through her banking account. In connexion with the purchase of 28, Gunter Grove, Ann received clear and adequate independent legal advice as to her rights under the settlement. The advances under (c) were made on representations in writing by Ann that the money was required for the purpose of furnishing, improving or repairing 28, Gunter Grove or for paying to her mother, Mrs. Younghusband, sums which she had, or would shortly thereafter have, spent on that property. In fact, probably not more than £300 was spent on furniture and the representations were to Ann's knowledge untrue, as she admitted in evidence. His Lordship said that it was essential that on a transaction entered into so soon after her majority she should have reliable and full independent advice, but that given such advice, he was satisfied that her relations with her parents were not such as to prevent her from acting with independence. The advice which she received was clear and adequate and she was quite capable of understanding it. His Lordship held that it would not be right to permit Ann to recover in respect of payments made on the faith of untrue statements made by her as to matters which, if truly stated, would have furnished ample justification for the advances. He would not make any distinction between advances on account of different wording in the supporting documents where all of the advances formed part of a larger series of advances understood by the bank, and intended to be understood by the bank, as required for the purchase, furnishing, repair or improvement of Ann's house, 28, Gunter Grove. His Lordship, accordingly, rejected the plaintiffs' claim in respect of the advances to Ann. He continued:]

(vi) I now come to the advances to Anthony. The proposal to advance to him originated on June 18, 1951, when Commander Younghusband called at the bank. The bank's note is worth quoting in full.

> "Interview with: Commander Younghusband. They want £2,000 to be raised for the youngest son. Mr. Burrell is to write to the boy explaining

A that the money will be his to do as he likes with and when that has been done and we receive Mrs. Younghusband's formal request, we are to raise the money and get the boy's directions for its disposal."

This note was not without its background. In September, 1950, the mother's account being in difficulty, a proposal was made to raise £1,000 on mortgage of 28, Gunter Grove (which was Ann's house) "to keep her mother's overdraft B below the permitted limit". The bank were somewhat sensitive about this: they wrote:

"if there is a crash too many conflicting interests will be involved and our duties as trustees will conflict with our interests as bankers."

This sentiment was expressed in relation to a proposal to arrange a trustee C mortgage—it had an a fortiori application in relation to a proposed advance. Ann duly deposited her deeds with the bank. Between then and November, 1950, the bank advanced £700 on these deeds, which they transferred to the mother's account and paid £300 to Ann's account. In February, 1951, the bank told the commander that they expected him to arrange a mortgage to repay the loan of £1,000, and in April they said that they would allow it to remain outstanding a D few months longer pending breaking of the trust when Anthony came of age.

Nothing more had been done when the memorandum of June 18 was signed. Looking at the memorandum, it is impossible not to be struck by the distance the bank had travelled from the early days in 1948 when they recoiled from the idea of using advances to reduce the overdraft. Now the technique appears to be streamlined, almost automatic: get Mr. Burrell to repeat the familiar formula, E so that the bank could be told that separate advice had been obtained; get Mrs. Younghusband's formal consent; get the directions of the boy for its disposal—the boy who was a customer of the bank and had his account there, and if he were really to receive the money, only need to have the money paid into it. The words "directions for disposal" were simply a euphemism for "authority to pay into the mother's account". Mr. Burrell duly wrote to Anthony, then serving in F Germany, on June 22, and I must read his letter. He writes:

"Dear Mr. Younghusband, Your Parents' Marriage Settlement. I have been asked by your father to write to you about an appointment of funds from this marriage settlement which your parents are thinking of making in your favour. I am writing to you as your solicitor in this matter to advise you on your rights and I understand that this is what you wish. If the sum G of £2,000 or indeed any other sum for that matter, is appointed to you by your parents from the settlement funds it will be at your absolute and uncontrolled disposal and you can do with it whatever you will. This is really the only point I have to make clear to you, but if there is anything which you would like me to explain, I will, of course, do so."

H Before I comment, as I must, on this letter, it is right that I should say that Mr. Burrell, who (it is to be noted) refers to "an appointment . . . which your parents are thinking of making", said—and, of course, I accept it—that he regarded this as a merely preliminary piece of advice "to get on the record"; it was an "opening letter" and, as an appointment was involved, would have to be followed by further steps.

I Quite obviously, regarded as a definitive piece of separate advice, it was wholly inadequate. It made no attempt to explain what the boy's rights or interests under the settlement were; what was the legal character of what was proposed; what the effect of doing it would be on his prospects, or what justification there was for his giving up £2,000 "or indeed any other sum". Yet no other advice or explanation was ever given. Anthony in the box said that he had been expecting a letter from the bank about an advance, because the commander had told him that money was to be raised for him and paid over to his mother, as it had been for his brothers and sister: he knew six months before that this was going

to be done. With such an impression in his mind, so bare a letter as he received would do nothing to cause him to reflect, and he naturally dismissed it as a meaningless technicality. It was maintained for the bank that they were not to know what advice, adequate or otherwise, had been given; that they had done their duty by seeing that separate advice was given to their beneficiary. I cannot accept this. A trustee's responsibility extends well beyond putting the record in order, which was really what the bank were content to do. The advice must be a protection to the beneficiary, not just a cloak to cover up the transaction. Here again, I think that the bank's position has been weakened by the fact that Mr. Burrell was at the same time the solicitor advising Anthony and the general solicitor for the bank. I am not in the least criticising him for this, but the bank were on this account perhaps less active in checking that advice had been given. In fact, the letter written was just what the bank contemplated would be written (I refer back to the memorandum of June 18, 1951) and was little more than a formality on which Mr. Campling (36) could report to the board that separate advice had been obtained.

There followed an interview between the commander and the bank's officer on June 28, the record of which contains this passage:

> "We arranged to write to Anthony before the week-end to obtain his instructions as to the disposal of the money. The commander wanted us to send a memo authorising us to credit Mrs. Younghusband's account, but we said we thought we should not do that; the commander will no doubt write the instructions out to that effect and ask his son to sign them."

Compare this again with the same officer's evidence, that he thought particular care was to be exercised when authorities, signed by a child, were written out by the commander; compare it, too, with the bank's previous refusals to advance money for the purpose if it was going into the mother's account. The main preoccupation of the bank seems to have been to avoid associating themselves directly with a transaction of which they did not like the look. On July 3, Anthony wrote asking for the full amount to be paid to his mother's account. Shortly after, the money was raised and £1,000 was used to repay the temporary loan which the bank had made to Anthony; the rest went into Mrs. Younghusband's account

The ink was hardly dry on this transaction before Mrs. Younghusband, in a note indorsed on the bank's letter informing her about the £2,000, wrote saying:

> "Many thanks, will you please raise another £1,000 as soon as convenient for same purpose as there will not be enough for all he now wants."

So the same procedure is gone through (except that no separate advice is obtained) and on Aug. 3, 1951, the £1,000 is placed to the mother's account. On Oct. 30, 1951, the same procedure produces £2,000 for the mother's account, and in January and February, 1952, a further £1,500 is similarly disposed of. No reason was given for any of these advances; no purpose for which they were required was stated, except in relation to the last advance of £1,500, which it was said was wanted for a derelict cottage and its restoration. What interest Anthony had in derelict cottages did not appear.

In my judgment, all these advances, amounting together to £6,500, were improper and were breaches of trust, and I am unable to hold that in respect of them the bank are protected by Anthony's consent. That consent was, and the bank must have known that it was, uninformed and blindly given at the commander's request. Anthony himself initiated nothing; he was simply an instrument conveying money to his mother. There is therefore here, in my judgment, a liability to replace.

However, that is not the end of the matter. It was established by the evidence that considerable sums were paid out of the mother's account to Anthony or for his benefit. There was a standing instruction to the bank—with a note on it

(36) The bank's section officer handling the Younghusband trust.

A that Anthony was not to be told of the arrangement—to feed Anthony's account, whenever overdrawn, out of the mother's account, and large sums were so paid in the years 1949 to 1953. In addition, some of Anthony's bills (the amount of which I cannot determine) were directly paid out of the account. Anthony, of course, must have known that his account was being supplied by his parents, but he said that it did not occur to him that his mother's account was being used for B his own expenditure. There is no suggestion on the documents that the bank, when deciding to make advances to Anthony and to transfer the amount of them to his mother's account, did so with a view to their reaching Anthony's account. All that Mr. Campling was able to say was that he knew that Anthony had been a very expensive young man and had been to Sandhurst: he could not state what direct benefit to Anthony the advances provided, nor what their purpose was, C except perhaps to repay Mrs. Younghusband expenditure incurred on his behalf.

Anthony has thought it right, and he maintained his right in the witness-box, to claim the whole amount of the advances from the bank. I express no view on the morality of such a claim, but, exercising the jurisdiction of a court of equity, I think it would be unconscionable to permit him to call on the bank to replace money paid on his signature to his mother which was directly and at the time D paid to him or spent on him. It seems to me that this approach to the matter is in accordance with what was decided by the Court of Appeal in *Raby* v. *Ridehalgh* (37) as interpreted in *Chillingworth* v. *Chambers* (38). I think the proper course is to declare that the bank must replace the £6,500, but that there must be deducted against it in account such sums as have been paid to the credit of Anthony or used to pay his debts. An account will have to be directed to ascertain these sums, E and I will hear counsel as to the form in which it should be directed.

[HIS LORDSHIP then considered eight advances (two to George, two to Ann and four to Francis) made subsequent to September, 1953. He stated that he did not propose to direct that any of these sums should be replaced, although they, too, had been paid into Mrs. Younghusband's account or to her or Commander Younghusband, because at that date all three plaintiffs were of mature age F and, in HIS LORDSHIP'S view, as a result of a transaction and proposals in 1952 for a reconstitution of the settlement, fully understood their rights. HIS LORDSHIP continued:] I must now deal with certain special defences.

(1) *The Limitation Act, 1939.* The relevant provision (39) is, of course, s. 19 (2), and the whole question is whether the plaintiffs' rights are preserved by the proviso. In my judgment, they are. Undoubtedly they had "a future interest" G and, in my judgment, that interest did not fall into possession when the bank by an, ex hypothesi, invalid advance raised a sum of money out of the capital. Mrs. Younghusband's consent to the advance was not, in my view, equivalent to a release of her life interest, and the only way (without a release) in which a capital sum could fall into possession would be by means of a valid advance. This defence, in my judgment, fails.

H (2) *Laches.* There being an express statutory provision, providing a period of limitation for the plaintiffs' claims, there is no room for the equitable doctrine of laches (40).

(3) *Acquiescence.* In relation to the two claims against the bank which I have held that the plaintiffs can validly pursue, namely, the claim in respect of the purchase of Oakhill Lodge in the Isle of Man and the advances made to Anthony I in 1951 and 1952, the question is whether the plaintiffs have by their conduct

(37) (1855), 7 De G.M. & G. 104. (38) [1896] 1 Ch. at p. 705.

(39) Section 19 (2) of the Limitation Act, 1939, so far as material, reads: ". . . an action by a beneficiary to recover trust property or in respect of any breach of trust . . . shall not be brought after the expiration of six years from the date on which the right of action accrued: Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession."

(40) See, for authority for this proposition, 14 HALSBURY'S LAWS (3rd Edn.) 641, para. 1181, note (q).

done anything which is equivalent to a release of their claims or on which an estoppel may be founded against them. As regards Oakhill Lodge, the two sons, Francis and George, or at least George, had when the purchase was made thought that the house was to be enjoyed by their mother during her life under some kind of gentleman's agreement. George's evidence was that he never had any different idea, though some time in 1949 the commander had said, "The house is ours" and George said that this struck him momentarily as odd. I accept this evidence. I also accept that it was not until 1954 or thereabouts, when counsel (not the same who had advised in 1947) was consulted on the "debts" scheme and commented on the way in which the trust had been administered, that any idea of attacking the advances presented itself. The period between that advice and the time when solicitors were consulted was insufficient, and no change of position took place in it such as to establish acquiescence in the bank's action. There had, indeed, been a change of position in April, 1949, when the house was mortgaged and thereby became irrecoverable to the trust, but that took place when the sons' knowledge of the position was very incomplete.

With regard to Anthony's advances, in my judgment, he never properly appreciated the position until after the advice of counsel to which I have referred. Anthony's evidence was that George told him that counsel had expressed the view that there might have been a breach of trust, which even then he did not take seriously, and that it was not until yet another counsel had been consulted at the end of 1955 or the spring of 1956 that he realised the effect of what had been done. In my judgment, therefore, a defence based on acquiescence does not succeed with respect to either of these matters.

(4) *Section 61 of the Trustee Act, 1925* (41). In my judgment, the bank as a professional trustee, though they acted honestly, did not act reasonably in either of the two matters as to which I have held that a breach of trust was committed, nor, in my judgment, ought they to be excused. I have already referred fully to the advice which they received from their solicitors, which was, in general, sound and correct, and which did not support what in fact was done. The purchase of Oakhill Lodge in the names of Commander and Mrs. Younghusband was not even known to the trust solicitors, who always supposed that it was to be put in the names of the sons and settled; and no advice subsequently given, in particular in the letter of Mar. 1, 1949, on which a good deal of reliance was placed, gave the stamp of legal approval to advances made in the manner of those made for Anthony, which I need not recapitulate. I therefore decline to relieve the bank under the section.

In the result, I hold that the bank are liable to replace to capital: (1) the sum of £8,450; (2) the sum of £6,500, less so much of the advances making up this sum as on inquiry is shown to have been transferred to Anthony or used directly to meet expenditure incurred by him. The bank must also, of course, make good any withdrawal fees charged in respect of these sums.

Judgment accordingly; the bank to pay one-half of the plaintiffs' costs.

Solicitors: *Charles Russell & Co.* (for the plaintiffs); *Bird & Bird* (for the trustees, the bank).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

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(41) Section 61 of the Trustee Act, 1925 (26 Halsbury's Statutes (2nd Edn.) 141) empowers the court, if it appears that a trustee is or may be personally liable for any breach of trust but has acted honestly and reasonably and ought fairly to be excused for the breach to relieve him either wholly or partly from personal liability for it.

A

R. *v.* DUKE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Veale, JJ.), October 9, 1961.]

Criminal Law—Appeal—Insanity—Special verdict of guilty of act but insane at time of its commission—Whether right of appeal against finding of guilty of act—Trial of Lunatics Act, 1883 (46 *&* 47 *Vict. c.* 38), *s.* 2 (1)—*Criminal Appeal Act,* 1907 (7 *Edw.* 7 *c.* 23), *s.* 3.

B

A special verdict of "guilty of the act charged but insane at the time of commission" given under s. 2 (1) of the Trial of Lunatics Act, 1883*, is one and indivisible and is a verdict of acquittal; accordingly, a person so found is not a person convicted on indictment within s. 3 of the Criminal Appeal Act, 1907†, and cannot appeal to the Court of Criminal Appeal against the finding of guilty of the act.

C

Felstead v. *R.* ([1914] A.C. 534) followed.

Dictum of LORD READING, C.J., in *R.* v. *Taylor* ((1915), 11 Cr. App. Rep. at p. 202) applied.

Appeal dismissed.

D

[**Editorial Note.** The Lord Chief Justice refers to a conflict of practice whether the prosecution can call evidence to show that an accused who raises a defence of diminished responsibility was insane within the M'Naghten rules (see p. 739, letter D, post). Compare, in this connexion, *R.* v. *Dixon*, p. 460 ante, though in that case the defence did not put forward diminished responsibility at the trial, and *R.* v. *Bastian* ([1958] 1 All E.R. 568).

E

As to special verdicts, see 10 HALSBURY'S LAWS (3rd Edn.) 289, para. 534; and for cases on the subject, see 14 DIGEST (Repl.) 365, 366, *3540-3547*.

For the Trial of Lunatics Act, 1883, s. 2, see 5 HALSBURY'S STATUTES (2nd Edn.) 903; and for the Criminal Appeal Act, 1907, s. 3, see ibid., 928.]

Cases referred to:

F

Felstead v. *R.*, [1914] A.C. 534; 83 L.J.K.B. 1132; 111 L.T. 218; 78 J.P. 313; 10 Cr. App. Rep. 129; 14 Digest (Repl.) 365, *3546*.

R. v. *Ireland*, [1910] 1 K.B. 654; 79 L.J.K.B. 338; 102 L.T. 608; 74 J.P. 206; 4 Cr. App. Rep. 74; 14 Digest (Repl.) 365, *3543*.

R. v. *Taylor*, [1915] 2 K.B. 709; 84 L.J.K.B. 1671; 113 L.T. 513; 79 J.P. 439; 11 Cr. App. Rep. 198; 14 Digest (Repl.) 366, *3547*.

G

Appeal.

This was an appeal by Irene Mary Duke against her conviction at the Central Criminal Court on July 4, 1961, before GLYN-JONES, J., and a jury of the killing of her husband by shooting. She had been charged with capital murder, contrary to s. 5 (1) (b) of the Homicide Act, 1957, but the jury returned a verdict of "Guilty of manslaughter but insane." The judge directed that the verdict be recorded as: "Guilty of the act charged but insane at the time of commission." He sentenced the appellant to be kept in strict custody until Her Majesty's pleasure be known.

H

D. P. F. Wheatley for the appellant.

J. M. G. Griffith-Jones for the Crown.

I

* Section 2 (1), so far as material, provides: "Where in any indictment . . . any act . . . is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done . . . , then, if it appears to the jury before whom such person is tried that he did the act . . . charged, but was insane as aforesaid at the time when he did . . . the same, the jury shall return a special verdict to the effect that the accused was guilty of the act . . . charged against him, but was insane as aforesaid at the time when he did the act . . ."

† Section 3, so far as material, provides: "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—(a) against his conviction on any ground . . . which involves a question of law alone . . ."

LORD PARKER, C.J., delivered the following judgment of the court, in which he stated the facts and continued: The appellant now appeals to this court against what she terms her conviction and her sentence. Counsel who has appeared on her behalf quite rightly abandons any question of appeal against sentence because, if the verdict stands, the sentence, which was that she was to be kept in strict custody until Her Majesty's pleasure be known, is statutory and there could be no alternative (1). Notwithstanding that verdict and record, counsel maintains that he is entitled to appeal to this court and to show, if he can, that the learned judge misdirected the jury on the question whether the act charged had been committed. Quite shortly, it is said that the learned judge directed the jury that, in the case of a sane person, the verdict must, on the evidence, be one of murder or manslaughter, and that there was no room for a verdict of acquittal. It is said that the learned judge was wrong in so directing the jury, and that the appellant is entitled to appeal to this court.

The difficulty with which counsel for the appellant is at once faced is that our jurisdiction in this court depends on the Criminal Appeal Act, 1907, and, by that Act, an appeal is only given to a person convicted on indictment (2). The question is whether this verdict represents a conviction on indictment. This court has always considered that the matter had been put beyond doubt some forty-seven years ago in *Felstead* v. *R.* (3) in 1914, in which the House of Lords held that a special verdict given under the Trial of Lunatics Act, 1883, was a verdict of acquittal, and, accordingly, the Court of Criminal Appeal had no jurisdiction in the matter. Counsel for the appellant seeks to maintain that that case is only authority for the proposition that there can be no appeal from that part of the special verdict which has found insanity, and that the appellant is entitled to appeal on what I may call the first limb, namely, whether she was guilty of the act charged. He points out what is no doubt true that, in *Felstead* v. *R.* (3), the appeal which it was sought to bring was an appeal on the second limb, namely, insanity. A reading of the reasoning in that case, however, makes it perfectly plain that no appeal, whether on the first or second limb, will lie to this court. It is enough to refer to a passage in the speech of LORD READING where he referred to *R.* v. *Ireland* (4), an earlier case in which the Court of Criminal Appeal had held that an appeal could be brought against the first part of the verdict, what I have called the first limb, but not against the finding of insanity, and continued (5):

> "Thus the court divided the verdict into two parts, and held that no appeal lay against that part relating to insanity. The special verdict is, in my opinion, one and indivisible by reason of the statutory provision and takes the place of the general verdict of 'Not guilty', and is a verdict of acquittal of the accused."

Not only has *Felstead* v. *R.* (3) stood without question since 1914, but it is relevant to observe that, in the very next year, in *R.* v. *Taylor* (6), an attempt was made to get round the decision in *Felstead* v. *R.* (3) by bringing the matter forward by way of Case Stated. In that case LORD READING, C.J., sitting in the Court of Criminal Appeal, said this (7):

> "According to the law laid down by the House of Lords in *Felstead* v. *R.* (3) the appellant has not been convicted, and so he has no right to come to this court either on a Case Stated or in the ordinary way of appeal. There are difficulties which arise in consequence of this view, difficulties

(1) I.e., under s. 2 (2) of the Trial of Lunatics Act, 1883.
(2) See s. 3 of the Criminal Appeal Act, 1907, footnote †, p. 737, ante.
(3) [1914] A.C. 534; 10 Cr. App. Rep. 129.
(4) [1910] 1 K.B. 654; 4 Cr . App. Rep. 74.
(5) [1914] A.C. at p. 543; 10 Cr. App. Rep. at p. 139.
(6) [1915] 2 K.B. 709; 11 Cr. App. Rep. 198.
(7) (1915), 11 Cr. App. Rep. at p. 202; [1915] 2 K.B. at pp. 712, 713.

A which were probably not foreseen at the time of the passing of the Criminal Appeal Act. That is a matter for the legislature, which can introduce amendments if it thinks fit. We can only say that we have no jurisdiction to deal with the matter."

This court would like to adopt that passage in the judgment of the lord chief justice. It has been the experience of all of us that the fact that there is no B appeal from the special verdict may work—we do not say that it has worked—injustice. We are not, however, suggesting that that has happened in the present case. Indeed, we have deliberately refrained, having regard to the view we have taken as to our jurisdiction, from considering the alleged misdirections of the learned judge, and nothing we say in this case must be taken in any way as a criticism of his summing-up. Nevertheless, there may be cases in which con- C siderable hardship would occur. The matter is brought to light still more by the fact that, under the Homicide Act, 1957, there is now a further defence open to an accused, namely, a defence amounting to something less than insanity, i.e., diminished responsibility (8). Cases from time to time arise in which an accused having the two defences open to him will naturally put forward the one which will not send him to Broadmoor, in other words, will put forward diminished D responsibility rather than insanity. It may be, however, that the accused was in fact insane within the M'Naghten rules (9) and ought to go to Broadmoor. In those circumstances, there is real doubt and conflict of practice (10) whether, in such a case, the prosecution themselves can say, and call evidence to the effect, that the accused's mental condition goes far beyond diminished responsibility and is, in fact, a matter of insanity. As I have said, the practice varies E because some judges have taken the view that, if that were allowed, the prosecution would be in effect asking for a special verdict which, according to *Felstead* v. *R.* (11) amounts to acquittal. This court would emphasise what was said by LORD READING, C.J., as long ago as 1915 (12). Certainly there is no less reason today than there was then for considering an amendment by legislation. So far as this case is concerned, the court is quite satisfied that the matter is covered F by *Felstead* v. *R.* (11), and that they have no jurisdiction at all.

The court would only add a word on the form of the verdict. It is certainly, so far as this court is concerned, a novel verdict in that it did not take the ordinary form of saying: "Guilty of the act charged but insane at the time of its commission", and it was for that reason that the learned judge ordered it to be recorded in the statutory form (13). All that this court would like to say is that they G are not satisfied that a verdict in the form returned by the jury in this case was necessarily wrong, but, in any event, so far as this case is concerned it mattered not whether the record included the words of the jury or recorded the matter as instructed by the learned judge. Accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(8) I.e., under the Homicide Act, 1957, s. 2.
(9) See *M'Naghten's Case*, (1843), 10 Cl. & Fin. at pp. 209-212.
(10) Cf. p. 737, letter D, ante. (11) [1914] A.C. 534; 10 Cr. App. Rep. 129.
(12) See p. 738, letter I, to p. 739, letter A, ante.
(13) I.e., under s. 2 (1) of the Trial of Lunatics Act, 1883.

A

LINCOLN *v.* DANIELS.

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), May 30, 31, June 1, 2, 5, 6, 7, 8, 9, July 17, 1961.]

Libel—Privilege—Absolute privilege—Qualified privilege—Communications to Bar Council—Libel alleged contained in letters of complaint against Queen's Counsel addressed to secretary of Bar Council—No complaint made to Benchers of Inn of Court—Letters not protected by absolute privilege.

B

Libel—Privilege—Absolute privilege—Inquiry by Benchers into conduct of barrister.

The absolute privilege against liability for defamation that attaches to proceedings before a court of justice attaches also to disciplinary proceedings before Benchers of an Inn of Court, for the disciplinary powers of the Benchers are derived from the judges and are subject to appeal to the judges (see per LORD MANSFIELD in *R.* v. *Gray's Inn* (1780), 1 Doug. K.B. at p. 355), and when exercising such powers the Benchers act judicially, and accordingly the committee or tribunal hearing the disciplinary inquiry is a court or tribunal "recognised by law" within the scope of that phrase in the judgments of KELLY, C.B., in *Dawkins* v. *Lord Rokeby* ((1873), L.R. 8 Q.B. at p. 263) and of LOPES, L.J., in *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson* ([1892] 1 Q.B. at p. 451); see p. 745, letter C, p. 747, letter H, and p. 757, letter A, post.

C

D

Dictum of FRY, L.J., in *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson* ([1892] 1 Q.B. at p. 447), not followed.

E

Complaints to the Bar Council, however, on matters that may lead to disciplinary proceedings before the Benchers are not the subject of the absolute privilege, because the Bar Council are a distinct body, deriving authority from the general meeting of the Bar, not from the Benchers, and do not exercise judicial functions in relation to such complaints (see p. 749, letter G, and p. 757, letters B and D, post).

F

The defendant wrote two letters to the Secretary of the Bar Council containing defamatory statements concerning the conduct of the plaintiff, who was a member of the Bar and a Queen's Counsel. In an action by the plaintiff for libel the defendant claimed that the letters were protected by absolute privilege as being the appropriate initial step in proceedings for an inquiry by the proper tribunal into the alleged misconduct. The defendant did not plead qualified privilege, which would afford protection only if the communications were not made maliciously.

G

Held: the letters did not initiate proceedings before the Benchers of the plaintiff's Inn and were too remote from possible subsequent proceedings before the Benchers for the absolute privilege that would attach to such proceedings, if any had been instituted, to extend to the letters; therefore, as the letters were communications to, and remained with, the Bar Council, they were not protected by absolute, as distinct from qualified, privilege (see p. 746, letters B and C, p. 753, letters A and B, p. 757, and letter D, post).

H

Lilley v. *Roney* ((1892), 61 L.J.Q.B. 727) distinguished.

Watson v. *M'Ewan* ([1905] A.C. 480) considered.

Decision of SALMON, J. ([1960] 3 All E.R. 205) affirmed.

I

[**Editorial Note.** It was not in issue whether the letters were the subject of qualified privilege. DEVLIN, L.J., expressly states that this question is not decided by this appeal (see p. 753, letter H, post). It seems, however, from observations of other members of the court that they incline to the view that qualified privilege would attach (see p. 742, letter F, and p. 757, letter F, post); further, that the communications had the protection of qualified privilege was the opinion of SALMON, J., at first instance ([1960] 3 All E.R. 205, letter G).

A For a consideration of the position in colonies, where the judges may have retained the powers of admission to or suspension from or prohibition of practice in their own hands, see *A.-G. of the Gambia* v. *N'Jie* ([1961] 2 All E.R. at p. 508).

As to the nature of absolute privilege and its application to the administration of justice, see 24 HALSBURY'S LAWS (3rd Edn.) 48-52, paras. 86-92.

As to the nature of qualified privilege and what is a privileged occasion, B see 24 HALSBURY'S LAWS (3rd Edn.) 54-62, paras. 97-108.]

Cases referred to:

Addis v. *Crocker*, [1960] 2 All E.R. 629; [1961] 1 Q.B. 11; [1960] 3 W.L.R. 339; *affg.*, [1959] 2 All E.R. 773; [1960] 1 Q.B. 87; [1959] 3 W.L.R. 527; 3rd Digest Supp.

Beresford v. *White*, (1914), 30 T.L.R. 591; 32 Digest 109, *1408*.

C *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405; 88 L.J.K.B. 472; 118 L.T. 541; 32 Digest 104, *1347*.

Dawkins v. *Rokeby* (*Lord*), (1875), L.R. 7 H.L. 744; *affg.*, (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 32 Digest 102, *1339*.

Gerhold v. *Baker*, [1918] W.N. 368; 35 T.L.R. 102; 32 Digest 121, *1526*.

Lilley v. *Roney*, (1892), 61 L.J.Q.B. 727; 32 Digest 109, *1406*.

D *Minter* v. *Priest*, [1930] All E.R. Rep. 431; [1930] A.C. 558; 99 L.J.K.B. 391; 143 L.T. 57; 22 Digest (Repl.) 405, *4351*.

More v. *Weaver*, [1928] All E.R. Rep. 160; [1928] 2 K.B. 520; 140 L.T. 15; Digest Supp.

Munster v. *Lamb*, (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 Digest 105, *1368*.

E *O'Connor* v. *Waldron*, [1934] All E.R. Rep. 281; [1935] A.C. 76; 104 L.J.P.C. 21; 152 L.T. 289; Digest Supp.

R. v. *Gray's Inn*, (1780), 1 Doug. K.B. 353; 99 E.R. 227; 3 Digest (Repl.) 351, *3*.

Rippon v. *Shapcott*, (C.A., 1951), unreported.

Royal Aquarium and Summer and Winter Garden Society, Ltd. v. *Parkinson*, F [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 32 Digest 128, *1592*.

Seymour v. *Butterworth*, (1862), 3 F. & F. 372; 176 E.R. 166; 32 Digest 145, *1756*.

Szalatnay-Stacho v. *Fink*, [1946] 2 All E.R. 231; [1947] K.B. 1; 115 L.J.K.B. 455; 175 L.T. 336; 11 Digest (Repl.) 451, *892*.

G *Watson* v. *M'Ewan*, *Watson* v. *Jones*, [1905] A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489; 32 Digest 109, *1407*.

Appeal.

The defendant appealed against the judgment of SALMON, J., on the verdict of a jury, awarding the plaintiff £7,500 damages for libel against the defendant. The appeal is reported solely on the question whether the libels, which were H contained in letters sent by the defendant to the General Council of the Bar complaining about the conduct of the plaintiff, a Queen's Counsel, were protected by absolute privilege. The ruling of SALMON, J., dated June 24, 1960, that they were not is reported [1960] 3 All E.R. 205. The facts are stated in the judgment of SELLERS, L.J.

A. R. Campbell for the defendant.

I *Neville Faulks, Q.C.*, and *Joseph Dean* for the plaintiff.

Cur. adv. vult.

July 17. The following judgments were read.

SELLERS, L.J.: By this appeal the defendant seeks to avoid the total judgment against him for £7,500 and costs entered by SALMON, J., on the verdict of a jury on June 24, 1960. He asks that judgment should be entered in his favour, or that the damages should be only nominal or greatly reduced or that a new trial be ordered.

The jury found that a letter of Feb. 12, 1958, written by the defendant to the Secretary of the General Council of the Bar of England was defamatory of the plaintiff and that the allegations were not in substance true and they awarded for this defamation £4,000 damages. The jury also found that a further communication from the defendant of Feb. 19, 1958, similarly addressed, was defamatory of the plaintiff and was not in substance true and for this they awarded £3,500 damages. There had been no plea of qualified privilege and no question of malice arose for the jury's decision.

In support of the appeal it was submitted: (i) that the written documents complained of were in the circumstances absolutely privileged and could not be the subject of an action in the courts; (ii) that certain words in the first letter were incapable of a defamatory meaning or the defamatory meaning alleged and that the learned judge ought so to have ruled; (iii) that there was misdirection of the jury in the summing-up in certain specified matters; and (iv) that the award of damages having regard to the circumstances of publication was grossly excessive on any reasonable measure for assessment.

In this judgment I shall endeavour to avoid any incursion into the prolonged and discordant, even bitter, wrangles between various factions interested in the management and control of Gordon Hotels, Ltd., which form the background of this case. At the time of these publications the plaintiff had become a director of that company together with Lord Keyes with the intention that Lord Keyes should become its chairman and the plaintiff its vice-chairman, as indeed both of them did respectively. The plaintiff has been a Queen's Counsel for several years and a barrister since 1929 and he has throughout been in active practice. He was and is a Master of the Bench of the Inner Temple. The defendant's case is that he wrote as he did as he wished to bring to the notice of those responsible for the good conduct of the Bar the matters of complaint he had against the plaintiff's conduct in relation to the management and control of Gordon Hotels, Ltd. At the time the defendant was not a director of the company. He and his daughter, Miss Zena Daniels, held a substantial number of shares between them and had formed a shareholders' committee, which no doubt consisted of other shareholders as well but any further representation has not been outstanding or obvious. It may well be that if the defendant had written in good faith and from a sense of duty he would have escaped all liability, notwithstanding the defamatory things he said, on the basis of a qualified privilege; but he made no such claim. His motive in writing as he did could readily have been impugned and he did not risk asking the jury to find that he acted without malice.

The case has been argued on the basis that the two documents were the complaint of the defendant, the delivery of which was the appropriate step in proceedings of inquiry by the proper tribunal into the plaintiff's alleged misconduct. The letter of Feb. 12, 1958, it was said, initiated the proceedings and the document of Feb. 19, 1958, headed "Memorandum re F. Ashe Lincoln" was supplementary to the letter. Before the letter of Feb. 12, 1958, was written the defendant had telephoned Mr. Boulton, the Secretary of the Bar Council (to use an abbreviated description), and, as a consequence addressed the letter to him. It is to be inferred, and I do not think that it was really challenged, that Mr. Boulton intimated that that was the right avenue of complaint. The defendant is a member of the public. He appears to be a successful man of business and a man of much force, at least when encouraged by the auxiliary power of his daughter, but there is no reason to think that he or his daughter were conversant with the organisation and direction of the profession of the Bar.

The plea of absolute privilege seemed to this court to require an understanding of the provisions for dealing with complaints of misconduct of a member of the profession both by the Bar Council and by the Inner Temple. The evidence, as it stood, seemed obscure and inadequate. No doubt the parties relied on the knowledge the judge would have at first hand and it may be that judges could

A have regard to what they know of the practice in the profession, subject to the possibility that the practice of the four Inns may vary in detail though not in substance. On the whole the court thought that, in a matter of general importance coming before the court for the first time, the evidence should be amplified, and learned counsel agreed. In the course of the hearing the court has therefore been supplied with a statement from the Inner Temple on the direction of the B treasurer of that society and the court is indebted to him and to those responsible for providing the information for their ready assistance.

The first question is whether the evidence establishes that an inquiry by the Masters of the Bench of the Inner Temple into the conduct of a member of the profession, whether barrister, Queen's Counsel or Bencher, is a judicial or quasi-judicial proceeding so comparable to a court of law that it would command the C same privilege for those participating in it. In *Addis* v. *Crocker* (1) it was decided in this court, upholding GORMAN, J. (1), that the proceedings of the disciplinary committee set up under the Solicitors Act, 1957, s. 46, were in function and procedure so similar to those of a court of law that its findings were absolutely privileged. It was submitted that no less could be said of the disciplinary proceedings of the Inns of Court in relation to the Bar and that having regard to D the constitution, powers and authority of an Inn of Court it was immaterial that its authority was not derived from a statute.

There is no doubt that in a court of law the observations of the judge, counsel, parties and witnesses are the subject of absolute privilege. This was established clearly in 1883 in *Munster* v. *Lamb* (2) where the existing authorities were reviewed by the court. The basis of the rule was succinctly stated by FRY, L.J. (3):

E "The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the F present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of G defending actions."

SIR WILLIAM BRETT, M.R., said (4):

". . . inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been."

H Some years earlier, in 1873, *Dawkins* v. *Lord Rokeby* (5) had been heard before a Full Court of the Exchequer Chamber who held that a court of inquiry instituted by the Commander-in-Chief of the Army under the Articles of War to inquire into a complaint made by an officer in the army, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, was nevertheless subject to the absolute privileges in respect of its hearings as a I court of law. The judgment of the court was given by KELLY, C.B., who stated (6):

"The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law."

(1) [1960] 2 All E.R. 629; [1961] 1 Q.B. 11; *affg.* [1959] 2 All E.R. 773; [1960] 1 Q.B. 87.
(2) (1883), 11 Q.B.D. 588.
(3) (1883), 11 Q.B.D. at p. 607.
(4) (1883), 11 Q.B.D. at p. 599.
(5) (1873), L.R. 8 Q.B. 255.
(6) (1873), L.R. 8 Q.B. at p. 263.

It was held that the court of inquiry was a court duly and legally constituted and recognised in the Articles of War and many Acts of Parliament and that once called into existence it had all the qualities and incidents of a court of justice, which the judgment examines in detail. A

It was restated in *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson* (7) that the absolute immunity from liability to an action in respect of statements made in the course of proceedings before a court of justice was applicable to all kinds of courts of justice and that the immunity had been carried further and would apply wherever there is an authorised inquiry before a tribunal which has similar attributes to a court of justice. This doctrine, it was said by LORD ESHER, M.R., had not been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act. FRY, L.J. (8), would restrict the immunity to a " court in law "; to that, he said, the law " attaches certain privileges " among which is " the immunity in question ". Neither he nor LOPES, L.J., showed any inclination to extend a complete immunity and FRY, L.J., would, it appears, have expressly excluded from it the Inns of Court when considering the conduct of one of their members. As the Master of the Rolls had remarked in *Munster* v. *Lamb* (9), some judges had shown a strong objection to carry the privilege beyond that which authority required and were disinclined to admit its existence, whereas other judges were inclined at that time to carry the privilege to its full extent. There may be much to be said against complete immunity at all, for in a court of law in which the truth is sought there seems no reason why a person who maliciously states falsehoods should be protected, for such evidence does not help an inquiry but hinders it. A qualified privilege to protect a person acting in good faith would, it might be said, be sufficient. But the reason for the absolute privilege stated above in the quotation from FRY, L.J., clearly prevails over these considerations and has long been authoritative. B C D E

The *Parkinson* case (7) differentiated proceedings of an administrative character, as they were here, from judicial proceedings and it is well settled that for complete immunity to arise the proceedings must be either judicial in the strict sense or, as it is said, " quasi-judicial ". F

It was strongly pointed out to us by counsel for the plaintiff that many of the elements in *Addis* v. *Crocker* (10) were absent in the present case, especially that the disciplinary committee of the Law Society was set up by and functioned under the Solicitors Act, 1957, s. 46. It is true that no Act of Parliament governs the four Inns of Court in this respect but their disciplinary powers over their members have been exercised over centuries and as far as I know have never been in abeyance. These powers are not solely or primarily exercised for the good government and wellbeing of the Inns themselves, as is the case with private clubs or institutions, whose powers of control are derived from the consent of the members, but are enforced for the benefit of the public by these ancient legal societies in order to retain the trustworthiness and complete integrity of counsel in the performance of their duties in the administration of the law in all its many phases. G H

In *R.* v. *Gray's Inn* (11), where a mandamus was sought to direct the Benchers to call to the Bar one William Hart, a student of the Inn, LORD MANSFIELD said that the original institution of the Inns of Court nowhere precisely appears but all the power they have concerning the admission to the Bar is delegated to them from the judges and in every instance their conduct is subject to the judges' control as visitors. LORD MANSFIELD describes the Inns of Court (12) as " voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the judges ". That right of appeal was exercised by Mr. I

(7) [1892] 1 Q.B. 431. (8) [1892] 1 Q.B. at p. 447. (9) (1883), 11 Q.B.D. 588.
(10) [1960] 2 All E.R. 629; [1961] 1 Q.B. 11. (11) (1780), 1 Doug. K.B. 353.
(12) (1780), 1 Doug. K.B. at p. 355.

A Hart after his failure in the courts in 1780 and has been retained over the years and in recent times has been more than once exercised to the knowledge of all of us.

I would regard the Inns of Court in their disciplinary power in relation to the practising member of the Bar as equivalently established over the centuries by its practice and acceptance as if the power had been derived from statute and B as unassailable. If the Inns of Court had not controlled the professional conduct of the Bar the judges themselves would have had to do so. The judges themselves, deriving their authority from the Crown, were minded in the distant past to delegate, and the undisputed view in LORD MANSFIELD'S time was that the judges had delegated, their disciplinary power over the Bar to the Inns of Court. The disciplinary procedure of the Inner Temple, as would be expected, provides C for as fair a trial as would be available in a court of justice and the decision of the Benchers is of a like judicial character and not merely an administrative one. As the power to adjudicate is derived from the judges, and as judges presently in office in their capacity as Benchers may be members of the tribunal which hears a complaint and as an appeal lies to the judges by established practice, I would hold that such an inquiry and decision is recognised by law and is a D judicial process to which in the public interest absolute privilege attaches to the full extent of proceedings before a court of justice. It could not, I think, be contemplated that the immunity of the judges would be recognised in one sphere and not in the other which also bears the hallmark of judicial proceedings. I am not unmindful of some of the matters which attach to court procedure such as hearing evidence on oath and the power to summon witnesses which do not E apply to an Inn of Court disciplinary inquiry but I do not regard these as vital to the present issue.

This conclusion of absolute privilege does not conclude this appeal in favour of the defendant. The communications were not to the plaintiff's Inn of Court but were to the Secretary of the Bar Council. It was not submitted that the General Council of the Bar, in such inquiries as it holds, exercises quasi-judicial F functions but it was contended that the complaints of the defendant, delivered as they were to the Secretary of the Bar Council (as the defendant had been advised by him so to deliver them) came within the ambit of the absolute privilege attaching to the investigation before the plaintiff's Inn.

The extent of a court's complete privilege has been the subject of authoritative decision and it may prevail outside the actual hearing or trial. In *Watson* v. G *M'Ewan*, *Watson* v. *Jones* (13) the House of Lords held that it protects a witness against the consequences of statements made to the client and solicitor in preparing the proof for trial. The EARL OF HALSBURY, L.C., said that the privilege which surrounds the evidence actually given in a court of justice necessarily involves the same privilege in the case of making a statement to a solicitor or other person who is engaged in the conduct of proceedings in courts H of justice when what is intended to be stated in court is stated to the solicitor, otherwise the witness could be sued, not for what he said in court but for what he said in his proof, and the privilege would be of no avail. The protection of witnesses, it was held, must involve the examination of witnesses to find out what they can prove. On the other hand, in *Gerhold* v. *Baker* (14), BANKES and WARRINGTON, L.JJ., distinguished *Watson* v. *M'Ewan* (13), where a potential I witness (the defendant in the action) at the request of a military representative for the County of London complying with the express wish of the chairman of the Appeal Tribunal constituted under the Military Service Acts, 1916, had written a letter during the pendency of an appeal by the plaintiff, stating what his evidence would be if he attended the hearing, which he found it difficult to do. The defendant escaped liability on the basis of a qualified privilege and no evidence of

(13) [1905] A.C. 480. (14) [1918] W.N. 368.

malice. It would seem that this court retained the decision of *Watson* v. *M'Ewan* (15) to its precise facts and was not prepared to enlarge it. A

In *Lilley* v. *Roney* (16) absolute privilege was extended to a letter of complaint against a solicitor in respect of his professional conduct forwarded to the registrar of the Incorporated Law Society. The letter with an affidavit was in accordance with the form laid down in the rules (17) for setting in motion the judicial proceedings. A letter written to the Bar Council does not initiate proceedings and therefore is not within the absolute privilege accorded to the form of complaint and other documents in the case. Nothing at all may arise out of it of any such nature. The same may be true of a letter written direct to an Inn of Court. The qualified privilege is sufficient at that stage to protect the writer and anyone who gives preliminary consideration to the matter involved. It is at a later stage that a charge may be framed which would lead to a judicial inquiry and although proofs taken beforehand may fall under absolute protection as in *Watson* v. *M'Ewan* (15) the absolute privilege of the proceedings themselves might, I think, properly and reasonably be held to apply from the time the charge is made on which the conduct of the barrister is assessed, but this precise point does not arise in the present case. That stage was not reached here. The communications remained with the Bar Council, which was not performing any function on behalf of the Inner Temple and which had no authority to act on its behalf. I recognise that the position is not wholly satisfactory, for the defendant had inquired before he wrote to whom he should address his letter, and in any event the functions of the Inns of Court and the Bar Council and their respective spheres of activity are unique and perhaps not generally or well understood. But the defendant wrote with the apparent intention of injuring the plaintiff and if a man so determines he cannot complain if he is held liable because he is found to be not within the letter of the law. At that stage he was too remote from judicial proceedings to be immune and I doubt if he thought at the time that he had any such protection. B C D E

In my view, the defence of absolute privilege fails.

[His Lordship then considered, and rejected, the other grounds of appeal, and concluded:] I would dismiss the appeal. F

DEVLIN, L.J.: The initial question of law in this case is whether a complaint made to the Bar Council about the conduct of a barrister is absolutely privileged, the privilege being that which attaches to proceedings in courts of justice and similar tribunals. It has not been argued by counsel for the defendant that the Bar Council or its professional conduct committee is itself such a court or tribunal. His argument is that the Bench of the barrister's Inn—in this case the Inner Temple—is such a tribunal and that the protection attaching to it extends in the circumstances of this case to the complaint made by the defendant to the Bar Council. Counsel for the plaintiff disputes, first, that absolute privilege would attach to the proceedings of the Bench, and, secondly, that if it does, it extends to the complaint to the Bar Council. It is therefore necessary to consider first whether absolute privilege attaches to the proceedings of the Bench. G H

It is settled that to come within the principle a tribunal must proceed in a manner that is similar to a court of justice, that its object must be to arrive at a judicial and not an administrative determination, and that it must be recognised by law. We have had as evidence an agreed statement from the Treasurer of the Inner Temple and on that counsel for the plaintiff concedes that the first two of the qualifications I have mentioned are satisfied; his argument is that the Bench of an Inn, trying a charge of misconduct against one of its members, is not a tribunal " recognised by law ". These are the words that were used in the leading case of *Dawkins* v. *Lord Rokeby* (18), per Kelly, C.B., and adopted and approved I

(15) [1905] A.C. 480. (16) (1892), 61 L.J.Q.B. 727.
(17) Form I in the Schedule to the rules made under the Solicitors Act, 1888.
(18) (1873), L.R. 8 Q.B. at p. 263.

A in the judgments of FRY and LOPES, L.JJ., in *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson* (19). Counsel for the plaintiff submits that "recognised by law" means constituted or recognised by Act of Parliament. The importance of this gloss on the phrase at once becomes apparent when one considers the nature of the Benchers' jurisdiction. It is not derived by consent from members of the Inn as is that of a committee from members B of a club; neither is it founded on statute, as is the disciplinary committee constituted under the Solicitors Act, 1957, s. 46, whose proceedings have recently been held by this court to be absolutely privileged: *Addis* v. *Crocker* (20). The jurisdiction of the Benchers is derived from the judges and exercised under their superintendence; and they, I imagine, must have assumed it by virtue of their inherent power to determine who may and who may not plead at the Bar before C them. In *R.* v. *Gray's Inn* (21) LORD MANSFIELD said:

> ". . . all the power they have concerning the admission to the Bar, is delegated to them from the judges, and, in every instance, their conduct is subject to their control as visitors."

In my judgment the requirement of recognition by law is not equivalent to D recognition by Act of Parliament but is capable of a wider meaning. In *Dawkins* v. *Rokeby* (22), KELLY, C.B., referred to the military court of inquiry in that case as "recognised in the articles of war and many Acts of Parliament". Articles of war appear first to have been issued by the Sovereign in the seventeenth century; before then the Crown had not attempted to keep a standing army. CLODE, in his work on THE MILITARY FORCES OF THE CROWN (1869), vol. 1, pp. 18 and 146, E traces the process by which the articles, at first dependent on the prerogative for their force, later became authorised by statute, the Mutiny Acts and then successive Army Acts. The process follows a pattern familiar in English constitutional history; the prerogative powers are clarified and amplified by statute until statute becomes the sole effective source of authority. The authority of the Crown as the source of justice has received much the same sort of treatment. F The language used by KELLY, C.B., in *Dawkins* v. *Rokeby* suggests to me that in the phrase "recognised by law"—or "authorised, recognised and sanctioned by law", the wider phrase which he uses (23)—he was not concerned to distinguish between statutory authority and the authority of the Sovereign. In the same case in the House of Lords LORD CAIRNS, L.C. (24) did not refer to any statutory authority but described the inquiry as "warranted by the Queen's G Regulations and orders for the army". There is nothing to show that the absolute privilege accorded to the court of inquiry in that case depended entirely on the fact that the articles or regulations under which it was constituted had statutory force. Likewise, the absolute privilege that is accorded to the proceedings of regular courts of justice does not depend on whether the court was created or has been recognised by Act of Parliament or whether it is one set up under the H prerogative, as all courts used to be, in which the judges sit as servants of the Crown, deriving their power from the Crown as the fountain of justice. It is by virtue of the power so derived that the judges have conferred authority on the Benchers of the Inns of Court to act as their delegates in maintaining the discipline of the Bar. In my judgment the Benchers of an Inn of Court, when they sit as delegates of the judges to determine questions relating to call to the Bar or I disbarment or suspension, are sitting as a court or tribunal recognised by law and their proceedings are absolutely privileged. I recognise that in reaching this conclusion I have to differ, with respect, from the obiter dictum of FRY, L.J., in *Royal Aquarium* v. *Parkinson* (25). There appears to be no other authority on the point.

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(19) [1892] 1 Q.B. at pp. 446, 451. (20) [1960] 2 All E.R. 629; [1961] 1 Q.B. 11.
(21) (1780), 1 Doug. K.B. at p. 354. (22) (1873), L.R. 8 Q.B. at p. 266.
(23) (1873), L.R. 8 Q.B. at p. 270. (24) (1875), L.R. 7 H.L. at p. 754.
(25) [1892] 1 Q.B. at p. 447.

This conclusion seems to me to fit in with the reason that is behind the requirement that in order that its proceedings should be absolutely privileged a tribunal must be one that is recognised by law. A private institution, such as a club, may set up a body to determine questions of admission or expulsion and it may be composed entirely of lawyers and may follow with exactitude the procedure of a court of law; but absolute privilege is granted only as a matter of public policy and must therefore on principle be confined to matters in which the public is interested and where therefore it is of importance that the whole truth should be elicited even at the risk that an injury inflicted maliciously may go unredressed. The public is not interested in the membership of a private club. The significance of the third requirement—that the court or tribunal should be recognised by law—is that it shows that the public is interested in the matter to be determined by the court. Parliament would not, for example, regulate the disciplining of solicitors if it were not that there is a public interest in the sort of men who practise as solicitors. The same consideration applies to the Bar. In *Seymour* v. *Butterworth* (26), COCKBURN, C.J., said:

> "The Benchers exercised their jurisdiction partly for the protection of the profession and partly for the protection of the public—for the protection of the profession that it might not be disgraced by having enrolled among its members those who dishonoured and discredited it, and for the protection of the public that their confidence in the rank of the barrister being a sufficient test of the trustworthiness and honour of each individual member of the Bar might not be misled and abused."

The jurisdiction now exercised over solicitors by virtue of the Solicitors Act, 1957, was originally exercised, and still may be, by the Master of the Rolls and the judges: see *Addis* v. *Crocker* (27). I have no doubt that the public interest in the purity of the Bar is at least as great as in the purity of the solicitors' profession—both are essential to the administration of justice—and if Parliament were not satisfied with the manner in which the discipline of the Bar is at present controlled it would have intervened. I appreciate that the Bench of the Inner Temple (and I dare say those of the other Inns) conducts its proceedings with less formality than in a court of law. There are no pleadings or discovery; witnesses cannot be subpoenaed and do not give evidence on oath. These are factors to be taken into account, but I think that in any case of doubt the overriding factor is whether there will emerge from the proceedings a determination the truth and justice of which is a matter of public concern, for it is public policy that justifies absolute privilege.

I confess that I am relieved at being able to come to the conclusion that I have stated, not merely because it would be unsatisfactory to have different rules applicable to the two branches of the legal profession but also because any other conclusion might well lead to difficulty and embarrassment. If absolute privilege is not granted to proceedings before the Benchers would it not also have to be denied to a re-hearing on appeal before the Lord Chancellor and judges? The rule of absolute privilege, as has so often been pointed out, has not been devised so as to protect malicious persons but to ensure that judges and others engaged in the administration of justice should be free from the fear of proceedings and "the vexation of defending actions", as FRY, L.J., put it in *Munster* v. *Lamb* (28). It is no argument in favour of the extension of the rule that it would avoid vexatious action against judges and prominent members of the Bar; but if the conclusion is otherwise well warranted it is a matter for satisfaction that it will prevent the bringing of actions which might otherwise be difficult and embarrassing to try.

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(26) (1862), 3 F. & F. at pp. 381, 382.
(27) [1960] 2 All E.R. at p. 638; [1961] 1 Q.B. at p. 29.
(28) (1883), 11 Q.B.D. at p. 607.

A The next question is whether the privilege that attaches to proceedings before the Bench of an Inn extends to letters of complaint addressed to the Bar Council which, if there is found to be any substance in them, will be referred to the Bench of the Inn for adjudication. By comparison with the Inns of Court, the Bar Council is a young body. The evidence before us shows that it was created in 1895 and that it claims to derive its authority from the consent of the Bar as a whole. B Its functions are mainly administrative but "as a practice of long standing" it investigates complaints about the conduct of barristers. In so doing it does not seek to usurp the jurisdiction of the Inns of Court. If a complaint is made to it, the Council, acting through its professional conduct committee, may, if the complaint is thought to have some substance, call on the barrister concerned to give an explanation. It does not normally hear the complainant; it has no power to C summon the barrister before it or to apply any sanction against him; it does not invariably ask him for his defence. In short, there is no trial process. If there emerges an issue of fact to be tried, the matter must be referred to the Bench of the barrister's Inn. There is nothing to prevent a complainant preferring a complaint direct to the Bench of the Inn, and a number do; but the majority of the complaints dealt with by the Bench of the Inner Temple, the Inn with which D we are concerned, come through the Bar Council. The plaintiff in his evidence agreed—and he spoke as a member of the Bar Council as well as a Bencher of his Inn—that the proper way to initiate a complaint against a member of the Bar was through the Bar Council.

Thus it has been said that the function of the Bar Council in this matter is to act as a clearing house for complaints against members of the Bar. It is well E known to the public as a body that represents the profession as a whole, and it is no doubt more convenient for members of the public to be able to address their complaints to a central body. It is easier to do that than to ascertain the Inn to which the accused barrister belongs and the official in the Inn to whom complaints should be addressed. Complaints that are not taken up by the Bar Council are frequently dropped and thus the Benches of the Inns are relieved F from the necessity of dealing with some minor matters. The work of the Bar Council in this respect may perhaps be compared either with that of the examining justices who decide whether or not there is a prima facie case against the accused, or, perhaps more correctly, with that of the Director of Public Prosecutions, who decides whether or not to take up a case. The work of the examining magistrates is essentially judicial and the word of the Director essentially administrative. G Counsel for the defendant does not contend that the work of the Bar Council is judicial. I do not think that it would matter to this case if it were, for it could not be argued that it acts in a manner similar to a court of justice or that as a court or tribunal it is recognised by law.

How, then, is it contended that its proceedings are affected by the absolute privilege enjoyed by the Bench of an Inn? The absolute privilege which covers H proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for I the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson* v. *M'Ewan* (29), in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford* v. *White* (30), the privilege was held to attach to

(29) [1905] A.C. 480. (30) (1914), 30 T.L.R. 591.

what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings. A

Counsel for the defendant does not, of course, contend that the complaint to the Bar Council falls within the first category. He submits that it comes within either the second or third. In submitting that it comes within the second he relies chiefly on *Lilley* v. *Roney* (31), in which it was held that a letter of complaint against a solicitor sent to the Law Society was absolutely privileged. Counsel for the defendant argues that on the evidence which I have summarised above the Bar Council must be regarded as the proper channel of communication with the Benchers of the Inns and therefore that a complaint addressed to the Bar Council is to be treated in the same way as one addressed to the appropriate Bench. I think that this argument fails. If there was evidence that the Bar Council was authorised by the Benches to receive complaints on their behalf my conclusion might be different; but there is no such evidence, and it is expressly stated by the Treasurer of the Inner Temple that his Bench has not delegated any of its powers or functions to the Bar Council. If the Bar Council were appointed to receive complaints its duty would be simply to pass them on, whether it thought anything of them or not. That is not what it does and it cannot be said that a letter, which according to the way in which it is regarded by the Bar Council may or may not reach the Bench, initiates proceedings before them. B C D

I must observe that counsel for the plaintiff does not concede that if the letter had been addressed to the Treasurer of the Inner Temple it would have had the effect of initiating proceedings before his Bench. *Lilley* v. *Roney* (31) is no authority for the proposition that all proceedings must be regarded as initiated when first a letter of complaint is written to the body authorised to try them. The letter in that case followed the form given in the Schedule to the Solicitors Act Rules, and, as required by the rules, was accompanied by an affidavit. CAVE, J., said (32): "The letter with affidavit is the form given for setting in motion what are admittedly judicial proceedings". On such a point form is of the first importance; it is by form rather than by the substance of the complaint that a writ is to be distinguished from a letter before action. When the body to whom the letter is addressed has many other functions besides that of investigating complaints, it may not be easy to say when "proceedings" begin. *Rippon* v. *Shapcott* (33), a case in which this court gave in 1951 a judgment which has been read to us, concerned an action for libel said to be contained in a letter written by the Judge-Advocate General's Department to the Bar Council. The plaintiff was a barrister whose name had been included in a list of counsel agreed by the defendant, acting for the department, and the Bar Council as suitable for conducting defences in courts-martial in Germany. The letter informed the Bar Council that the Judge-Advocate General had removed the plaintiff's name from the list and gave his reasons for doing so, based on the alleged misconduct of the plaintiff. The letter was not, therefore, in form a complaint addressed to anyone, but the material which it contained caused the Bar Council to take the matter up and proceedings against the plaintiff took place before the Bench of his Inn. In the action for libel the defence raised by the defendant was based on qualified and not on absolute privilege. I have referred to this case partly because it was relied on by counsel for the plaintiff as showing that letters of complaint addressed to the Bar Council in a matter which was subsequently the subject of proceedings before the Bench were not covered by absolute privilege. He cited it, of course, only as persuasive authority, pointing out that the distinguished members of the Bar retained for the defendant did not think it worth while pleading absolute privilege and that the possibility of such a plea was not mentioned in the course of the judgments. I do not think that the case helps much from that point of E F G H I

(31) (1892), 61 L.J.Q.B. 727. (32) (1892), 61 L.J.Q.B. at pp. 727, 728.
(33) (C.A. 1951), unreported.

A view. Privilege was not claimed on the ground that the defendant's letter led to an inquiry but on the ground that he was corresponding with the Bar Council on a matter in which they had administratively a common interest. But the case does illustrate the sort of circumstances in which it may be very difficult to decide just when judicial proceedings of this sort are begun. It is unnecessary to decide whether, if the defendant's letter were to be treated as addressed to the Bench B or its agent, it would have been absolutely privileged as coming within the second category, and I shall not explore any further counsel for the plaintiff's submissions on that point.

I turn now to the third category. It is obvious that unless there were a category of this sort the absolute privilege granted for matters said and done coram judice might be rendered illusory. This is the consideration that animates C the reasoning of the EARL OF HALSBURY, L.C., in *Watson* v. *M'Ewan* (34); can a plaintiff, he asks, say:

> " ' I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box '. If that could be done the object for which the privilege exists is gone, because then no witness could be D called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, ' I shall not tell you anything; I may have an action brought against me tomorrow if I do; therefore I shall not give you any information at all '. It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary E consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove."

I do not treat this principle as necessarily limited to the proofs of witnesses. I think it might well cover, for example, instructions given by a party to his solicitor, F going beyond matters to which the party could himself depose, for the preparation of a statement of claim or like document. It may be, although the point appears to be doubtful, that such matter is absolutely privileged anyway on the different ground that in such a case a solicitor is communicating with his own client and that the absolute privilege, like the privilege from disclosure, flows from that relationship: see *More* v. *Weaver* (35), and *Minter* v. *Priest* (36) per LORD DUNEDIN G and LORD ATKIN. But if it is not, I think it would be covered by *Watson* v. *M'Ewan* (37). A plaintiff in a libel action could not be allowed to say, " I do not bring the action against you for what was said in the statement of claim but for what you instructed your solicitor and counsel to put into the statement of claim ".

Absolute necessity, counsel for the defendant submits, is not the test whether H *Watson* v. *M'Ewan* (37) applies or not. It is not absolutely necessary for a witness to give a proof before being called or for a party to act through a solicitor; but it is proper and reasonable that such things should be done. Likewise, counsel for the defendant argues, it is not absolutely necessary, but it is proper and reasonable and customary, for complaints to the Bench of an Inn to be made through the Bar Council. The majority of complainants act in that way. It is, in LORD HALSBURY'S words (34), " a step towards " the administration of justice I by the Bench of the Inn. Ought, therefore, a plaintiff in a libel action to be allowed to say in respect of such a complainant, " I do not bring my action in respect of the complaint you made to the Bench; I bring it because you made the same complaint first to the Bar Council"? This appeals to me as a formidable argument and I have hesitated a lot before reaching a conclusion on it.

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(34) [1905] A.C. at p. 487. (35) [1928] All E.R. Rep. 160; [1928] 2 K.B. 520.
(36) [1930] All E.R. Rep. at pp. 437, 442; [1930] A.C. at pp. 574, 586.
(37) [1905] A.C. 480.

It is a question of how far the principle in *Watson* v. *M'Ewan* (38) is to be taken. The other authorities in which the case has been considered show that the connexion between the two things —the evidence and the precognition, the document and the draft, the actuality that is undeniably privileged and the foreshadowing of it—must be reasonably close. In *Gerhold* v. *Baker* (39), this court distinguished *Watson* v. *M'Ewan* (38). The case is briefly reported and the grounds for the distinction are not elaborated in the judgment. The court in question was a tribunal constituted under the Military Service Acts, 1916, with jurisdiction to grant or refuse certificates of exemption from military service. In *Copartnership Farms* v. *Harvey-Smith* (40), SANKEY, J., held that the proceedings before such a tribunal were absolutely privileged, and, as I understand the judgment of the Court of Appeal in *Gerhold* v. *Baker* (39), they adopted and followed that decision. But while in the former case the slander was plainly uttered in the course of the proceedings, in the latter case it was not, and the question, therefore, for the Court of Appeal was whether the principle in *Watson* v. *M'Ewan* (38) could be extended to cover the letter which the defendant wrote to the tribunal. The plaintiff carried on business in London and had applied to a London tribunal for exemption from military service. His claim for exemption was not based on his London business but on the fact that he cultivated a farm in the Tendring district of Essex. The defendant was a member of the Tendring tribunal, being the agricultural representative on it. The military member of the London tribunal wrote to the defendant a letter in which he said that the chairman of the tribunal had expressed a wish to have the defendant's assistance in deciding the case. The libel was contained in the defendant's reply, in which he expressed his inability to attend and included some very derogatory remarks about the plaintiff as a farmer. BANKES, L.J., is reported (41) to have stated quite shortly that these facts were very different from those in *Watson* v. *M'Ewan* (38).

In *Szalatnay-Stacho* v. *Fink* (42), absolute privilege was claimed for a letter of complaint, accompanied by statements from prospective witnesses, on the ground that it was " the first step in criminal proceedings ", but this court held that it was too remote. The letter was written by the Public Prosecutor of the Czechoslovak Military Court of Appeal, a tribunal established in this country under the Allied Forces Act, 1940, and addressed to the Military Office of the President of the Republic of Czechoslovakia which was then functioning in London. The Court of Appeal assumed that in these unprecedented circumstances it would be proper to extend the doctrine of absolute privilege to foreign judicial proceedings. At the time when the letter was written there was no Czechoslovak court either in England or in Czechoslovakia before which the plaintiff could have been charged, but the Court of Appeal did not decide the case exclusively on that ground. SOMERVELL, L.J., said (43) that the effect of the letter was that the defendant was forwarding a " dossier for investigation and any action that may be thought proper " and he held that that was too remote from actual or contemplated proceedings. This appears to me to compare very closely with the effect of the defendant's letter to the Bar Council. The function of the Bar Council was to investigate the matter and take any action that they thought proper. The same sort of description would apply to a complaint made at a police station or to a letter addressed to the Director of Public Prosecutions. Such " statements in aid of justice " are said, in GATLEY ON LIBEL AND SLANDER (5th Edn.), p. 210, to attract qualified privilege, and authority is cited for the proposition, though it does not appear that the question whether the privilege should be absolute or qualified has ever been specifically considered.

It is not at all easy to determine the scope and extent of the principle in *Watson* v. *M'Ewan* (38). I have come to the conclusion that the privilege that

(38) [1905] A.C. 480. (39) [1918] W.N. 368. (40) [1918] 2 K.B. 405.
(41) [1918] W.N. at p. 369. (42) [1946] 2 All E.R. 231; [1947] K.B. 1.
(43) [1946] 2 All E.R. at p. 234; [1947] K.B. at p. 11.

A covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from a flank attack. It is true that it is not absolutely necessary for a witness to give a proof, but it is practically necessary for him to do so, as it is practically necessary for a litigant to engage a solicitor. The sense of LORD HALSBURY's speech is that the extension B of the privilege to proofs and precognition is practically necessary for the administration of justice; without it, in his view, no witness could be called. I do not think that the same degree of necessity can be said to attach to the functions of the Bar Council in relation to the Inns of Court. It is a convenience to the public to have a central body to deal with, but that is as high as it can be put. In my judgment the defence of absolute privilege fails.

C I have no doubt that, as a practical matter, it would be much more convenient if the same degree of privilege were extended to the investigatory proceedings of the Bar Council as to those of the Benches. If the defendant had addressed his letter to the Treasurer of the Inner Temple instead of to the Secretary of the Bar Council, as he claims that the latter advised him to do, he might have won this action. That may be unfortunate for him but it need not distress anyone D else. He was clearly acting maliciously; he has not sought even to plead that the occasion was one of qualified privilege, though counsel for the plaintiff was prepared to concede that it was, and if, therefore, his defence had succeeded it would not have been because of the defendant's merits but because he was lucky enough to have fallen within a class of persons who are given immunity as a matter of public policy. But experience shows that there are many prudent E people who are not in the least malicious but who are nevertheless unwilling to put forward a complaint if there is any danger that it will involve them in litigation. The practical value of absolute privilege is that it encourages such people to come forward. Where, as with the Bar, the honour of a profession is of the first importance to the administration of justice, it is desirable that every complaint should be entertained and scrutinised even at the price that occasionally F absolute privilege will be used as a shield for malice. If, in the past as in the future, the majority of complaints from the public go to the Bar Council rather than direct to the Bench, the value of the absolute privilege attaching to proceedings before the Bench will be considerably diminished. Prudent persons who are well advised will go direct to the Benches and it may be that if the Bar Council encourages and permits complaints to be addressed to them, it will be felt by the G public to be a trap for the unwary. But these difficulties are for the profession to surmount and arise from the unusual fact that for historical reasons there is no single body responsible for the discipline of the Bar. This anomalous situation may lead to inconvenient and anomalous results. I should be happy if we could decide this case so as to provide a convenient working rule, but we are bound to decide it according to principle and authority.

H I must note, in order to avoid misunderstanding in the future, that the question whether communications of this sort to the Bar Council are covered by qualified privilege has not been raised in this case and is not decided by it. I do not suppose it would be argued that there is no common interest between the complainant and the Bar Council in such a matter, but it might be argued in some future case that, since discipline is administered solely by the Inns, a complaint I to the Bar Council involves a communication to people who are not necessary parties to the disclosure. I express no opinion on that point.

On the other issues in the appeal I agree with the conclusions reached by SELLERS, L.J., and I need add little to what he has said. [HIS LORDSHIP dealt with the other issues, and concluded:] I have come to the conclusion that the verdict should stand.

DANCKWERTS, L.J.: The defamatory statements of which the plaintiff complains in this action were contained in two letters, dated respectively Feb. 12

and Feb. 19, 1958, from the defendant to the Secretary of the General Council of the Bar, which contained complaints in regard to the conduct of the plaintiff, a member of the Bar and a Queen's Counsel and Bencher of his Inn. A

The only question of difficulty in this appeal by the defendant against the verdict of the jury and the judgment of the court is whether those complaints were made in such circumstances that they were protected from an action by absolute privilege. If they were so protected the action must fail; but if the complaints were only protected by qualified privilege the protection is insufficient for this defendant, who, though it is said that he believed the statements were true, is admitted to have been actuated by vindictive or such other improper motives as to constitute malice, so that the protection would be lost. B

Paragraph 8 of the defence alleges that each of the letters were documents incidental to the proper initiation of quasi-judicial proceedings, that is to say, an inquiry by the General Council of the Bar and/or the Masters of the Bench of the Honourable Society of the Inner Temple into allegations relating to the professional conduct of the plaintiff as a barrister, the said tribunal having at all material times jurisdiction so to inquire; and it is claimed that by reason of the premises the words complained of were written and published on an occasion which was absolutely privileged. C D

The General Council of the Bar is an elected body of barristers which was formed in 1895 and derives its authority from the Bar acting in general meeting. It considers matters affecting the profession, including questions of professional conduct, discipline and etiquette which are dealt with in the first instance by the professional conduct committee of the Council. The Council has no disciplinary powers but, as a practice of long standing, it investigates formal complaints against members of the Bar which are referred to it, and, if such course appears necessary, refers them to the Benchers of the appropriate Inn. Each Inn of Court, acting through the Benchers, exercises disciplinary powers over all its members. Disciplinary measures may include expulsion of a member from the Inn, disbarment or suspension of a barrister and the disbenching of a Bencher. In all matters concerning disciplinary measures the Benchers are outside the jurisdiction of the ordinary courts, but their decisions are subject to an appeal to the Lord Chancellor and the judges of the High Court of Justice sitting as a domestic tribunal. In *R.* v. *Gray's Inn* (44), LORD MANSFIELD describes the powers of the Benchers as having been delegated to them from the judges and states that, in every instance, their conduct is subject to the control of the judges as visitors. As the procedure of the four Inns of Court did not appear to be entirely similar, a statement was obtained from a Bencher of the Inner Temple as to the practice of that Inn. From this it appears that in the Inner Temple when a complaint is received by the Treasurer of the Inn against a member, if it appears to the treasurer that the allegation is of substantial gravity and is supported by substantial evidence it is referred to a committee of the Benchers constituted under a standing order. The committee notify the member and require him to appear before them, and make any documents in their possession or under their control available to him. If it appears to the committee that a further investigation or presentation of the case is desirable, then on their report the treasurer appoints a member of the Inn to investigate the facts, to conduct the case, and, if he deems it necessary, with the consent of the treasurer, to employ a solicitor and/or counsel for such purpose. On completing their inquiry, the committee report to the Bench, setting out their conclusion, with a summary of the evidence, together with recommendations either that the allegation be declared unfounded or, where in their opinion it is in whole or in part substantiated, for such action as they think appropriate. When the matter is considered by the whole Bench, the accused is given notice that he has the right to appear again or by counsel or solicitor and the matter could be considered afresh with full leave to the accused person to E F G H I

(44) (1780), 1 Doug. K.B. at p. 354.

A defend himself all over again. There is no power to compel discovery of documents or the attendance of witnesses, and an oath is not administered.

In the present case the complaints have never reached the treasurer or the Benchers of the Inner Temple because, as the result of the issue of the writ in this action, the consideration of the complaints by the professional conduct committee of the Bar Council was adjourned.

B The contentions on behalf of the defendant are that when exercising their disciplinary powers the Benchers of an Inn are acting judicially or quasi-judicially, so that the proceedings before them are protected by absolute privilege, and that a complaint to the Bar Council, if not independently protected by absolute privilege, receives the same protection because it is the proper method of initiating the proceedings before or bringing the matter to the notice of the Benchers C and is, therefore, a step in the judicial or semi-judicial proceedings before the Benchers.

On behalf of the plaintiff the contention is that the Benchers are a domestic tribunal in the same category as a committee of a club and that the protection is no more than qualified privilege at the highest and the proceedings of the Bar Council cannot have any greater privilege; further, even if the proceedings before D the Benchers would involve absolute privilege, this does not extend to a complaint to or investigations by the Bar Council, who are quite a separate body with no judicial functions.

In *Royal Aquarium* v. *Parkinson* (45) LORD ESHER, M.R., after stating that, in respect of statements made in the course of proceedings before a court of justice, whether by a judge, or counsel, or witnesses, there is an absolute immunity E from liability to an action, said (45):

> "The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes."

F After mentioning *Dawkins* v. *Lord Rokeby* (46), a case of a military court of inquiry, he added (45):

> "It was so extended on the ground that the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect G of an inquiry before it. This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act."

In the result, in that case it was held that a meeting of the London County Council for granting music and dancing licences was a matter of public administration and not a court within the rule relating to absolute privilege. LOPES, L.J., in the same H case, said (47):

> "This 'absolute privilege' has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it I by those who appear before them. It is, however, a privilege which ought not to be extended. It belongs, in my opinion, to courts recognised by law, and to such courts only."

What is a court recognised by law is one of the problems presented by the present case. *Dawkins* v. *Lord Rokeby* (46) and other cases of a similar nature

(45) [1892] 1 Q.B. at p. 442.
(46) (1873), L.R. 8 Q.B. 255; (1875), L.R. 7 H.L. 744.
(47) [1892] 1 Q.B. at p. 451.

present no difficulty where the foundation of the jurisdiction is some statute or statutory authority. FRY, L.J., said (48):

> "It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word 'judicial' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterise proceedings in courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege."

FRY, L.J., thus refers to the actual kind of case now under consideration, and it is tempting to take his obiter dictum as settling the matter. But the learned lord justice did not, in the case before him, have the advantage of any argument about the example he includes in his observations, and I fear that the matter must be considered more carefully.

To begin with, it is somewhat startling, if absolute privilege does not attach to the disciplinary proceedings of the Benchers, to find that absolute privilege undoubtedly does protect proceedings of a disciplinary character in the case of solicitors. In *Lilley* v. *Roney* (49) it was held that a letter of complaint against a solicitor in respect of his professional conduct with an affidavit of alleged charges, forwarded to the Registrar of the Incorporated Law Society, in accordance with Form 1, in the Schedule of the Rules under the Solicitors Act, 1888, was so essentially a step in a judicial proceeding that statements in the letter were absolutely privileged. In *Addis* v. *Crocker* (50), the disciplinary committee of the Law Society was held to come within the rule of such absolute privilege, though it was directed by the rules to hear all its proceedings in private and to give its findings and order only in public. It is true that in *Lilley* v. *Roney* (49) the statutory form was the method provided by the rules for initiating the proceedings, and as regards *Addis* v. *Crocker* (50) counsel for the plaintiffs was able to make an effective point in respect of the inapplicability in the case of the Benchers of the majority of the features enumerated by PEARCE, L.J. (51), as indicating that the Law Society's committee had the characteristics of a court of law.

I do not think that the absence of a statutory foundation or of some of these features such as the taking of evidence on oath need be fatal to the recognition of a tribunal as a judicial body to which it is necessary in the interests of a proper and complete hearing to attach the protection of absolute privilege. It seems to me that in case of proceedings which may result in the deprivation of a barrister of the right to practise his profession, it is desirable that a judicial determination of the matters by the Benchers of his Inn should be as free from harassing consequences as that of a military court of inquiry or the proceedings before the disciplinary committee of the Law Society. "Recognised by law" surely cannot be confined to statutory recognition. The established courts of law must have acquired their powers originally from the Crown as the fountainhead of justice and not from what would properly be called a statute. It would

(48) [1892] 1 Q.B. at p. 447.
(49) (1892), 61 L.J.Q.B. 727.
(50) [1960] 2 All E.R. 629; [1961] 1 Q.B. 11.
(51) [1960] 2 All E.R. at p. 638; [1961] 1 Q.B. at pp. 28, 29.

A appear that the disciplinary powers of the Benchers are derived from the judges. Would not an appeal from their decision attract the immunity of absolute privilege? And, if so, surely the earlier proceedings before the Benchers acting in a judicial and not an administrative capacity must have the same immunity? The point, no doubt, is one of difficulty, but my conclusion is that a hearing before the Benchers would be protected by absolute privilege.

B This is not the end of the present matter but merely the first step in the defendant's case. No doubt the making of a complaint to the Bar Council or its secretary, as the proper officer to receive the complaint, would attract qualified privilege, but I can find no ground for conferring the immunity of absolute privilege, since the Bar Council is no more than an investigating body, without, as it seems to me, any judicial or quasi-judicial functions or any disciplinary C powers (compare *O'Connor* v. *Waldron* (52)). If there can be any ground for conferring such immunity it must be through a connexion between the Bar Council and the proceedings before the Benchers of the Inn, which would bring the situation within the principles of *Watson* v. *M'Ewan* (53), and *More* v. *Weaver* (54), which extend the immunity to preliminaries such as the taking of a proof from a prospective witness or statements made to a solicitor by a client who has D retained him. I do not think that a complaint to the Bar Council comes within that condition. The Bar Council are in no sense the agents of the Benchers. The Bar Council does not derive its authority from the Benchers or from the same source as that from which the Benchers derive their authority. The Bar Council derives its authority from the general meeting of the Bar, and it is only as a matter of practice that complaints are received by the Bar Council and E receive some investigation. The two bodies—that is, the Benchers of the Inn (who alone have the disciplinary powers and functions) and the Bar Council—are two distinct bodies. Of course, these bodies co-operate, as they both have the interests of the profession at heart, and the Bar Council receives some financial assistance from the Inns of Court; but it is to be observed that this is given on condition that the Bar Council shall not claim any right to exercise any of the F jurisdiction, powers or privileges of the Inns of Court, under the resolutions passed by the Benchers of the individual Inns in 1895.

Nor indeed is there any real need for more than the qualified privilege to give adequate protection to a person who desires to call the attention of the Council to what he conceives to be a failure of a barrister to observe the standards of the profession. As DENNING, L.J., is said to have observed in *Rippon* v. *Shapcott* (55), G anybody can say what they like to the Bar Council so long as they do not say it maliciously.

I have not commented on the other cases to which we were referred, as it does not appear to me that they can affect the arguments to any relevant extent.

The defence of absolute privilege, therefore, fails. This disposes of the only substantial point in this appeal. The summing-up of the learned judge seems to H me free from any real objection and was not unfavourable to the defendant. I see no reason for interfering with the verdict of the jury or the damages which they awarded.

Appeal dismissed. Leave to appeal to the House of Lords granted only on the issue of absolute privilege.

Solicitors: *Basil Greenby & Co.* (for the defendant); *A. Kramer & Co.* (for the plaintiff).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(52) [1934] All E.R. Rep. 281; [1935] A.C. 76.
(53) [1905] A.C. 480.
(54) [1928] All E.R. Rep. 160; [1928] 2 K.B. 520.
(55) (C.A. 1951), unreported.

EAST YORKSHIRE MOTOR SERVICES, LTD. *v.* CLAYTON (VALUATION OFFICER).

A

[COURT OF APPEAL (Sellers, Devlin and Danckwerts, L.JJ.), June 27, 28, 29, July 20, 1961.]

Rates—De-rating—Industrial hereditament—Purposes of user—Primary and substantial purposes—Reconditioning of parts of vehicles—Maintenance of occupier's road vehicles—Whether hereditament as a whole an industrial hereditament—Apportionment between industrial and other use—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5 *c.* 44), *s.* 3 (1), (2) (*b*), *s.* 4.

B

Premises of a bus company were used for two purposes. First, for the remaking or reconditioning of parts or units of the company's road vehicles which had been dismantled at the seven local service depots of the company and sent to the premises and which after the processing went into stock for use as spare parts for replacements in vehicles; and, second, for the repair and maintenance of the company's road vehicles brought to the premises. The area used for the second purpose was rather less than that used for the first and twenty-seven persons were employed on it compared with thirty-five.

C

D

Held: (i) the premises constituted an industrial hereditament, viz., a hereditament occupied and used as a factory, within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, for the following reasons—

(a) regard must be had to the premises as a whole, including those portions thereof which were deemed (by virtue of s. 3 (2) (b)) not to form part of the factory because they were used by the occupier for the maintenance of its road vehicles, and in determining what areas were within s. 3 (2) (b) regard should be had to the substantial use of the areas, and

E

(b) on the facts, so regarded, the hereditament was primarily occupied and used as a factory or workshop, as the reconditioning of spare parts and engine units was not maintenance of road vehicles within s. 3 (2) (b).

F

Potteries Electric Traction Co., Ltd. v. *Bailey* ([1930] All E.R. Rep. 63) applied.

(ii) accordingly the case would be remitted for apportionment to be made, pursuant to s. 4 of the Act of 1928, between the occupation for industrial purposes and the occupation for other purposes.

G

Per CURIAM: the mere fact that a hereditament or part thereof is used for or in connexion with the maintenance of road vehicles to an extent exceeding de minimis does not ipso facto make such hereditament or part a "place used . . . for the . . . maintenance of . . . vehicles" within s. 3 (2) (b) of the Act of 1928 and thus deemed not to form part of a factory or workshop (see p. 764, letter E, and p. 766, letters A and B, post).

The practice of appending a transcript of the evidence of a witness to a Case Stated by the Lands Tribunal disapproved (see p. 759, letter I, post).

H

Appeal allowed.

[As to the extent of a factory or workshop for rating purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 144, para. 191; and for cases on the subject, see 38 DIGEST (Repl.) 524, *292, 293*.

As to primary user for non-factory or non-workshop purposes, see 32 HALSBURY'S LAWS (3rd Edn.) 152, para. 199; and for cases on the subject, see 38 DIGEST (Repl.) 520-525, *272-294*.

I

For the Rating and Valuation (Apportionment) Act, 1928, s. 3, see 20 HALSBURY'S STATUTES (2nd Edn.) 176.]

Cases referred to:

London Transport Executive v. *Betts* (*Valuation Officer*), [1958] 2 All E.R. 636; [1959] A.C. 213; [1958] 3 W.L.R. 239; 3rd Digest Supp.

A *Moon (Lambeth Revenue Officer) v. London County Council. Pomeroy Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer).* [1930] All E.R. Rep. 63; [1931] A.C. 151, 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 38 Digest (Repl.) 514, 242.

Sainsbury (Valuation Officer) v. Brook Road Services, Ltd., [1961] R.V.R. 171.

Case Stated.

B The ratepayers were the owners and occupiers of a hereditament described as "works, offices and premises", Hull Road, Anlaby Common, Yorkshire (East Riding) assessed at £1,400 net annual value, £450) rateable value in Part II of the valuation list for Haltemprice Urban District. The assessment was amended to £1,750 gross value, £1,455 rateable value in Part I of the valuation list under decisions of a local valuation court of Kingston-upon-Hull and East Riding C of Yorkshire Local Valuation Panel, on appeals from which an interim decision was given by the Lands Tribunal (sir WILLIAM FITZGERALD, Q.C., President) on Feb. 11, 1960, reported (1960), 4 R.R.C., 382. The tribunal held that the hereditament was not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, because in determining that question the whole hereditament must be looked at, including part used D for the maintenance of the ratepayers' road vehicles, and that it was primarily occupied and used for the maintenance of the road vehicles, i.e., a non-factory purpose under s. 3 (1) proviso (f) and s. 3 (2) (b).

P. R. E. Browne, Q.C., and D. G. Widdicombe for the ratepayers.

Sir Derek Walker-Smith, Q.C., and J. R. Phillips for the valuation officer.

Cur. adv. vult.

E July 26. The following judgments were read.

SELLERS, L.J.: The appellant ratepayers' premises, 244, Hull Road, Anlaby Common, have in the past been scheduled as an industrial hereditament and placed in Part II of the valuation list. The premises therefore have had the benefit of the appropriate allowances for the rating of industrial hereditaments. F In 1953 the ratepayers sought a reduction of the assessment and in 1957 the respondent valuation officer countered with a proposal to transfer the premises to Part I of the valuation list, to which proposal the local valuation court assented and it transferred the premises accordingly. The premises therefore lost de-rating benefit. The local valuation court's order was affirmed by the Lands Tribunal. The ratepayers seek to have the premises restored to Part II, G contending that they constitute an industrial hereditament under s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and are entitled to de-rating benefits, subject to some apportionment.

The ratepayers have a fleet of 240 buses which in the ordinary course have to be maintained in serviceable order. Provision is made by the ratepayers not only for daily or weekly attention, i.e., regular servicing by cleaning and oiling, H minor adjustments and minor repairs, but also for extensive periodic reconditioning and overhaul of the vehicles or parts thereof—the engine, gearbox and axles, etc., the replacements of parts taking place on a mileage basis. The case turns on how those functions necessary to keep the fleet of vehicles in efficient condition were performed.

The parties to the appeal, wishing to amplify the facts found in the tribunal's I decision, agreed to append to the Case, with the approval of the Lands Tribunal, a transcript of the evidence of a witness. The court disapproves of this course as a matter of practice. It can rarely, if ever, be justified. The necessary facts should be found in the Case Stated for the consideration of the court on any question of law. The convenient practice of incorporating any judgment or decision of the Lands Tribunal in accordance with a direction of the Master of the Rolls on July 27, 1956 (1), does not alter the established practice that the

(1) *Practice Direction*, [1956] 3 All E.R. 117.

Case should state the facts found sufficiently for the purpose of an appeal. The direction expressly refers to cases in which a written decision has been given containing all necessary findings of fact. On this occasion the court found it unnecessary to remit the Case and so was able to avoid further delay and probable additional costs by adding to the Stated Case a written statement of additional facts agreed by the parties.

The hereditament in question is only one of the premises occupied by the ratepayers for the purposes of their business and it is necessary to regard the function of these premises in relation to the organisation as a whole. There are in addition seven depots where the vehicles are maintained and two so-called dormi-houses where vehicles are garaged but not apparently serviced in any way.

The decision of the Lands Tribunal recognises that the premises under consideration are used for two kinds of work: for the manufacture and reconditioning of parts or units of vehicles, which parts or units are for the most part dismantled at and sent from the local service depots to this central workshop and which, after remaking or reconditioning, are stored and form a stock of spare parts to serve as replacements for vehicles generally, and that the premises are also used for the repair or reconditioning of a limited number of vehicles, four each week, which come to an allotted portion of the premises. A vehicle remains there for about three weeks.

The learned President, having found these distinctive and separate uses of the premises and having asked "what are the real activities carried out in these premises", it would appear, disregarded the difference between reconditioning of the parts or units and the maintenance of the vehicles themselves, and inquired only whether the nature of the work undertaken on the premises was reconstruction or repairing and reconditioning. In my opinion and with all respect to the learned President, the decisions of the House of Lords do not support such an approach and the reasoning seems to disregard the decision of the House (2) which has stood, and I do not doubt has been applied, since 1931.

I turn at once to *Potteries Electric Traction Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*) (2) which was considered at the same time as *Moon* (*Lambeth Revenue Officer*) v. *London County Council* (2). These cases established that, in determining whether a hereditament occupied and used as a factory is primarily occupied and used for purposes which are not those of a factory, it is the actual use to which the hereditament itself is put that has to be considered and not the use to be made of the products of the hereditament or of the work there carried on. The omnibus company there operated a fleet of vehicles and occupied and used the hereditament for the manufacture of spare parts for the fleet and for other manufacturing and repair processes distinct from ordinary maintenance in connexion with the fleet. Except for that portion of the ratepayers' premises which is given over to the "docking" and repairing of the vehicles which come into the premises, the activities in the present case, in my view, closely resemble those of the *Potteries* case (2). It would seem that the parts and units taken from the vehicles in the fleet for reconditioning were received and repaired in a similar way to the practice in the ratepayers' hereditament. There is nothing to indicate, I think, that the used units were scrapped and only new units constructed. The House held that the hereditament in that case was not occupied and used for purposes which were not those of a factory and that the manufacture of an article needed to maintain differed from "maintenance" as used in s. 3 (2) and that the hereditament, except as to one part used as a paint shop, was a factory and an industrial hereditament.

LORD DUNEDIN, after saying that the scheme of the Act of 1928 seemed to him to be remarkably clear (3), read s. 3 (1) and then interpreted it. He said that the first thing a person making a claim to have his hereditament included in the

(2) [1930] All E.R. Rep. 63; [1931] A.C. 151.
(3) [1931] A.C. at p. 165; [1930] All E.R. Rep. at p. 70.

A special list (i.e., Part II now) has to show is that the hereditament is a factory or workshop. The premises now under consideration are undoubtedly within the definition of the Factory and Workshop Act, 1901, s. 149, which defines the ways in which the character of a factory or workshop can be obtained.

LORD DUNEDIN continued (4):

B "Now, as to the proviso, the reasons for it are, I think, plain. Once the term 'factory or workshop' (I shall not go on repeating the double term) is given, the whole hereditament obtains that character. A workman injured in any part of the hereditament, however removed from where the machinery was, would, under the old law, before it was swallowed up under the wider provisions of the Workmen's Compensation Acts, have obtained relief. But C it was not wished to extend this rating benefit to a hereditament which, although it was called a factory, yet was not primarily, and that, I take it, is equivalent to 'mainly,' used for factory purposes. To do so when the factory engaged but a small portion of the hereditament would be to give relief little in keeping with the true industrial tenement sought to be relieved. Accordingly, you have enumeration of various things which are not factory operations. But be it observed that in each and all of the sentences, (a), D (b), etc., the nominative is a hereditament which is described as being used and occupied primarily for a specific purpose which is not a factory purpose. Obviously part of the hereditament is a factory, but the portion occupied for the other purposes is in contradistinction to the portion occupied for factory purposes, and the question is—which is primarily or most occupied? In other words, the whole hereditament is being considered, for upon that E whole the relief would necessarily be calculated, in order to see whether it is used and occupied primarily or mainly for non-factory purposes, in which case the privilege is not accorded. The truth is that 'for the purposes of' might perfectly well be expressed by the one little word 'as'. All this has nothing to do and could have nothing to do with the product of the factory itself. That is, of course, quite apparent in the earlier sentences. No factory F makes dwelling-houses, retail or wholesale shops, or storage. But the Court of Appeal has gone on the terms of the last sentence (f) 'any other purposes . . . which are not those of a factory or workshop'. To my mind, the use of this subsection is clear. The earlier ones do describe various uses to which the parts of the area not actually used by the factory might be put. Then comes this sub-division, which is put in to cover anything that G might be omitted by reason of the antecedent paragraphs containing specific descriptions and includes purposes which, though not specifically similar to those already specified, yet resemble them in this, that they are not mainly factory purposes. But to suddenly change the whole scheme, no longer to consider how the area is occupied except in so far as it is occupied by the factory, but to bring in the question of whether the product of the H factory is for the purpose of being used by something which was not a factory is, to my mind, and with deference to the learned judges who have so thought, quite fantastic. Its operation would defeat the whole scheme of the Act, and all this is to be drawn out of the word 'purpose'"

Again, a little lower down (5):

I "The scheme of the Act as I have described it is most logically carried on in s. 4. If industrial hereditament had been made equivalent to factory the whole hereditament would have enjoyed the privilege. If the most part of it is used, not as a factory or, to use the exact words, if the hereditament is used primarily for non-factory purposes, the privilege is not obtained, but even if the privilege is obtained it may yet well be that much of the

(4) [1931] A.C. at p. 166; [1930] All E.R. Rep. at p. 70.
(5) [1931] A.C. at p. 168; [1930] All E.R. Rep. at p. 71.

hereditament is not used for factory purposes and then, under the provisions of s. 4, there must be apportionment." A

In the *Potteries* case (6) LORD DUNEDIN pointed out that much of the hereditament was occupied for purposes which were obviously not factory purposes, e.g., as a garage, and these portions had been apportioned under s. 4 with the portions occupied as a factory, as shown on a plan produced.

In applying s. 3 (2) the House of Lords found that the place or part of the factory given over to the repairing of units was not occupied for the purpose of the maintenance of vehicles, as maintenance in the subsection meant something done to the vehicle on the premises. As LORD BUCKMASTER said (7): B

> " The fact that spare parts are necessary for repairing omnibuses does not, in my opinion, make the manufacture of the spare parts a maintenance of the omnibus within the meaning of the statute." C

But within that place where spare parts were made there was a paint shop and this the House itself excluded as non-industrial as ". . . it seems pretty clear that the painting shop is used for the purpose of real maintenance " (per LORD DUNEDIN (8)). The House therefore looked at the purpose for which the manufacturing part was primarily used and the fact that it had some slight user for maintenance did not affect the whole. D

It is only thirty years since, in the early stages of the de-rating privileges, the pronouncement of the House of Lords was made, and it is with some reluctance that I have quoted so extensively but it seems to have been ignored in its application in this case and has been questioned in argument. An illustration of its proper application, in my view, is to be found in *Sainsbury* (*Valuation Officer*) v. *British Road Services, Ltd.* (9). The case was heard in February, 1961, after the decision in the present case, and the learned President found the premises to be an industrial hereditament since, although the ultimate fate of the units repaired on the hereditament was for use on the ratepayer's fleet of vehicles, the hereditament was not used for the maintenance of road vehicles within s. 3 (2) (b) of the Act. E F

In 1959 there was another decision of the House of Lords, *London Transport Executive* v. *Betts* (*Valuation Officer*) (10) concerning the Aldenham depot owned and occupied by the executive for the periodic overhaul of omnibuses and for repair in the case of major accidents suffered by them. Broadly speaking, the case was almost the converse of the *Potteries* case (11), for the vehicles came to the premises and were there dismantled and reconditioned. The body of a vehicle was detached from the chassis and the chassis and other parts were sent away elsewhere for reconditioning. It was held (with an interesting dissenting view of LORD DENNING which if it had prevailed might have left the whole scheme more harmonious) that " maintenance " within the meaning of s. 3 (2) (b) included repairing, overhauling and reconditioning of vehicles so long as the work did not amount to reconstruction. G H

As the vehicles in that case were dealt with on the premises, the argument in favour of de-rating—the premises falling within the definition of a factory—was that they were not caught by s. 3 (2) (b) because what was done was more than maintenance. It was recognised that if new vehicles were made there the premises would be an industrial hereditament but as that was not the case on the facts the case fell within s. 3 (2) (b). LORD REID said (12): I

> " Nor do I see any proper distinction between different kinds of repairs, or between repairs which are done with simple equipment and repairs which

(6) [1931] A.C. at p. 168; [1930] All E.R. Rep. at p. 71.
(7) [1930] All E.R. Rep. at p. 69; [1931] A.C. at p. 163.
(8) [1930] All E.R. Rep. at p. 72; [1931] A.C. at p. 169.
(9) [1961] R.V.R. 171. (10) [1958] 2 All E.R. 636; [1959] A.C. 213.
(11) [1930] All E.R. Rep. 63; [1931] A.C. 151.
(12) [1958] 2 All E.R. at p. 646; [1959] A.C. at p. 232.

A are more conveniently done in a fully equipped workshop. But reconstruction which goes beyond producing a repaired vehicle and, in effect, produces a different vehicle may be another matter."

The speeches were not considering the component parts but the whole vehicle. LORD KEITH of AVONHOLM said (13) of the *Potteries* case (14):

B "In my opinion, there underlies all the speeches of their Lordships in that case an acceptance of the view that repairing of vehicles was maintenance."

But that did not prevent the House of Lords from placing the hereditament in Part II or its equivalent as an industrial hereditament, because the hereditament was the place where units were repaired, not vehicles.

C *London Transport Executive* v. *Betts* (15), applied to the present appeal, would have the effect that the place given over to the repair of the vehicles which came to the premises four at a time each week would be deemed not to form part of the factory but "save as aforesaid" the expression "factory" has the same meaning as in the Factory and Workshop Act, 1901. Therefore, subject to further submissions, the part given over to the reconditioning of units is a factory unaffected by the subsection.

D If I read the decision of the tribunal in this case aright, this position does not appear to have been recognised throughout. Instead the inquiry was directed to whether what took place on the premises was manufacture or maintenance and the conclusion was that (16)

"some reconstruction does take place on this hereditament but it is
E entirely subsidiary to the main purposes of the hereditament which are those of repairing and reconditioning."

A similar argument was adduced, it would appear, by the solicitor to the valuation officer in the *Sainsbury* case (17). In my view it is fallacious. It fails to recognise the established distinction between reconditioning vehicles and reconditioning units. The reconditioning of units is as much an industrial purpose as the making
F of completely new units. The product of the factory area is a number of spare parts and it seems to me to matter not whether the spare parts are brand new or in part consist of old material with new material added. The distinction is material if one has to consider whether a vehicle is being maintained or constructed, but it has no materiality in considering whether a part of premises is used as a factory. The processes of producing the unit new or secondhand are
G clearly industrial processes not deemed to be otherwise.

It is, however, clear from s. 3 (1) that a hereditament, albeit a factory, is not an industrial hereditament if it is primarily occupied and used for certain specified purposes or for any combination of them. It was submitted further that the hereditament in question was not an industrial hereditament because it fell
H under (f), "any other purposes . . . which are not those of a factory or workshop". The *Potteries* case (14) recognised that in applying this proviso one has to look at the hereditament as a whole, including any non-industrial user by reason of some part of the hereditament being occupied and used for the housing and maintenance of road vehicles, e.g., the thirty-six garages in that case. Similarly, in looking at other defined parts, the primary purpose for which those parts are
I used decides their character in the assessment of the primary purpose for which the whole is used; for example, the area for the manufacture of spare parts was in the *Potteries* case (14) and is here an industrial area, notwithstanding that a paint shop which is non-industrial is one of the purposes for which the area is used.

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(13) [1958] 2 All E.R. at p. 648; [1959] A.C. at p. 237.
(14) [1930] All E.R. Rep. 63; [1931] A.C. 151.
(15) [1958] 2 All E.R. 636; [1959] A.C. 213.
(16) (1960), 6 R.R.C. at p. 368.
(17) [1961] R.V.R. 171.

The court has hesitated about sending the case back for a finding whether this hereditament is primarily occupied and used for purposes which are not those of a factory or workshop. But we have come to the conclusion that only a finding that this hereditament was primarily used as a factory would be justified. We have a plan showing the areas allocated to particular work and considerable detail of the number of men employed and the nature, extent and value of the work done. The areas 1, 2, 3 and 6, the docking shop, body shop, paint shop and paint store respectively, occupying twelve thousand square feet and employing twenty-seven men, would seem to be wholly non-industrial as the area is given over primarily to the maintenance of the vehicles, but there is a somewhat greater area associated substantially with the work of the fitting shop which employs thirty-five men.

Although I would hold that the hereditament as a whole is an industrial hereditament, there are obviously places within it which have a non-industrial use and which call for exclusion from the de-rating benefit under s. 4. The case should be remitted to the Lands Tribunal to make an apportionment accordingly. I do not wish to go into detail but, although on occasions spare parts are drawn from the store in order to refit a vehicle on the premises, I would not regard that as affecting in any way the industrial character of the fitting shop and its store. Any part removed from a vehicle on the hereditament goes for treatment in just the same way as if it had been removed at one of the depots. It forms the raw material for the manufacture of spare parts. Replacements for vehicles, wherever situated, are drawn from the stores, and if they were not available by reason of the ratepayers making them in this way similar work would have to be done to them by some outside source or new or reconditioned component parts would have to be purchased.

I would expressly accept the terms of ground (3) of the amended grounds of appeal, that the mere fact that a hereditament or part thereof is used for or in connexion with the maintenance of vehicles to an extent exceeding de minimis does not ipso facto make such hereditament or part a " place used . . . for the . . . maintenance of . . . vehicles " within the meaning of s. 3 (2) (b). I think that view underlies the decision in the *Potteries* case (18). The primary use of the area No. 4, wood machine and upholsterers, is not so clear. It is undoubtedly used in part for the maintenance of the vehicles on the premises but it has several other uses which will call for consideration.

For these reasons I would allow the appeal and declare the hereditament in question to be an industrial hereditament which is occupied and used partly for industrial purposes and partly for non-industrial purposes, and I would remit the case to the Lands Tribunal to apportion the occupation and user between the one and the other and to order their entry in the valuation list accordingly.

DEVLIN, L.J.: I have had the advantage of reading in advance the judgment which SELLERS, L.J., has just delivered and also that which DANCKWERTS, L.J., is about to deliver. I agree with them both and shall add nothing.

DANCKWERTS, L.J.: Unlike some cases on the subject of rating and valuation, in which the argument was that a hereditament was a factory or a workshop when no ordinary intelligent person would have called it anything of the sort, this is a case where the hereditament was about as plainly a factory or workshop as could be imagined, but it is contended that by reason of the highly involved, artificial and contentious provisions of the relevant Acts it is something else and, therefore, is not entitled to the de-rating provisions of the Acts.

Starting for this purpose with the provision of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, it is first of all necessary to decide whether the hereditament is prima facie an " industrial hereditament " because it is

(18) [1930] All E.R. Rep. 63; [1931] A.C. 151.

A either " a factory or a workshop ". As I have already indicated, it seems to me quite plainly that it is.

It is a hereditament which for general purposes is used for the purpose of keeping the omnibuses of the ratepayers on the road and doing the work for which that company exists. According to the findings in the Case and the decision of the Lands Tribunal, the work which is done on the hereditament falls into two B categories. Quoting from the decision (19):

> " The first is the manufacture and reconditioning of parts and units of vehicles. In this connexion parts and units of the vehicles are sent from the local service depots run by the omnibus company to the central workshop for reconditioning when required, the reconditioned units are then C returned from stock to the local service depots again as required. The second kind of work done is work upon the vehicles. What happens in this connexion roughly is that a bus is brought in to area No. 1 known as the docking shop, vehicles are put over the pits for examination to ascertain what parts of the vehicle such as chassis frame members, body outrigger brackets, holding down brackets, lifeguard brackets will require to be D made for the purposes of body and chassis overhaul. Units due for replacement on a mileage basis may be removed and factory reconditioned units fitted."

The effect of the occupation and use of the hereditament as a factory or workshop may, however, be nullified if it is primarily occupied and used for any of the purposes which are referred to in the proviso to s. 3 (1), the only one of which E that seems to be material in the present case being " storage ", though there is the general reference to " any other purposes . . . which are not those of a factory or workshop." Further, s. 3 (2) (b) contains a provision which has been the principal subject of discussion in the present case. " Any place used by the occupier for the housing or maintenance of his road vehicles or as stables . . .", though situate within the close, curtilage or precincts forming a factory or F workshop, and used in connexion therewith, are to be deemed not to form part of the factory or workshop. Before a decision whether this is an industrial hereditament can be reached, therefore, these two further questions have to be considered, though in what order of application I do not for the moment consider.

Now, though the general object of the hereditament and its workshops is to keep the fleet of omnibuses in working order and performing their functions G on the road, which has in a sense a purpose of maintenance involved in it, it is plain from the decision of the House of Lords in *Potteries Electric Traction Co., Ltd.* v. *Bailey* (20) that this is a consideration which does not have any serious effect in regard to the questions which have to be decided. Further, it is established by that case that it is the actual use to which the hereditament itself is put that has to be considered, and not the use to be made elsewhere of the H products of the hereditament or of the work there carried on. It seems to me to be plain that the application of that principle as laid down by the House of Lords requires us to disregard any maintenance work which may be done on the ratepayers' vehicles at the other depots by means of units or articles which have been produced in the workshops which are on the hereditament which is under consideration. Accordingly in deciding whether the hereditament is I primarily occupied or used as a factory or workshop for any of the purposes referred to in the proviso to s. 3 (1), it is necessary to consider only the work which is done on the hereditament.

It is, of course, plain that a part of the hereditament is used for maintenance of the ratepayers' vehicles, i.e., the work which is done on the premises on the omnibuses which are brought into the area No. 1 or the docking shop, and presumably also any part in which painting of omnibuses is carried out. Counsel

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(19) (1960), 6 R.R.C. at p. 363. (20) [1930] All E.R. Rep. 63; [1931] A.C. 151.

for the valuation officer, however, claimed that the description of "maintenance of the company's vehicles" must also be applied to a number of other places on the hereditaments, indeed, so extensively, it seemed, that very few places would escape that description. He contended that, if in any place any work of maintenance was carried out which was not negligible (not de minimis) that whole place must be treated as used by the ratepayers for the maintenance of vehicles. The basis of his contention was that "used" in s. 3 (2) (b) meant "used" to any extent, however small, provided it was not so small as to be negligible. Applying, therefore, the provisions of the subsection by excluding all the places so used, in accordance with his arguments, there would be so little of the site used for purposes other than maintenance that it would be impossible to say that the hereditament as a whole was occupied and used primarily as a factory or workshop and not primarily for maintenance.

I reject this construction and application of s. 3 (2) (b) without hesitation. It seems to me that it would lead to absurd results and cannot have been intended by the statutory provisions, which, I suppose, were intended to apply in a practical manner, and with some measure of common sense. In my view, it is necessary and proper to have regard to the substantial use which is made of the places in the factory or workshop in deciding whether (on the one hand) such places should be eliminated as used for the housing or maintenance of the ratepayers' vehicles or (on the other hand) such places are used for workshop purposes. No doubt the facts before us are insufficient to decide these matters in all cases and there will have to be further investigation and an apportionment.

On the question to be decided in respect of the proviso to s. 3 (1), having regard to the finding in the Case and the decision, and to the further agreed facts which have been placed before the court, I have reached the conclusion that the hereditament is primarily occupied and used as a workshop. It seems to me that the work which is done in respect of spare parts and in regard to engine units, whether it is called by the name "reconditioning" or by any other term, is not properly described by the words "maintenance of vehicles". I agree with the observations of SELLERS, L.J., and I think that this case is substantially covered by the decision of the House of Lords in *Potteries Electric Traction Co., Ltd.* v. *Bailey* (21) and is essentially different from *London Transport Executive* v. *Betts* (22).

The object of s. 3 (2) (b) is obviously to remove places which are used for the housing or maintenance of road vehicles out of any benefit of de-rating. This is simple enough. But it seems to me to be a difficult question whether, when the proviso to s. 3 (1) is being considered to see whether the hereditament is a factory or workshop occupied and used primarily as a factory or workshop or primarily occupied and used for some other purpose specified in the proviso, the places excluded by s. 3 (2) (b) should be taken into consideration; but as the unit under consideration is the hereditament as a whole probably regard must be had for this purpose to those parts which are used for housing or maintenance of the occupier's road vehicles. On the other hand there seems to be force in the argument that, if those parts are to be deemed not to form part of the factory or workshop, they cannot affect the question whether the rest of the hereditament is occupied and used as a factory or workshop or something else. Be that as it may, I have reached the conclusion on the findings and agreed facts, that this hereditament is primarily occupied and used as a factory or workshop, and is an industrial hereditament. I think that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Sydney Morse & Co.* (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(21) [1930] All E.R. Rep. 63; [1931] A.C. 151.
(22) [1958] 2 All E.R. 636; [1959] A.C. 213.

A

SCARSBROOK AND OTHERS v. MASON.

[QUEEN'S BENCH DIVISION (Glyn-Jones, J.), October 5, 1961.]

Road Traffic—Negligence—Liability of passenger—Driver unknown—Driver driving as agent of passengers—Accident due to dangerous or careless driving and third persons injured.

B

The plaintiffs were standing on a footway by the side of a road when a motor car came round a bend on the opposite side of the road, travelling so fast that the driver lost control. It careered to its offside, mounted the footway and knocked down and injured the plaintiffs. It was discovered that the motor car had been taken and driven away by someone without the owner's consent. The defendant was a passenger in the motor car on the invitation of the occupants, of whom there were several. He was not driving, and he did not know who the driver was, but was travelling in the motor car for the purpose of a pleasure trip to Southend and had paid a contribution towards the cost of the petrol. In an action by the plaintiffs for damages for negligence against the defendant,

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Held: the plaintiffs were entitled to damages against the defendant, since the driver of the motor car was acting as agent for each and all the members of the party, who were jointly and severally liable for the negligent manner in which the motor car was driven.

[As to liability for the negligence of others, see 28 HALSBURY'S LAWS (3rd Edn.) 22, para. 20.]

E

Action.

The first and second plaintiffs, Ernest John Scarsbrook and his wife, Gladys Mary Scarsbrook, were standing on the footway by the side of the road at Five Bells Corner, Vange, Essex. Mrs. Scarsbrook was holding her infant daughter, the third plaintiff, Ann Scarsbrook, in her arms. A motor car came round a left-hand bend on the opposite side of the road, travelling so fast that the driver lost control. It careered to its offside, knocked down the plaintiffs and went into a field behind the footway where it overturned. The plaintiffs sustained injuries. Police found a man named Smith about ten yards from the car but he refused to say anything. The jacket of a suit belonging to the defendant, Charles James Mason, was found caught in the offside back door of the car. It was discovered that, three days previously, the car had been taken and driven away by someone without the owner's consent. Proceedings were taken against Smith, who later admitted that he had been in the car, and also against the defendant. In the course of those proceedings, the defendant made a statement, not on oath, in which he said that he accepted the invitation of the occupants of the car to go for a ride, and that he gave them 4s. as his contribution towards the cost of the petrol. In answer to interrogatories, he stated he was not driving the car, that he did not know who the driver was, and that the purpose of the drive was a pleasure trip to Southend. The plaintiffs claimed damages against the defendant.

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J. R. B. Fox-Andrews for the plaintiffs.

J. T. Molony, Q.C., and *D. J. Stinson* for the defendant.

GLYN-JONES, J., stated the facts, referred to the pleadings and the answers to the interrogatories, and continued: Counsel claims on the plaintiffs' behalf that, at the time of this accident, the motor car was being driven dangerously, or at any rate carelessly, and that the driving of the motor car in that manner was a criminal offence. He says that the act of driving the motor car in that way was the joint act, the concerted act, of the driver and the passenger, the defendant. I suppose that he can say equally it is the concerted act of all the others who were in the car. Counsel for the plaintiffs supports that by suggesting that, whenever a passenger in a car sits silent without making any endeavour to control the driver, while the driver is driving at a speed or in a manner which the passenger knows

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to be dangerous, there comes a point when the passenger must be said to have assented to the driving in this manner, so that he and the driver become jointly parties to the unlawful driving. I do not need to express any opinion about that as a general proposition, or to say that there are no circumstances in which it could not possibly be applicable. Either the defendant in this case is affected with responsibility for the manner in which the motor car was being driven throughout the journey, on the footing that he was with the other persons in the motor car, a party in the enterprise or venture of going to Southend in the motor car, in which they were all equal parties together, or, if he was not so affected, there is nothing to justify me here in saying that, whereas the defendant was not responsible for the manner in which the car was being driven up to the moment when it began to be driven dangerously, he became responsible at some subsequent point of time, i.e., when the dangerous driving had continued for some period of time, which counsel for the plaintiffs does not specify and which was never defined. I do not accept that on the facts of this case.

A much more difficult question is: What was the status of the defendant in that motor car? Was he a mere guest of someone who, as it were, retained control of the motor car, or was he, as was suggested earlier, an equal member, so to speak, of a group who were jointly using this motor car for the purpose of taking them all to Southend? I have come to the conclusion that the latter is the right view of the facts.

[His Lordship commented on the evidence of the defendant and Smith, and continued:] I think that the defendant was told that the others in the motor car were all going as a party to Southend. I think that he was told, summarising the effect of it, that if he cared to pay his share of the cost of petrol he could come too. He said that he had only got 4s., and the rest of the party accepted that as a general contribution, and accepted him from that time onwards, not as a guest, but as an equal member of the party. So also, when they picked up Smith, he was asked whether he had got any money before he was admitted to the party, and when he said that he had, he was told that if he would pay the sum of money which was demanded of him, he, too, could join the party as (as I have already said) an equal member. I do not think that it matters whether Smith and the defendant knew in what circumstances the car had been acquired, or did not know. They knew they were joining a party, all equally concerned in this trip to Southend, and that one member of the party was going to drive on behalf of all the others, so that the party could get to Southend.

The members of that party are jointly and severally liable for the manner in which the motor car was driven, viz., that it was driven negligently, and the plaintiffs are entitled to succeed against this member of the party on the ground that the driver was acting as agent for each and all the members of that party. For that reason, judgment will be given against the defendant.

Judgment for the plaintiffs.

Solicitors: *Hatten, Asplin, Jewers & Glenny*, Barking (for the plaintiffs); *Gascoin & Co.* (for the defendant).

[*Reported by* Kathleen J. H. O'Brien, *Barrister-at-Law.*]

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NEVILLE ESTATES, LTD. v. MADDEN AND OTHERS.

[CHANCERY DIVISION (Cross, J.), July 18, 19, 20, 21, 24, 25, 27, 31, 1961.]

Charity—Unincorporated association—Trust for members of synagogue—No limit as to time.

Charity—Religion—Public benefit—Synagogue—Ancillary social activities.

B *Charity—Sale of charity estate—Consent of Charity Commissioners—"Wholly maintained by voluntary contributions"—Charity partially maintained by voluntary contributions and partially by endowment—Transfer at time when not a "mixed charity"—Charitable Trusts Act,* 1853 (16 *&* 17 *Vict. c.* 137), *s.* 62.

C On June 1, 1959, the defendants, as trustees of the Catford Synagogue, entered into a contract with the plaintiffs for the sale to them of two pieces of vacant land adjoining the synagogue. The contract was subject to the consent of the Charity Commissioners "so far as the same is required". The Charity Commissioners refused their consent, but the plaintiffs claimed that their consent was not needed because (i) the land was not held on a charitable trust, and (ii) if it was held on a charitable trust it was exempt D from the jurisdiction of the Charity Commissioners under the Charitable Trusts Act, 1853, s. 62*. The Catford Synagogue was established in 1937 and was affiliated to the United Synagogue. The United Synagogue existed under a scheme made in 1870 by the Charity Commissioners and confirmed by a private Act of Parliament. Its objects were, among others, the maintaining, erecting, founding and carrying on of places of worship E for persons of the Jewish religion who conformed to certain ritual, the giving of instruction in religious subjects, and the relief of poor persons of the Jewish religion. The United Synagogue had power to assist in founding places of worship for persons of the Jewish religion who conformed to the said ritual. The Catford Synagogue was an unincorporated association and its bye-laws provided that its members should consist of persons "who shall be in F occupation of seats" at the synagogue. It was necessary to apply to the board of management for membership and if they considered the applicant suitable, his application would be sent to the United Synagogue for approval. Each member paid a subscription, and failure to do so involved loss of membership. The subscription covered the rental of his seat and his contribution to a funeral expenses scheme organised by the United Syna- G gogue. The board of management were elected annually by the members of the synagogue. The bye-laws contained no provision for dissolution, but they could be modified. In 1938 the Catford Synagogue made an agreement with the United Synagogue under which the Catford Synagogue agreed (among other things) to remain in permanent association with the United Synagogue under the agreement and the United Synagogue scheme H for affiliated synagogues, and that its freehold, leasehold or tenancy rights of and in any premises used for religious purposes should if the council of the United Synagogue required be vested in the United Synagogue or in trustees for the latter. The United Synagogue scheme for affiliated synagogues required that each affiliated synagogue should have as its main object the establishing and maintaining of regular sabbath and other I religious services, and should establish and maintain Hebrew and religious classes of a standing approved by the London Board of Jewish Religious Education. The Catford Synagogue launched a building fund appeal and in 1941 used the moneys so obtained together with moneys raised by mortgage in the purchase of a house which was thereafter used as a synagogue. The house was conveyed to trustees for sale on trust to hold the

* Repealed by the Charities Act, 1960, as from Jan. 1, 1961; see p. 783, letters F to I, post, where the relevant portion of s. 62 is set out.

proceeds on the trusts of a deed of even date. The latter deed recited that the "purchase moneys were the property of the members of the synagogue" and provided that the trustees should permit the members to use the property until sale for all the purposes of the synagogue and for such other purposes as the board of management should resolve. The deed also provided that the trustees should hold the net proceeds of sale on trust to pay the principal, interest and costs payable under the mortgage and to pay the balance to such persons as the board of management might direct. In 1943 the board of management set up a building fund and imposed a levy of 3d. per week on the members of the synagogue, and entertainments were held in order to raise money for the building fund. The building fund was kept in a separate bank account, and from time to time portions of it were transferred to the Post Office Savings Bank in order to earn interest. In 1953 the defendants (and another who had since ceased to be a trustee) took a transfer of three adjoining plots of land to be held on the trusts of a deed of even date. In the transfer the trustees declared that the land transferred would for the purposes of the Settled Land Act, 1925, s. 29, be held by the trustees on charitable trusts. The trust deed of even date recited that the purchase price was the property of the members of the synagogue and contained provisions similar to those in the trust deed of 1941. The land the subject of the present dispute comprised two of the three plots purchased in 1953, a synagogue having been constructed on the third plot. A communal hall was erected near the synagogue and social functions were held there.

Held: (i) the moneys used for the purchase in 1953 and the land bought with those moneys were held on trust for the benefit of the members of the synagogue from time to time without limit of time and the trust would accordingly fail unless the purposes for which the land was held were charitable purposes.

Leahy v. *A.-G. of New South Wales* ([1959] 2 All E.R. 300) applied.

(ii) the land purchased in 1953 was held on trust for purposes that were charitable as being religious purposes, notwithstanding that social activities were carried on by members of the synagogue as part of its activities and that the trust was for the benefit of the members, a private unincorporated association, because the social activities were merely ancillary to the religious purposes, and the religious purposes had the requisite element of benefit to the public, since the members of the synagogue mixed with their fellow men and did not live secluded from the world.

Inland Revenue Comrs. v. *Baddeley* ([1955] 1 All E.R. 525) distinguished.

Gilmour v. *Coats* ([1949] 1 All E.R. 848) applied.

(iii) the questions in the present action could properly be decided in the absence of the Charity Commissioners and of the Attorney-General (see p. 777, letter I, and p. 778, letter A, post).

(iv) the land was not exempted by s. 62 of the Act of 1853 from the jurisdiction of the Charity Commissioners because

(a) the synagogue was not "wholly maintained by voluntary contributions" at the date of the contract since it had freehold premises used for the purposes of the charity.

A.-G. v. *Mathieson, Re Wilkinson and Fell's Contract* ([1907] 2 Ch. 383) followed.

Re Society for Training Teachers of the Deaf and Whittle's Contract ([1907] 2 Ch. 486) not followed.

(b) even assuming that the proceeds of entertainments were donations and that the Catford Synagogue was partly maintained by the interest paid on the deposit in the Post Office Savings Bank, so that it was a "mixed charity", i.e., a charity maintained partly by voluntary subscriptions and partly by income arising from an endowment, the plaintiffs had failed to establish that the whole of the purchase price paid by the Catford Synagogue

A for the land contracted to be sold to the plaintiffs was exempted by s. 62 since some part of the donations to the building fund were made at a time when the Catford Synagogue was not a " mixed charity ".

[As to when consent of the Charity Commissioners is not required to a sale of charity property, see 4 HALSBURY'S LAWS (3rd Edn.) 340, para. 699; and for cases on the subject, see 8 DIGEST (Repl.) 476-478, *1793-1804*.

B For the Charitable Trusts Act, 1853, s. 62, see 2 HALSBURY'S STATUTES (2nd Edn.) 865.

For the Charities Act, 1960, s. 48 (2), Sch. 7 (which repealed the Act of 1853), see 40 HALSBURY'S STATUTES (2nd Edn.) 176, 187.]

Cases referred to:

C *A.-G.* v. *Bunce*, (1868), L.R. 6 Eq. 563; 37 L.J.Ch. 697; 18 L.T. 742; 8 Digest (Repl.) 425, *1157*.

A.-G. v. *Mathieson, Re Wilkinson and Fell's Contract*, [1907] 2 Ch. 383; 76 L.J.Ch. 682; 97 L.T. 450; 8 Digest (Repl.) 476, *1792*.

Bunting v. *Sargent*, (1879), 13 Ch.D. 330; 49 L.J.Ch. 109; 41 L.T. 643; 8 Digest (Repl.) 339, *207*.

D *Child Villiers' Application, Re, Villiers* v. *A.-G.*, [1922] All E.R. Rep. 671; [1922] 1 Ch. 394; 91 L.J.Ch. 473; 126 L.T. 555; 8 Digest (Repl.) 512, *2392*.

Church Army, Re, (1906), 75 L.J.Ch. 467; 94 L.T. 559; 8 Digest (Repl.) 477, *1799*.

Clergy Orphan Corpn., Re, [1894] 3 Ch. 145; 64 L.J.Ch. 66; 71 L.T. 450; 8 E Digest (Repl.) 476, *1796*.

Cocks v. *Manners*, (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 8 Digest (Repl.) 325, *86*.

Gilmour v. *Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034; *affg.* sub nom. *Re Coats' Trusts, Coats* v. *Gilmour*, [1948] 1 All E.R. 521; [1948] Ch. 340; [1948] L.J.R. 1178; 8 Digest (Repl.) 325, *87*.

F *Inland Revenue Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525; [1955] A.C. 572; [1955] 2 W.L.R. 552; *revsg.* S.C. sub nom. *Baddeley* v. *I.R. Comrs.*, [1953] 2 All E.R. 233; [1953] Ch. 504; [1953] 3 W.L.R. 135; 3rd Digest Supp.

Leahy v. *A.-G. of New South Wales*, [1959] 2 All E.R. 300; [1959] A.C. 457; [1959] 2 W.L.R. 722; 3rd Digest Supp.

G *Society for Training Teachers of the Deaf and Whittle's Contract, Re*, [1907] 2 Ch. 486; 76 L.J.Ch. 656; 97 L.T. 538; 71 J.P. 454; 8 Digest (Repl.) 477, *1800*.

Stockport Ragged, Industrial and Reformatory Schools, Re, [1898] 2 Ch. 687; 68 L.J.Ch. 41; 79 L.T. 507; 8 Digest (Repl.) 483, *1912*.

H **Action.**

By an agreement in writing dated June 1, 1959, the plaintiffs, Neville Estates, Ltd., agreed to buy and the defendants, the trustees of the Catford Synagogue, agreed to sell two pieces of vacant land comprised in the Catford Synagogue premises registered under title No. 38990 in the Land Registry, for £10,000. The plaintiffs had paid the deposit and completion date was fixed for July 13, 1959. The agreement provided that the contract was subject to the consent of I the Charity Commissioners " so far as the same is required ". That consent was refused at the sale price of £10,000, and the defendants refused to complete. The plaintiffs maintained that the land was not held on a charitable trust but that if it was so held it fell within s. 62 of the Charitable Trusts Act, 1853, and was exempt from the jurisdiction of the Charity Commissioners; and the plaintiffs claimed (i) a declaration that the land could be sold without the consent of the Charity Commissioners and (ii) specific performance of the agreement dated June 1, 1959.

Michael Albery, Q.C., and *Jeremiah Harman* for the plaintiffs. A
Nigel Warren, Q.C., and *B. J. H. Clauson* for the defendants.

Cur. adv. vult.

July 31. **CROSS, J.**, read the following judgment: On June 1, 1959, the defendants, who are the trustees of the Catford Synagogue, entered into a contract with the plaintiffs, Neville Estates, Ltd., for the sale to them of two pieces of B vacant land adjoining the synagogue for £10,000. Completion was to be on July 13, 1959, but it was provided that the contract was subject to the consent of the Charity Commissioners "so far as the same is required". The Charity Commissioners will not give their consent to the sale at the price of £10,000, but the plaintiffs claim that their consent is not needed (i) because the land in question is not held on a charitable trust at all; and (ii) because if it is held on a C charitable trust, it is nevertheless within the exemptions from the Charity Commissioners' jurisdiction contained in s. 62 of the Charitable Trusts Act, 1853. They have therefore brought this action asking for a declaration that the Charity Commissioners' consent is not necessary and for specific performance of the contract.

The Catford Synagogue was established in 1937. In that year some thirty or D forty persons of the Jewish faith living in or about Catford decided that instead of going to the New Cross Synagogue, which was some five miles away, they would try to set up a synagogue of their own which should be affiliated with the United Synagogue. The United Synagogue is an institution which was brought into being in 1870 by a scheme of the Charity Commissioners confirmed by an Act of Parliament (33 & 34 Vict. c. cxvi) under which five existing synagogues E in London were amalgamated into a single body the objects of which are declared to be

> "the maintaining, erecting, founding, and carrying on, in London and its neighbourhood, of places of worship for persons of the Jewish religion who conform to the Polish or German ritual, the giving of instruction in religious subjects to persons of the Jewish religion in conformity with the said ritual, F the providing means of burial of persons of the Jewish religion, the relief of poor persons of the Jewish religion, the contributing with other Jewish bodies to the maintenance of a Chief Rabbi and of ecclesiastical persons, and to other communal duties devolving on Metropolitan congregations, and other charitable purposes in connexion with the Jewish religion."

G

By cl. 5b (ii) the United Synagogue is given power:

> "To found or assist in founding, in any district or districts in Great Britain, places of worship for persons of the Jewish religion who conform to the Polish or German ritual, such places of worship not being or necessarily to be or become constituent synagogues of the United Synagogue, in such manner as shall be mutually agreed to by the Council of the United Synagogue H and the other persons (if any) promoting the foundation of such non-constituent synagogue. Each such non-constituent synagogue shall contribute to the like purposes as hereinbefore provided in the case of a union of non-constituent synagogues."

The Catford Synagogue is an unincorporated association. Its bye-laws which are in the form prepared by the United Synagogue, were formally adopted I by a general meeting of the members in 1948. Bye-law A 1 says:

> "The members of this synagogue consist of, seatholders, i.e., persons (whether male or female) who shall be in occupation of seats at this synagogue."

An applicant for membership is first interviewed by the minister. His application then goes before the board of management, and if they consider him suitable the application is sent to the United Synagogue for its approval. Each member

A pays a subscription and forfeits his rights of membership if he fails to keep up his payments. The subscription covers not only the rental of the member's seat, but also his contribution to a funeral expenses scheme organised by the United Synagogue towards which each affiliated synagogue contributes. The synagogue is managed by a board of management elected annually by the members of the synagogue at a general meeting. The bye-laws contain no pro-
B vision for dissolution, but the last of their rules is as follows:

> "The bye-laws applicable to this synagogue may be modified by or with the approval of the board of management, provided that no modification be made that would be repugnant to or inconsistent with the Jewish faith."

On Mar. 8, 1938, an agreement was entered into between the United Synagogue
C and the Catford Synagogue, acting by its then vice-chairman. By clauses 1 and 2 the Catford Synagogue agreed to observe the provisions of the United Synagogue scheme for affiliated synagogues and to make the appropriate payments to the United Synagogue in respect of its welfare work and the burial scheme. Clause 3 was as follows:

> "In consideration of the acceptance by the council of the congregation's
D application to become and be an affiliated synagogue of the United Synagogue the congregation hereby records its desire and agrees (A) to remain in permanent association with the United Synagogue under this agreement and the said scheme or such other (if any) agreement and/or scheme as may hereafter be mutually agreed between the council and the congregation (B) to observe in its religious services the ritual prevailing in the constituent
E synagogues of the United Synagogue (C) to conduct its affairs in accordance with the usages and traditions of the United Synagogue and (D) that the freehold leasehold or tenancy rights of and in any site and/or premises from time to time used provided or acquired for the religious purposes of the congregation shall if and when and so far as the council shall so require be vested in the United Synagogue or in trustees for the United Synagogue to
F be appointed by the council. The council shall create such tenancy rights for the congregation in respect of the site and/or premises so used provided or acquired as shall enable the congregation to utilise the premises for the aforesaid religious purposes at an annual rental payable to the council of 1s. in the case of a freehold or in any other case of the amount of the rent (and other periodical payments if any) payable by the United Synagogue or the said
G trustees under the lease or tenancy agreement vested in it or them."

To complete the picture, I should perhaps refer to certain provisions of the United Synagogue scheme for affiliated synagogues. Clause 5 of that scheme provides:

> "Each affiliated synagogue shall have as its main object the establishing
H and maintaining of regular sabbath and other religious services, and shall establish and maintain Hebrew and religious classes of a standing approved by the London Board of Jewish Religious Education."

Clause 7 (iii) provides:

> "Every applicant for membership of the synagogue shall complete the official form of application of the United Synagogue. The chairman of the
I membership committee of the United Synagogue may give notice to the board of management of the synagogue of objection to the name of any prospective member submitted by an affiliated synagogue within two months of the submission of the name for the first time."

Clause 11 provides:

> "Every member of an affiliated synagogue shall be deemed to be an assessed member of the United Synagogue, and entitled to the following rights and privileges, subject to the bye-laws and regulations in force for the

time being: (a) The full rights and privileges of a contributing member of the burial society of the United Synagogue, and where applicable, of the funeral expenses scheme of the United Synagogue." A

And, finally, cl. 23 provides:

"If the premises of the synagogue are inadequate for its needs, the synagogue shall raise a building fund towards the erection of suitable synagogue premises, with or without classrooms. The building fund shall be held for the synagogue by the United Synagogue at the Westminster Bank in a special account, whereof one of the signatories shall be a person appointed by the board of management of the synagogue and the other shall be one of the honorary officers of the United Synagogue; or, alternatively, the fund may be held, subject to the approval of the honorary officers of the United Synagogue, in a special local account whereof the signatories shall be not less than two persons appointed by the board of management of the synagogue for this purpose. The amount so raised and all interest accruing thereon shall be held in trust for the synagogue for any one or more of the following purposes: (a) The purchase of a site for the synagogue with or without appurtenant buildings for religious education and social purposes. (b) The erection of a synagogue with or without appurtenant buildings for religious education and social purposes." B C D

There follow other sub-clauses which I think I need not read.

In its early days the Catford Synagogue had no premises of its own, but held its meetings in the Town Hall; but a building fund appeal was launched at once, and the accounts for the year ending Dec. 31, 1939, show a sum of £440 odd to the credit of that fund in the Post Office Savings Bank. In 1941 a house, No. 53 Catford Hill, was purchased for about £1,100, some £700 being left on mortgage. It was conveyed to trustees for sale on trust to hold the proceeds of sale and the property until sale on the trusts of a deed of even date. Recital 2 of that deed stated that the "purchase moneys were the property of the members of the synagogue". Clause 1 defines members as being "the general members of the synagogue for the time being". Clause 2 of the trust deed provided that the trustees should hold the property until sale E F

"upon trust to permit the board of management and the members to use the same free of rent for all the purposes of the synagogue and for such other purposes as the board of management shall from time to time resolve upon and communicate to the trustees." G

Clause 9 provided that

"The trustees shall hold the net proceeds of sale of the said hereditaments upon trust to pay or apply the same firstly in discharge of principal interest costs and other charges in respect of any mortgage or charge then outstanding on the said premises and secondly to pay the balance to such person or for such purposes as the board of management may direct." H

The lower part of No. 53 Catford Hill was used as a synagogue and the upper part as a residence for the minister. Temporary permission for such user was obtained from the council; but it was clear that the arrangement was not likely to be permanent, and in 1943 a fresh building fund was started, the previous fund having been exhausted by the purchase of No. 53. In view of the terms of s. 62 of the Charitable Trusts Act, 1853, I must set out the facts with regard to the constitution of this fund in some detail. I

On Feb. 10, 1943, a building fund committee was set up. It held its first meeting on Feb. 18. At that meeting the committee formed the view that every member should be written to requesting him or her to make a regular contribution of 3d. a week to the fund. It was also decided to raise some money by holding a dance on Mar. 18 or Mar. 25. On that occasion Mr. Bornstein gave five guineas to the

A fund, which was the first money it received. On Mar. 10, 1943, the board of management considered the building fund committee's suggestions and formed the view that a compulsory levy of 3d. a week would be preferable to a mere request for regular contributions. On Mar. 18, the first dance was held and produced £26 7s. At the annual general meeting on Oct. 10, 1943, the members resolved to impose a levy of 3d. a week per member towards the building fund, and B the proceeds of this levy began to come in in the quarter starting on Jan. 1, 1944. The building fund was kept in a separate bank account, called the No. 2 account, and when the amount to the credit of this account became sufficiently large, portions of it were transferred to a Post Office Savings Bank account in order to earn interest. According to the accounts for the year ending Dec. 31, 1951, the building fund then consisted of just over £2,000, of which about £1,840 was in C the Post Office Savings Bank and the balance in this No. 2 account.

In 1952 a site was found which it was thought might be suitable for a new synagogue. It consisted of three adjoining plots of land. On one there was a disused squash court; on the second some derelict tennis courts; while the third was in use as a bowling green. The land was subject to a covenant against user otherwise than as sports grounds; but permission was obtained from the coven- D antee and also from the London County Council for the conversion of this squash court into a synagogue and for the erection of a communal hall adjoining it, and the purchase of the three plots at a price of £3,250 was resolved on at an extraordinary general meeting of members held on Nov. 4, 1952.

The land was registered land. On Mar. 25, 1953, a transfer was executed by the owner to the defendants and another gentleman who is no longer a trustee, E under the description of the trustees for the time being of the Catford Synagogue to be held on the trusts of a deed of even date. The transfer contained the following declarations by the trustees:

> "The trustees hereby declare as follows: 1. The land hereby transferred will for the purposes of s. 29 of the Settled Land Act, 1925, be held by the trustees upon charitable trusts. 2. The provisions of the Trustees Appoint- F ment Acts, 1850 to 1890, apply to the land in the above mentioned title acquired by us the trustees."

The trust deed of even date was made between the trustees and a Mr. J. M. Harris on behalf of the board of management. Recital 2 was as follows:

> "The said consideration of £3,250 was paid out of moneys provided by the G board of management who form the board of management for the time being of the Catford Synagogue (hereinafter called 'the synagogue') and the said money was the property of the members of the synagogue."

By cl. 1 of the operative part it is provided, inter alia, that "'the members' means the members of the synagogue for the time being". Clause 2 provides that the trustees should hold the property

H

> "until sold leased or otherwise disposed of upon trust to permit the board of management and the members to use the same free of rent for all the purposes of the synagogue and for such other purposes as the board of management shall from time to time resolve upon and communicate to the trustees."

I Finally, cl. 8 provides that the trustees shall hold the net proceeds of the sale of the property on trust in discharge of any mortgage, and "to pay the balance to such person or for such purposes as the board of management may direct." Clauses 1, 2 and 8 were in the same form as the corresponding clauses in the trust deed executed in 1941 with regard to 53, Catford Hill.

The trustees were registered as proprietors of the land on July 7, 1953, the following restrictions being entered against them on the register:

> "5. Except during such period as the buildings on the land are registered as a place of meeting for religious worship and bona fide used as such no

disposition or other dealing is to be registered without the consent of the Charity Commissioners or an order of the registrar. 6. Except under an order of the registrar no disposition by the proprietors of the land is to be registered unless the requirements of the Trustees Appointment Acts, 1850 to 1890, have been satisfied. 7. Except under an order of the registrar no disposition is to be registered without the consent of the Council of the United Synagogue of the United Synagogue Offices." A B

It is to be observed that the United Synagogue did not require the land to be vested in them or in trustees for them under cl. 3 of the agreement of Mar. 8, 1938.

The squash court was duly converted into a synagogue and a communal hall built near it on the first plot. The tennis court plot remained unused, and the third plot ceased to be used about 1956, when the bowls club became defunct. In 1957 the United Synagogue, acting on behalf of the Catford Synagogue, sought the permission of the London County Council to develop the two unused plots for residential purposes. Permission was refused, but the synagogue appealed against the refusal, and in January, 1959, the Minister of Housing and Local Government granted permission in outline for the development of the two plots by the erection of buildings for residential use. C D

On Mar. 3, 1959, a Mr. Cailes, acting on behalf of the plaintiffs, offered to buy the two plots in question subject to contract for £10,000, and on Mar. 4, that offer was accepted by the board of management. On Apr. 6, the defendants' solicitors wrote to the plaintiffs explaining that their delay in sending the draft contract was due to the necessity of obtaining consent to the sale from the Forster Estate, who were entitled to the benefit of the covenant restrictive of user, the United Synagogue and the Charity Commissioners. The Forster Estate and the United Synagogue gave their consents and no question arises with regard to them. The defendants' solicitors applied to the Charity Commissioners for their consent, but at this time they thought and so informed the plaintiffs' solicitors that the Charity Commissioners' consent was not necessary because the synagogue was registered as a place of religious worship. It is now common ground between the parties that this was a false point, since the land to be sold cannot be said to be part of the yard or forecourt of the synagogue within the meaning of s. 62 of the Charitable Trusts Act, 1853, as extended by s. 4 of the Charitable Trusts (Places of Religious Worship) Amendment Act, 1894. E F

Although the contract had not yet been signed, the plaintiffs started to apply for detailed planning permission for the erection of flats on the site, and on May 14, the defendants' solicitors pointed out that the contract was not subject to any such permission being obtained. On May 20, the Charity Commissioners wrote to the defendants' solicitors stating that prima facie their consent was required and enclosing a form of application for consent, pointing out that in cases of sale by private contract it was their practice to require notices to be published inviting higher offers. On June 1, contracts were exchanged between the parties, providing, as I have said, for completion on July 13, and, by cl. K, that the contract was subject to consent "(so far as the same is required)" of the Charity Commissioners. On July 24, 1959, the Charity Commissioners wrote to the defendants' solicitors saying that they would sanction sale at £10,000 subject to the result of the publication in the locality of the usual notices. On July 28, the plaintiffs obtained from the planning authority detailed permission for development by the erection of twenty flats and twenty-two garages. G H I

Several offers for the land higher than £10,000 came in in response to the notices published in the press, but it appears that the increases in price were due, or at least may have been due, to the increase in the value of the land brought about by the detailed planning permission obtained through the plaintiffs' exertions. The plaintiffs were not unnaturally put out, but the Charity Commissioners refused to consent to the sale to them at less than £14,300, which was the highest of the other offers received. The defendants felt considerable sympathy for the

A plaintiffs and would willingly have completed the sale to them at £10,000, if they could, but, having been advised that the consent of the Charity Commissioners was necessary, they had no alternative but to defend this action, the writ in which was issued on Feb. 26, 1960.

I must now refer to one or two passages in the pleadings. Paragraph 2 of the statement of claim says, inter alia:

B

> "By a trust deed dated Mar. 25, 1953, and made between the trustees of the one part and Jack Morris Harris of the other part it was recited that the trust deed was supplemental to the aforesaid transfer and that as was the fact the premises until sale and the proceeds of sale thereof were held upon the trusts by the said deed declared. It further recited as was the fact that the said consideration of £3,250 was paid out of moneys provided by the board of management which moneys were the property of the members."

C

Paragraph 8, so far as relevant, runs as follows:

> "On Feb. 2, 1960, the defendants' solicitors wrote to the plaintiff's solicitors stating that the consent of the Charity Commission to the said sale was refused. The defendants wrongfully refuse to complete the said sale upon the footing that the consent of the Charity Commission is required. The plaintiff avers and contends that the consent of the Charity Commissioners is not required for the sale of the disputed land for the following reasons: (a) That the disputed land is held upon trust for the members and not upon charitable trusts. (b) That if the Catford Synagogue is a charity it is a mixed charity and no special appropriation or application of the donations making up the said sum of £3,250 was directed or declared by the donors and the said donations can legally be applied as income by the governing or managing body of the Catford Synagogue."

D

E

Paragraph 3 of the defence is as follows:

> "Save that the said trust deed did not recite that the premises herein mentioned until sale and the proceeds of sale thereof were held upon the trusts by the said deed declared the defendants admit para. 2 of the statement of claim."

F

In para. 10 the defendants say:

> "Save that the defendants admit that on Feb. 2, 1960, the defendants' solicitors wrote to the plaintiff's solicitors stating that the consent of the Charity Commission to the sale to the plaintiff had been refused the defendants deny each and every allegation contained in para. 8 of the statement of claim."

G

After the pleadings were closed the defendants wrote to the Charity Commissioners telling them that an action had been brought.

H

When this case was opened counsel for the defendants submitted that the Charity Commissioners were necessary parties to this action. I rejected this submission. The question whether or not the Charity Commissioners' consent to a sale was necessary has frequently been decided by the courts on vendor and purchaser summonses in the absence of the Charity Commissioners. Counsel argued that this case differed from the ordinary case in that the Charity Commissioners had been consulted and had expressed their view that their consent was required. But that cannot, in my judgment, make them necessary parties. No doubt if the court thought that the vendor and the purchaser were acting in collusion and that the case for the sale requiring the Charity Commissioners' consent was not being properly presented, it might, in its discretion, require the Charity Commissioners or the Attorney-General to be added. But no such question arises here, where the case has been most fully argued on both sides. The Charity Commissioners know what is happening and have not asked to be joined as a party.

I

It was further suggested that the fact that the plaintiffs were arguing that the property in question was not held on a charitable trust made it necessary for the Attorney-General to be a party. I do not agree. The plaintiffs are not saying that they are the beneficial owners of the trust property—that it is held on trust for them and not on trust for charity. They are third parties who have entered into a contract with the trustees, and I cannot see why they should not have this question whether or not the trust is charitable decided as between them and the trustees in the absence of the Attorney-General, just as the question whether or not a trust is charitable is decided for income tax purposes between the Commissioners of Inland Revenue and the trustees without the Attorney-General being a party. Such a decision does not, of course, bind the Attorney-General, but that is a different point.

After the plaintiffs' case was closed and while the defendants' evidence was being called it became clear from the questions put that the defendants wished to argue that the purchase price of £3,250 was not part of the general funds of this synagogue but was held on a special trust to purchase a site and erect a synagogue on the footing that the land and the proceeds of its sale (if sold) would be a capital endowment the income of which could not be applied for general purposes, in effect, the position contemplated by cl. 23 of the United Synagogue's scheme for affiliated synagogues. Counsel for the plaintiffs submitted, and I agreed with him, that this contention was not open to the defendants on the pleadings as they stood, since the defence had admitted that the £3,250 belonged to the members for the time being, and, further, because this contention was inconsistent with the clause in the trust deed dealing with the application of the proceeds of sale. Counsel for the defendants then applied for leave to amend the defence to raise this point. He conceded that if his application was granted he could not oppose an application by counsel for the plaintiffs for an adjournment which would in the circumstances result in the case going over the long vacation; but he submitted that the plaintiffs would be adequately safeguarded by a suitable provision as to costs. I did not think it right to grant leave to amend. The suggested amendment was a far-reaching one and leave to make it was sought at a very late stage. If the plaintiffs are entitled to succeed in this action, they may have already suffered considerable damage by the delay in completion, and I thought it unfair to them to add another two or three months to that delay. Further, I was and am by no means clear whether, even if the defendants could establish the point which they desired to raise, they could make any use of it against the plaintiffs. If the point is a good one, then apparently the trust deed ought to be rectified, but the plaintiffs obtained their rights under their contract with the trust deed in its present form. I am not sure that the defendants could say against them that the recitals are inaccurate and that the operative parts do not carry out the intentions of the persons who subscribed the money.

I turn now at last to the legal issues involved. The question of the construction and effect of gifts to or in trust for unincorporated associations was recently considered by the Privy Council in *Leahy* v. *A.-G. of New South Wales* (1). The position, as I understand it, is as follows. Such a gift may take effect in one or other of three quite different ways. In the first place, it may, on its true construction, be a gift to the members of the association at the relevant date as joint tenants, so that any member can sever his share and claim it whether or not he continues to be a member of the association. Secondly, it may be a gift to the existing members not as joint tenants, but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect. If this is the effect of the gift, it will not be open to objection on the score of perpetuity, unless there is something in its terms

(1) [1959] 2 All E.R. 300; [1959] A.C. 457.

A or in the rules of the association which precludes the members at any given time from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity. Thirdly, the terms or circumstances of the gift or the rules of the association may show that the property in question is not to be at the disposal of the members for the time being, but is to be held in trust so that it or its income may be enjoyed by the association or its members from time to B time. In this case, if the duration of the trust is not limited to the perpetuity period, the gift will fail unless the association is a charitable body. If the gift is of the second class, i.e., one which the members of the association for the time being are entitled to divide among themselves, then, even if the objects of the association are in themselves charitable, the gift would not, I think, be a charitable gift. If, for example, a number of persons formed themselves into an associa- C tion with a charitable object—say the relief of poverty in some district—but it was part of the contract between them that if a majority of the members so desired, the association should be dissolved and its property divided between the members at the date of dissolution, a gift to the association would not, I conceive, be a charitable gift. The decision of WICKENS, V.-C., with regard to the gift to a convent at Selley Oak, the first of the two gifts considered by him in *Cocks* v. *Manners* D (2) is not, as I read it, an authority to the contrary, for I think that WICKENS, V.-C., construed the gift as a gift to promote the objects of this association and not a gift which the members at the date of the death of the testatrix could divide between themselves.

The questions which I have to decide on this branch of the case are, therefore, as I see them, first, whether the members of this synagogue for the time being E are legally entitled to divide its property, including the land which is the subject of the contract, between themselves; and, secondly, if they are not so entitled, whether the trusts on which the property of the synagogue is held are charitable.

In favour of the view that the synagogue's property belongs to the members for the time being beneficially, it is said that prima facie the property of an unincorporated association is divisible among its members; that there is nothing F in the bye-laws to negative this conclusion, and that it is strongly supported by the terms of the second recital and of cl. 2 of the trust deed of Mar. 25, 1953. The declaration in the transfer of even date and the restriction on the proprietorship register only show, it is said, that those concerned with the drafting of the transfer and declaration of trust thought that the property was held on a charitable trust, but cannot themselves contradict the effect of the trust deed.

G I accept these submissions so far as concerns the declaration in the transfer and the entry of restriction on the register. They were only conveyancing machinery, and if the purchase price for the land was in fact held on trust for the existing members beneficially, so that they could, if so minded, have divided it among themselves, I think that it would be wrong to hold that the document executed on Mar. 25, 1953, imposed a charitable trust on the £3,250. But although H I feel the force of this argument based on the wording of the trust deed, it would, in my judgment, be wrong to hold that the £3,250 belonged to the existing members beneficially. In the first place, I do not think that members of a body of this sort who subscribe to a fund for the erection of a building in which they and their successors can worship envisage for a moment that the fund can legally be divided between the members for the time being. Secondly, I think that the passing of a I bye-law enabling some majority of the members or even all the members to dissolve the synagogue and divide the proceeds among themselves would be a violation of the spirit, if not of the letter, of the final bye-laws. There is, as I see it, enough in the circumstances of this case to show that the donors meant this fund and any land purchased with it to be held on a trust for the synagogue as a quasi-corporate entity. I do not think that the second recital necessarily means more than that the purchase price was synagogue property, and the words

(2) (1871), L.R. 12 Eq. 574.

"such other purposes" in cl. 2 of the trust deed may well have been inserted because it was by no means clear in 1953 that the land would in fact ever be used, or, at all events, continue to be used as a site for the synagogue. Just as one can easily pay too much attention to the terms of this transfer, so, I think, one can easily pay too much attention to the wording of the trust deed. I think that the nature of the association and the terms of the final bye-laws are more important.

If, as I have held, this £3,250 and the land bought with it was held by the trustees on a trust for the benefit of the members of the synagogue from time to time without limit of time, then the plaintiffs contend that the trust is not a charitable trust on two grounds. First, because the objects of this synagogue are not wholly religious. Secondly, because if the objects are wholly religious, a trust for the benefit of the members of an unincorporated association of this sort is not a charitable trust but a private trust for the benefit of the members from time to time.

The chief purposes which a synagogue exists to achieve are the holding of religious services and the giving of religious instruction to the younger members of the congregation. But just as today church activity overflows from the church itself to the parochial hall, with its whist drives, dances and bazaars, so many synagogues today organise social activities among the members. A new clause added to the scheme of the United Synagogue in October, 1926, authorised, or purported to authorise, that body to establish (inter alia) halls for religious and social purposes, and the Catford Synagogue, as I have said, has erected a communal hall near the synagogue building in which social functions are held. The plaintiffs, fastening on these facts and on the wording of cl. 2 of the trust deed, argue that the trust in this case is open to the objections which proved fatal to the trust for the foundation of a community centre which came before the court in *Inland Revenue Comrs.* v. *Baddeley* (3). But in my judgment there is a great difference between that case and this. Here the social activities are merely ancillary to the strictly religious activities. In *Inland Revenue Comrs.* v. *Baddeley* (3), on the other hand, no one sought to argue—indeed it was manifestly impossible to argue—that the trust was for the advancement of religion. No doubt it had a religious flavour in that the beneficiaries were confined to Methodists or persons likely to become Methodists, and the premises and the activities in which the beneficiaries were to engage were to be under the control of the leaders of a Methodist mission. Nevertheless the activities in themselves were directed predominantly to the social and not to the religious wellbeing of the beneficiaries. In my judgment the purposes of the trust with which I am concerned are religious purposes—the social aspect is merely ancillary.

I turn now to the argument that this is a private, not a public trust. In an article which he contributed in 1946 to the LAW QUARTERLY REVIEW, Vol. 62, at p. 234, Professor F. H. Newark argued that the courts ought not to concern themselves with the question whether or not a trust for a religious purpose confers a public benefit. Even assuming that such questions can be answered at all, judges, he said (4), are generally ill-equipped to answer them and their endeavours to do so are apt to cause distress to the faithful and amusement to the cynical. I confess that I have considerable sympathy with Professor Newark's views; but the decision of the House of Lords in *Gilmour* v. *Coats* (5) has made it clear that a trust for a religious purpose must be shown to have some element of public benefit in order to qualify as a charitable trust. In that case it was held that a trust to apply the income of a fund for all or any of the purposes of a community of Roman Catholic nuns living in seclusion and spending their lives in prayer, contemplation and penance, was held not to be charitable because

(3) [1955] 1 All E.R. 525; [1955] A.C. 572.
(4) LAW QUARTERLY REVIEW, Vol. 62, at p. 245.
(5) [1949] 1 All E.R. 848; [1949] A.C. 426.

A it could not be shown that it conferred any benefit on the public or on any section of the public. And the trust with which I am concerned resembles that in *Gilmour* v. *Coats* (6) in this, that the persons immediately benefited by it are not a section of the public but the members of a private body. All persons of the Jewish faith living in or about Catford might well constitute a section of the public, but the members for the time being of the Catford Synagogue B are no more a section of the public than the members for the time being of a Carmelite priory. The two cases, however, differ from one another in that the members of the Catford Synagogue spend their lives in the world, whereas the members of a Carmelite priory live secluded from the world. If once one refuses to pay any regard—as the courts refused to pay any regard—to the influence which these nuns living in seclusion might have on the outside world, then it C must follow that no public benefit is involved in a trust to support a Carmelite priory. As LORD GREENE, M.R., said in the Court of Appeal (7): "Having regard to the way in which the lives of the members were spent, the benefit was a purely private one." But the court is, I think, entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens. As between D different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none.

But then it is said—and it is this part of the argument that has caused me the greatest difficulty: But this is a case of self help. Suppose that a body of persons, being dissatisfied with the facilities for the education of small children provided in their district, form an association for the education of the children of members. E A committee is formed; each member pays a subscription; the funds of the society are employed in hiring premises and paying a teacher; and the rules provide that the association cannot be dissolved by the members at any given moment but is to continue for the benefit of the members existing from time to time. No doubt the public benefits by the fact that the children of the members receive an education. But could it possibly be argued that the association was a F charity and was entitled to the great fiscal advantages which a charity enjoys? Or would it make any difference if the committee allowed the children of non-members to attend the classes free of charge if there was room for them, in the same way as members of the public, though having no right to enter the synagogue, are not in practice refused admission?

I feel the force of this analogy; but, as LORD SIMONDS pointed out in *Gilmour* G v. *Coats* (8), it is dangerous to reason by analogy from one head of charity to another. After the passing of the Toleration Acts, dissenting chapels sprang up all over the country. As can be deduced from the language of s. 1 of the Trustee Appointment Act, 1850 (Martin Pelo's Act), the chapel was normally vested in trustees for the particular congregation or society of dissenters in question. In course of time disputes sometimes arose between rival groups, H some members alleging that others had ceased to hold the tenets laid down in the trust deed and were not entitled to its benefits. A typical example of such a dispute is to be found in *A.-G.* v. *Bunce* (9). No one, so far as I know, ever questioned that trusts for such dissenting bodies were charitable trusts provided that the members for the time being could not put an end to them. What the position would be if the members for the time being could divide the property I among themselves was expressly left open by SIR GEORGE JESSEL, M.R., in *Bunting* v. *Sargent* (10).

Section 2 of the Religious Disabilities Act, 1846, provided that:

> "Her Majesty's subjects professing the Jewish religion, in respect to their schools, places for religious worship, education, and charitable purposes,

(6) [1949] 1 All E.R. 848; [1949] A.C. 426.
(7) [1948] 1 All E.R. at p. 525; [1948] Ch. at p. 345.
(8) [1949] 1 All E.R. at p. 856; [1949] A.C. at p. 449.
(9) (1868), L.R. 6 Eq. 563.
(10) (1879), 13 Ch.D. at p. 337.

and the property held therewith, shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to, and not further or otherwise."

From that time it has, I think, always been assumed by lawyers that trusts for the benefit of a congregation of Jews attending a synagogue were charitable trusts. It is, for example, obvious that Parliament and the Charity Commissioners assumed in 1870 (11) that the four synagogues which became the constituent synagogues of the United Synagogue were charitable bodies. Yet it is equally clear from cl. 6a of this scheme that the constituent synagogues have not been open to all persons of the Jewish faith, but were unincorporated associations with a list of members. Generally speaking, no doubt, an association which is supported by its members for the purposes of providing benefits for themselves will not be a charity. But I do not think that this principle can apply with full force in the case of trusts for religious purposes. As LORD SIMONDS pointed out (12), the law of charity has been built up not logically but empirically, and there is a political background peculiar to religious trusts which may well have influenced the development of the law with regard to them.

In my judgment, this trust with which I am concerned in this case is a charitable trust.

I turn now to s. 62 of the Charitable Trusts Act, 1853. This is a section which has given trouble to many Chancery judges and conveyancers ever since it was passed. It was repealed as from Jan. 1, 1961, by the Charities Act, 1960, and I am glad to think that I am probably the last judge of first instance who will have to wrestle with its provisions. I am, however, more fortunate than some of my predecessors in having to aid me in my task the views expressed by that well-known conveyancer, the late Mr. A. H. Withers, in a series of articles which he wrote in 1924 for the SOLICITORS' JOURNAL (13).

I start with the words of WARRINGTON, L.J., in his judgment in *Re Child Villiers' Application, Villiers* v. *A.-G.* (14):

> "There are two ways by which s. 62 of the Act of 1853 relieves certain charities and certain property of certain charities from the jurisdiction and control of the board. First it provides that the Act, taking the words of the section, shall not extend to certain charities at all. Secondly, it provides that certain property belonging to certain charities shall not be subject to the jurisdiction and control of the board. We have, therefore, two questions to decide, first, whether the charity in question is one to which the Act does not extend at all, and secondly, whether the property in question is property which under the provisions of the Act is not subject to the jurisdiction and control of the board."

The type of charity to which this Act does not apply at all includes a charity which is "wholly maintained by voluntary contributions", and the relevant date for determining whether or not the Catford Synagogue was such a charity must, I think, be the date of the contract, i.e., June 1, 1959.

According to the accounts for the year ending on Dec. 31, 1959, the assets of the synagogue then consisted of the synagogue, the communal hall, the minister's residence and their respective furniture and fittings, a sum of £850 on deposit account to the credit of the building fund, some cash in hand and refunds due in respect of tax deducted from contractual payments. The receipts during the year consisted of contributions of various sorts from members, a subsidy of £156 from the London Board of Jewish Religious Education, proceeds of functions, refunds under covenant and bank deposit interest.

Apart from authority, I should not have thought that the fact that the charity owned property which it used "in specie" for its own purposes had any bearing

(11) 33 & 34 Vict. c. cxvi.
(12) In *Gilmour* v. *Coats*, [1949] 1 All E.R. at p. 856; [1949] A.C. at p. 449.
(13) SOLICITORS' JOURNAL, Vol. 69, at pp. 133, 155, 170.
(14) [1922] 1 Ch. at p. 409.

A one way or the other on this question whether it was "wholly maintained by voluntary contributions". Such property is no doubt "an endowment" within the words of the definition contained in s. 66 of the Act, but I should not have thought that it could fairly be said that the charity was being partly maintained by such property. I would have thought that the determination of the question at issue in this case depended on whether all items on the receipts side of the B receipts and payments account could properly be called voluntary contributions. But in *A.-G.* v. *Mathieson, Re Wilkinson and Fell's Contract* (15) the Court of Appeal decided (inter alia) that a charity cannot be said to be "wholly maintained by voluntary contributions" if it has freehold premises used for the purposes of the charity, and that it is immaterial that the premises produce no income.

C In *Re Society for Training Teachers of the Deaf and Whittle's Contract* (16) which was decided a few days before *A.-G.* v. *Mathieson* (15) and was not cited in the latter case, Neville, J., reached a contrary conclusion. It was suggested in argument that the two cases ought to be distinguished on the ground that in *A.-G.* v. *Mathieson* (15) the property was subject to a trust which prevented the charity from spending the proceeds of its sale as income, D whereas in *Re Society for Training Teachers of the Deaf and Whittle's Contract* (16) before Neville, J., the proceeds of sale of the house could be applied as income. But I cannot see how on the wording of this section the question whether any property owned by the charity is or is not expendable as income has any relevance to the question whether or not it is "wholly maintained by voluntary contributions". In my judgment, therefore, this part of the decision of Neville, J., E was wrong, and I must hold that the Catford Synagogue was not "wholly maintained by voluntary contributions" at the date of the contract.

Even if all its income receipts at the time were properly describable as voluntary contributions, the part of s. 62 of the Charitable Trusts Act, 1853 (17) which is relevant to this question whether this particular property is exempt from the jurisdiction of the Charity Commissioners, even though the charity F as a whole is not exempt, runs as follows:

> "... and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto G or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, H or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest I in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act; ..."

The effect of this part of this section may, I think, be summarised thus: The land of a charity maintained partly by voluntary contributions and partly by income arising from an endowment—(what is conveniently called a "mixed

(15) [1907] 2 Ch. 383. (16) [1907] 2 Ch. 486.
(17) Repealed as from Jan. 1, 1961, by the Charities Act, 1960, see p. 782, ante.

charity ")—is free from the jurisdiction of the Charity Commissioners in three cases. First, if it represents a donation or bequest made to the charity when it was a mixed charity of which no special application or direction was directed or declared by the donor or testator and which might legally be applied by the governing body of such charity in aid of the voluntary subscriptions, even though it may subsequently have been set apart or appropriated or invested by the governing body for the purpose of being held or applied or expended to some defined and specific object or purpose connected with the charity. Secondly, if it represents voluntary subscriptions whenever made, even though they may have been set apart or appropriated or invested by the governing body as aforesaid. And, thirdly, if it represents a donation or bequest in aid of any fund so set apart as aforesaid by the governing body out of exempted donations or bequests or voluntary subscriptions.

The purchase price of the land bought on Mar. 25, 1953, was, as I have said, derived (i) from donations made to the building fund set up in February, 1943; (ii) from proceeds of entertainments held from time to time from March, 1943, onwards in aid of the building fund; (iii) from the levy of 3d. a week in aid of the building fund imposed on each member by resolution of the general meeting held on Oct. 10, 1943, which began to be paid in January, 1944; and (iv) the interest on so much of the fund as was from time to time placed in the Post Office Savings Bank.

The first question which I have to determine on this branch of the case is whether this charity was a " mixed charity " when this building fund was set up in February, 1943; and, if so, when, if ever, it became a mixed charity. After the premises at 53, Catford Hill had been bought in 1941, the income of the charity consisted, so far as I know, exclusively of contributions or donations and did not include any deposit interest. If, therefore, the synagogue was a " mixed charity " in February, 1943, it must have been by virtue of its ownership of the Catford Hill premises.

As I have said, the Court of Appeal decided in *A.-G.* v. *Mathieson* (18) that a charity is partly maintained by the ownership of premises which it uses for its purposes. But can it be said to be partly maintained by the income of such premises though they do not in fact produce any income? The question was raised but not answered by LINDLEY, M.R., in *Re Stockport Ragged, Industrial and Reformatory Schools* (19). It is argued by the plaintiffs that it would be wrong to let this charity fall, as it were, between two stools. The section, it is said, contemplates that a charity will be either wholly maintained by voluntary contributions; or wholly maintained by the income of endowment; or partly maintained by the income of endowment and partly by voluntary contributions. It is said one cannot have a charity which is partly but not wholly maintained by voluntary contributions and yet is not partly maintained by the income of endowment. I think that it may very well be that the intention of Parliament in passing s. 62 of the Charitable Trusts Act, 1853, was what NEVILLE, J., said it was in *Re Society for Training Teachers of the Deaf and Whittle's Contract* (20), viz., to divide all the means of subsistence of charities into two categories—endowment and voluntary contributions; to describe as endowment all property the capital of which is not applicable for general purposes, and to describe everything else as voluntary contributions; and to subject to the control of the Charity Commissioners the endowment and not the voluntary contributions. That would have been a simple and workable scheme, and, incidentally, it is the scheme which is adopted in the Charities Act, 1960. But if that is what Parliament meant in 1853, it expressed itself very badly and, having regard to the cases which had already been decided, notably *Re Clergy Orphan Corpn.* (21), it was, even in 1907, too late for any such view of the section to be taken by a judge of

(18) [1907] 2 Ch. 383.
(19) [1898] 2 Ch. at pp. 697, 698.
(20) [1907] 2 Ch. at p. 495.
(21) [1894] 3 Ch. 145.

A first instance. It would be a mere impertinence for me at this time of day to try to make sense of the section. The course which I ought to adopt is, I think, to follow the authorities so far as they go, and where they fail me, to abide by the words used. As LINDLEY, M.R., pointed out (22), it is as a matter of language impossible to say that a charity which is occupying land for its own purposes is being partly maintained by the income of that land. Therefore I propose to hold B that the synagogue was not a mixed charity in February, 1943. Counsel on both sides appeared to agree that if that was so, it must have become a "mixed charity" when it began to receive interest on the deposits in the Post Office Savings Bank made out of the building fund. I do not doubt that such interest is income of an endowment within the meaning of the section, but I should have thought that it was doubtful whether the charity could be said to be being partly C maintained by such income, since it was apparently being accumulated as an accretion to this fund. But at all events the Post Office Savings deposits were not made until the building fund had been in existence for some time; and so the plaintiffs have failed to establish that the donations made to the building fund in its early stages were donations to a mixed charity.

The next question which arises on this branch of the case is whether the D proceeds of entertainments or bazaars can be said to be "donations". No doubt those who organise such functions or provide goods to be sold or raffled at them give their time and property for nothing, and those who attend the entertainments and buy the goods generally pay more than the entertainments or goods are worth. But even if it be true to say that the charity spends nothing to earn the proceeds of such ventures, I doubt whether the proceeds can fairly be described E as "donations". A donation imports a donor—and who in such cases is the donor? It appears, however, that NEVILLE, J., in *Re Society for Training Teachers of the Deaf and Whittle's Contract* (23) regarded the proceeds of a bazaar as a voluntary contribution, and in the circumstances I think that it is sufficient for me to express my doubts whether he was right, without formally dissenting from him.

F The third question which arises is whether the donations made to the building fund—including the proceeds of entertainments, if they were donations—were donations of which no special application or appropriation was directed by the donors and which were legally applicable by the governors in aid of the voluntary subscriptions. In view of the terms of the declaration of trust of Mar. 25, 1953, and of my refusal of his application for leave to amend his defence, counsel for the G defendants did not find it possible to argue that the moneys paid into the building fund were not legally applicable by the governing body as income in aid of the voluntary contributions. He argued, however, that if a charity invites donations to a special fund which it opens for the declared purpose of buying land and erecting a building for its use, then those who subscribe to the fund may fairly be said to direct a special application of their donations, even though as a matter of H law the charity is at liberty to discontinue the fund and apply the money in it as income for its general purposes. Even if I might be otherwise disposed to accept that argument, I should, I think, be precluded from doing so by the decision of the Court of Appeal in *Re Church Army* (24). It follows from that case, as I understand it, that a donor does not direct a special application of his gift unless he subjects it to a trust which prevents the governing body of the charity from I using it for its general purposes. The fact that he expects it to be used—and that it is in fact used—for a special purpose is not enough.

The next question which arises is whether the proceeds of the 3d. levy were "voluntary subscriptions". I think that they can fairly be so described.

Finally, I should say that I do not think that what I have called the third branch of the exemption applies in this case. What that part of the section appears to contemplate is that the governing body, having in its hands donations or

(22) [1898] 2 Ch. at p. 697. (23) [1907] 2 Ch. at p. 494.
(24) (1906), 75 L.J.Ch. 467.

subscriptions applicable for its general purposes, establishes a special fund with them and invites gifts in aid of that fund. That did not happen here. The building fund was not started with money set aside by the governing body: it was fed from the first exclusively by donations and contributions expressly given or made to it.

The result of my conclusions on this part of the case may be stated as follows. Even if I assume in favour of the plaintiffs that proceeds of entertainments or bazaars are donations and that the charity was partly maintained by the Post Office Savings Bank interest as soon as it began to be received, the plaintiffs have still failed to establish that the whole of the purchase price for the land contracted to be sold was exempt from the jurisdiction of the Charity Commissioners, since some part—probably a substantial part—of the donations to the building fund were made at a time when the charity was not a mixed charity.

I hold therefore that the action fails.

Judgment for the defendants.

Solicitors: *Courts & Co.* (for the plaintiffs); *Victor Mishcon & Co.* (for the defendants).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

CROOK *v.* DERBYSHIRE.

[Court of Appeal (Ormerod, Harman and Pearson, L.JJ.), October 4, 1961.]

Court of Appeal—Evidence—Further evidence—Evidence obtainable with reasonable diligence for the trial—Relevance emerging towards end of opponent's case.

While descending some steps from a restaurant, an employee there fell and was injured. She brought an action for damages for negligence against the occupier alleging that the wooden hand-rail at the side of the steps swung outwards as she put her hand on it causing her fall. Her witnesses were herself and her husband, both of whom had worked at the premises, a window cleaner, a newsvendor and a person who delivered sacks of potatoes there regularly, all of whom testified that the hand-rail was insecure and moved, and the latter three that a groove board which admittedly made the hand-rail firm had been put in after the accident. This was denied by the occupier who with her husband gave evidence that the hand-rail was sound, and that it was in the same condition as it was in when she recently took over the premises. She called as a witness the previous owner-occupier who, very near the end of the case, said that he had had the hand-rail repaired by a firm of joiners some four or five years previously and that the repairs included the putting in of the groove board. The trial judge accepted the evidence of the occupier's witnesses and gave judgment in her favour. On appeal the employee, having made further investigation, applied for leave to adduce fresh evidence by the previous owner-occupier that, contrary to his previous evidence, he could not say if his repairs did include the groove board, and by the joiner who did the work that it did not.

Held: the additional evidence must be admitted since it might have had a material effect on the mind of the judge and, having regard to the late stage at which it became relevant and to the fact that before trial the investigation leading to its discovery might reasonably have seemed unnecessary, the fresh evidence was not such as could have been obtained with reasonable diligence for use at the trial; accordingly a new trial would be ordered.

Dictum of Denning, L.J., in *Ladd* v. *Marshall* ([1954] 3 All E.R. at p. 748) applied.

Appeal allowed.

A [As to grounds for adducing further evidence on appeal to the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 468, para. 884; and for cases on the subject, see DIGEST (Practice) 775-778, *3396-3420*.]

Cases referred to:

Corbett v. *Corbett*, [1953] 2 All E.R. 69; [1953] P. 205; [1953] 2 W.L.R. 1124; 3rd Digest Supp.

B *Ladd* v. *Marshall*, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489; 3rd Digest Supp.

Shedden v. *Patrick & A.-G.*, (1869), L.R. 1 Sc. & Div. 470; 22 L.T. 631; Digest (Practice) 603, *2440*.

Appeal and motion.

C The plaintiff appealed against an order of STABLE, J., made on Dec. 12, 1960, at Manchester Assizes, dismissing her action for damages for negligence and she applied for leave to adduce fresh evidence. The grounds of appeal were that further evidence not available to the plaintiff at the trial had been obtained by the plaintiff, which if given at the trial would have contradicted and disproved the evidence of the defendant and her witnesses on which the judge based his judg-
D ment and that the judge ought to have found negligence on the part of the defendant. The grounds of the application for leave to adduce further evidence were, inter alia, that at the date of the trial the plaintiff did not know and could not by the exercise of reasonable care and diligence have discovered the facts to be given in evidence, that the evidence was such that had it been before the court at the trial the defendant could not have refuted it, and that if believed it
E would be conclusive in the plaintiff's favour.

Alexander Karmel, Q.C., and *D. P. Bailey* for the plaintiff.

D. J. Brabin, Q.C., and *C. M. W. Elliott* for the defendant.

ORMEROD, L.J.: This appeal is against a decision of STABLE, J., given at Manchester Assizes on Dec. 12, 1960. With the appeal there was a motion by the
F appellant, the plaintiff, to adduce additional evidence and the whole argument has been taken up over the question whether that application should be allowed. As I understand the position, on whether this application is allowed or dismissed will depend the outcome of the appeal.

The circumstances are these. On Aug. 14, 1958, the plaintiff, Mrs. Ada Crook, sustained an accident by falling down some steps outside a restaurant or café
G occupied and run by Mrs. Derbyshire, who was the ostensible occupier of the premises and is the defendant in this case. The plaintiff was going down the steps leading from the premises to a yard where there was some kind of store. On one side of the steps, which were in the open air, there was a wall, and on the other side a wooden hand-rail. The plaintiff's case is that as she was going down the steps she put her left hand on the hand-rail, which swung outwards causing her to
H fall to the bottom of the steps, thereby sustaining the injuries the subject-matter of the action.

The issue before the learned judge was an issue of fact. The plaintiff, supported by a number of witnesses, said that the hand-rail was unsafe, that it had been in that condition for some time, and that it was because of the unsound condition of the hand-rail that the accident happened. On the other hand, the defendant
I together with her husband and certain witnesses called by her said that in fact the hand-rail was sound, that it was in the same condition as it was in when she took over the premises, and that work on the hand-rail and on the newel post of the hand-rail had been performed some years before she took them over. The evidence also shows that it was in the same condition when it was examined by the expert witnesses who were called, one on either side, who examined the stair-case and the surrounding premises some time in 1960.

The evidence called by the defendant was, first of all, of the defendant herself, of her husband, Mr. Derbyshire, and of a Mr. Hartley, the owner and occupier

of the premises up to a time shortly before the accident happened. In fact, the whole case turned on what appears to be a small question, viz., whether a piece of groove board which was strengthening the newel post and to which the hand-rail was attached, admittedly sufficiently firmly, was put into position after the accident occurred or was something which had been there for a very long time. If the latter, it is conceded that the hand-rail was sufficiently firm to have enabled the plaintiff to go down the steps with safety and that the defendant could not be considered to be to blame for her accident.

The learned judge, having considered the whole of the evidence given before him, came to the conclusion that the plaintiff had not established her case. The last paragraph in his judgment is as follows:

> "I have come to the conclusion here that on the evidence I have heard I am bound to accept the evidence of the Derbyshires and Mr. Hartley. As I have said, they cannot possibly be mistaken. It is either a deliberate falsehood on their part or they have told me the truth. Which it is I can only do my best to determine, and if I have determined wrong it simply means this, that they have lied and done this woman out of compensation which in truth and justice she would otherwise be entitled to. As it is, the plaintiff has not made out her claim and the action must be dismissed."

Following on that the solicitors for the plaintiff, who is the appellant and the applicant in this case, took the matter up and made further investigations. Affidavits have now been put before the court and, as is often done in a case of this kind, we have read them. The effect of them, and particularly those of the representatives of Sharples (Darwen), Ltd., is that certain work was done in 1953. Particulars of the work have been produced and examined, and particulars of the materials used have been examined from the books and documents which thereby came into existence, and none of those particulars disclose anything other than the making of a new newel post with a piece of wood supplied, which one of the witnesses in his affidavit said must have been used for that purpose. The evidence is partly the evidence of the managing director, and there is nothing to say whether he was employed in any capacity by his firm in 1953. But in addition there is the evidence of the joiner who did the work, who was employed by the firm at that time and was able to give particulars of the work that he did. They both say the same thing: that they have looked at the photograph and seen the piece of groove board attached to the newel post, and, from the type of work put into it they say it is the work of an amateur and certainly not the sort of work that would be turned out by a firm of experienced joiners like theirs.

In addition to that we have had put before us an affidavit sworn by Mr. Hartley, put forward by counsel for the defendant, in which he says that when he was in possession of the premises he did in fact have some repairs and alterations done to the stairway; but, contrary to his evidence in the court, that he could not say when the piece of groove board was put there or whether it was put there by a firm of joiners or whether he did it himself.

That is the position in the case, and the court is asked now to say that the plaintiff should be allowed to adduce additional evidence. The principles on which this court acts are well established. They were laid down by DENNING, L.J., in *Ladd* v. *Marshall* (1) which was a decision of this court. I will read the extract from the judgment of DENNING, L.J., appearing in the current edition of the ANNUAL PRACTICE (p. 1676) (2):

> "first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be uncontrovertible."

(1) [1954] 3 All E.R. 745. (2) [1954] 3 All E.R. at p. 748.

A In this case no one has suggested to this court that the third proposition there stated is a cogent reason one way or the other, and we are concerned only to determine whether the evidence which is now sought to be adduced is evidence which could not with reasonable diligence have been produced at the trial; and secondly, whether, if it had been produced, it would have had an influence on the mind of the learned judge, although it need not necessarily be conclusive.

B To deal with the second of those grounds merely to dispose of it, there is little doubt that if this evidence had been called it must have had some effect on the mind of the learned judge. I would not presume to go so far as to say that it would have affected his mind to such an extent that he would have come to a different conclusion, but I do not think it can be denied that it must have had some effect on his mind; and that has been conceded by counsel for the defend-

C ant, or, if not conceded, he has not argued to the contrary with anything like his usual vigour.

That leaves one point only which the court has to consider and that is the controversial point whether this evidence could with reasonable diligence have been produced at the trial. Counsel for the plaintiff has argued that it could not; that no one could suspect before the trial the sort of evidence that was going to

D be given by Mr. Hartley and Mr. Derbyshire, or the sort of evidence which was likely to be in existence and ought to be given at the trial. It is clear from the transcript of the shorthand note that it was only very near the end of the case that Mr. Hartley said that he had had this repair work performed on the stairway some four or five years ago by Sharples (Darwen), Ltd. In those circumstances, counsel for the plaintiff has argued that this was evidence which could not

E with reasonable diligence have been procured by the plaintiff prior to the hearing.

On the other hand, counsel for the defendant has argued in this way: that here there is an outside staircase and it was inspected by an expert witness on behalf of the plaintiff in July, 1960, i.e., approximately two years after the accident happened. At that time the newel post was supported by the groove board about which there has been so much controversy and that in itself was keeping the hand-

F rail firm and in position. There is no doubt, he says, that at that time the hand-rail was in a firm position. The evidence for the plaintiff was that that was done after the accident. But counsel for the defendant has argued that, such being the case, the solicitors to the plaintiff should have been put on inquiry and should at least have seen Mr. Hartley to inquire what the position was about this groove board when he was in occupation of the premises. The affidavit of Mr. Farley

G does not show that he made any attempt to interview Mr. Hartley, and counsel for the defendant says that quite clearly he has not taken the necessary steps which it was his reasonable duty to take to inquire fully into this matter. The effect of seeing Mr. Hartley might have been, on the one hand, that he would have told him to mind his own business and look after his own case, because he was a witness who was going to be called for the defence; or he might have given the

H evidence which in fact he gave to the learned judge, or something similar, which would have given the plaintiff's solicitors an inkling of who did the work and what was going to be said and in those circumstances further inquiries could have been made. But this must be borne in mind, and I think it is important: that at that time the plaintiff's solicitors had the evidence of the plaintiff herself and of Mr. Crook, her husband, to whom these premises were well-known, and in addition

I the evidence of three other witnesses—a newsvendor, a window cleaner and, perhaps more important than any other, one who delivered potatoes regularly at the premises—all of whom spoke as to the condition of the hand-rail, not before the accident and in the time of Mr. Hartley's occupation, but in the time of the defendant's occupation. All of these witnesses said—and Mr. Bromilow, the man who delivered potatoes, said it with greater particularity—that this hand-rail was in an unsound condition, and that the controversial plank, the groove board, had been put in after the accident had happened. That is the case which we have to consider. I should have thought that it was not unreasonable, in

those circumstances, for the plaintiff's solicitors to come to the conclusion that the case was well established and the evidence was sufficient to obtain a verdict for the plaintiff on the ground of breach of duty of the defendant and to go no further.

Our attention has been drawn to the pleadings in order that we should see just how the matter stood when the case was being prepared. The statement of claim says this:

> "On Aug. 14, 1958 the plaintiff in the course of her said employment at the said premises was walking down a steep flight of wooden steps from the kitchen to the yard, when owing to the negligence of the defendants, she fell down the said flight and suffered injury and loss."

Then the particulars of negligence are set out, and the only one which is material in this application is the first one: that the defendant

> "failed to ensure that the hand-rail on the left side of the plaintiff as she descended the said flight was safely and firmly fixed and/or safe to be used as a hand-rail."

The statement of claim was delivered on Jan. 25, 1960, and a defence was delivered on Feb. 16, 1960, which amounted to a general traverse of the allegations of negligence which had been made in the statement of claim. Some doubt has been thrown by HARMAN and PEARSON, L.JJ., on the question whether a general traverse of particulars of negligence is sufficient in circumstances of this kind. For my part, I would say that a general traverse of particulars of negligence is a long-standing practice and one which I think could only be altered or interfered with after considerable thought. That is the position, and those are the pleadings which the plaintiff's solicitors had: viz., nothing other than a general denial of the allegations of negligence contained in the statement of claim.

I am fully appreciative of the powerful argument which has been put forward by Mr. Brabin on behalf of the defendant. But having regard to the evidence which was in the possession of the plaintiff's solicitors at the time of trial, and to the fact that no indication had been given to them other than possibly being put on notice by the photograph which had been taken of this newel post, it does not appear to me that there was anything unreasonable in the conduct of the plaintiff or those advising her in not searching so diligently that this evidence might possibly have been discovered. In those circumstances, I have no doubt that this application should be acceded to and that the additional evidence should be allowed to be adduced.

HARMAN, L.J.: Ever since the decision of the House of Lords in *Shedden* v. *Patrick & A.-G.* (3) and LORD CHELMSFORD'S speech in particular, the court has set itself against the admission of new evidence after the trial is over. That rests on the high ground of public policy; it is in the general interest of the public that there should be an end to litigation. Therefore, it is important that we should not out of sympathy or out of the suspicion that perhaps justice may not have been done relax those rules. Mr. Brabin, in his ingenious and most persuasive address, called our attention to the modern case of *Corbett* v. *Corbett* (4) where the standard was certainly put very high indeed. But I do not think that case quite fits the present one because, as was pointed out in the course of the argument, in the Divorce Court there stands behind the parties the guardian of the public interest in the person of the Queen's Proctor and, therefore, if there is anything wrong he is there as a line of defence.

The only question in this case, as the learned judge points out at the outset, was the sufficiency of the hand-rail down these steps. Two experts were called, one by each side. Both of them had examined the rail shortly before the trial and each said that it was a sufficiently secure rail for its purpose. The question,

(3) (1869), L.R. 1 Sc. & Div. 470. (4) [1953] 2 All E.R. 69; [1953] P. 205.

A therefore, was whether it was in that state not only when the experts examined it but when the accident happened eighteen months or so before. What was the state of the plaintiff's knowledge of this as she approached the trial? She knew that she had alleged as one of the acts of negligence that the defendant failed to see that the hand-rail was in a sound condition; she knew that negligence was in general denied; but she knew no more. She did not know that it was going B to be admitted that the rail had ever been defective, and still less that it was going to be said that it had been repaired four or five years before the accident. She merely knew that she had to prove that before and up to the time of the accident the rail was in a defective state and ought not to have been so left, and it appears that she had a good deal of evidence, including three outside witnesses, to prove that fact.

C On the defendant's side there was the defendant herself and her husband, who had only been there a fortnight, and they brought in as an ally their vendor, Mr. Hartley. Mr. Hartley pinned himself (and very positive he was about it) to the fact that he had had the hand-rail repaired by a certain firm of joiners, whom he named, five years or so before, and that at the time when those joiners had fixed the hand-rail the tongued and grooved board which was there when the experts D examined it, and which they declared made it safe, was put on. That was a most cogent piece of evidence, and in the face of it the learned judge, feeling that he would have to convict the defendant, her husband and Mr. Hartley of perjury if he went the contrary way, did not feel that the plaintiff had made out her case, the burden being on her. The comment was quite properly made that the joiner mentioned by Mr. Hartley (and he was only mentioned at the last moment) E was not called as a witness. The learned judge admitted that that was a good point, but said that it did not go far enough.

After the trial inquiries were made by the plaintiff's solicitors which showed that the joiners had a record of the work done on the staircase, showing that they had put in the new newel post and that their workman had not put against the railing this tongued and grooved board which alone makes it safe. That seems to F show, as it now stands, that this was a subsequent repair. It also shows that Mr. Hartley was quite unreliable in his evidence. It may well be that it is not necessary to accuse him of a deliberate lie, but it must have been a most cogent matter for the learned judge to consider when he was balancing the credibility of the witnesses and considering whether he ought to reject the plaintiff and her three independent witnesses. The case therefore passes that test (knowledge) with G flying colours.

Counsel for the defendant says that this inquiry might have been made before, and that Mr. Hartley might have been asked. He was not a person unknown to the plaintiff and, says counsel, if he had been asked he might have said: "Yes; it was just as it was when the accident happened. I had it mended." H He might or might not have had to disclose by whom he had it mended. The question is whether in not making that inquiry the plaintiff's solicitors failed in that standard of duty which a solicitor owes to his client and in respect of which, if he fails, no further opportunity will be given to call the evidence which he might well have procured, but failed to do so. My opinion of this matter is that there was no failure of diligence on the part of the solicitors here. There was no reason to think that this angle would be productive or that it was necessary to I make inquiries of this sort of a man who, as must be concluded, was in the other camp. He was the vendor of the defendant and, therefore, to some extent, bound up with her interests. I do not think the solicitors fell in any way short of the duty which they owed to their client, and, therefore, I do not think the rule which ORMEROD, L.J., has already read, and which forbids the calling subsequently of further evidence which could have been with reasonable diligence called at the trial, debars us from allowing that course in this case. I think we should feel most uncomfortable if we did not depart from that rule in this case and say that

the evidence ought to be admitted. I would, therefore, allow the motion to that extent. A

PEARSON, L.J.: I agree and, as the matters have been fully gone into already, I will add only a few words. It is clear that the proposed additional evidence would be material evidence in the event of a further investigation taking place. The point that has been argued is the point that the first condition which the plaintiff who wishes to adduce additional evidence must satisfy is that the evidence could not have been obtained with reasonable diligence for the trial. I will state quite shortly the factors which have influenced my mind on that point. First, as the plaintiff's solicitors, or indeed, anybody, would see the matter before the trial and for the greater part of the trial, the important issue was what was the state of the hand-rail at the moment when the accident happened. If it was proved that the hand-rail was defective at that moment, then there would be a good chance of the plaintiff succeeding in the action. If it was proved that the hand-rail was firm and secure at that moment, then the plaintiff might well fail. The plaintiff's solicitors had, or appeared to have, very strong evidence on that point. They had the evidence of Mrs. Crook, the plaintiff, who had worked in these restaurant premises and had frequently gone up and down the stairs, and she said that the hand-rail was insecure and moved. There was also the evidence of the plaintiff's husband, Mr. Crook, who had done work on the premises from time to time and knew them, and he said that the hand-rail was unsafe. Then, as ORMEROD, L.J., has said, there were three other witnesses who might reasonably be described as independent witnesses—a window cleaner, a newsvendor and a man who several times delivered sacks of potatoes to the premises, and who had himself according to his evidence had an unfortunate experience owing to the insecurity of this hand-rail—all of whom said the same thing. Therefore, the plaintiff's solicitors might well feel that they had clear and direct evidence on the material point and that it was not necessary or desirable to incur further expense by investigating past history, even if they were able to do so. Moreover, one has this factor: that what was done or was not done in the year 1953 by some contractors who worked on the premises at that time would not seem to be material and, indeed, would not be material in the opening stages of the case. The evidence now proposed to be adduced, of Mr. Sharples, who was a director of the firm who carried out the work, and Mr. Newsholme, who was the man who did the work, only became material in view of the evidence given by Mr. Hartley at the very end of the evidence for the defendant, when Mr. Hartley said that this hand-rail was secure at the date of the accident because of the work that was done in 1953 by Mr. Sharples's firm. It then for the first time became material, and one might say highly material, to ascertain what work was done by Sharples (Darwen), Ltd., at that date. Having regard to those factors, I am of opinion that the first condition required for the admission of additional evidence is satisfied in this case. For this reason, I would agree that the motion succeeds and should be allowed. B C D E F G H

Application for the admission of fresh evidence granted. Appeal allowed and new trial ordered.

Solicitors: *Robinson & Bradley*, agents for *Farley, Parker & Pickles*, Blackburn (for the plaintiff); *James Chapman & Co.*, Manchester (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

YOUNG v. YOUNG (No. 2).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), October 6, 1961.]

Divorce—Maintenance—Wife—Variation of order—Re-marriage of wife—No power to order refund by wife of money received by her under the order after her re-marriage—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 28 (1).

B

There is no duty on a former wife, where a maintenance order in her favour has been made for the period of her and her husband's joint lives until further order, to disclose her re-marriage unless she is specifically ordered to do so (see p. 795, letter G, post).

Dictum of SACHS, J., in *Hayfield* v. *Hayfield* ([1957] 1 All E.R. at p. 601) applied.

C

On July 4, 1957, a decree absolute was made in the wife's favour and on July 18, 1957, an order was made that the husband should pay her £3 a week for her maintenance during their joint lives until further order. On Sept. 30, 1957, the wife re-married, after having written to the husband eleven days previously saying that she had no intention of re-marrying. The husband did not discover her re-marriage until September, 1959; he then stopped payments under the order. In March, 1961, the husband applied under the Matrimonial Causes Act, 1950, s. 28, to vary the order of July 18, 1957. On appeal by the husband from refusal of an order for the refund of payments made by him between Sept. 30, 1957, and Sept. 27, 1959,

D

Held: until the maintenance order was varied the husband was bound to pay, and the wife was entitled to receive payment, under it, and, as the court had no power under s. 28 of the Matrimonial Causes Act, 1950, or otherwise to order payments received by a wife under a subsisting maintenance order, to be refunded to her husband, even though she had been guilty of concealment or deceit, a refund in respect of payments made by the husband between Sept. 30, 1957, and Sept. 27, 1959, could not be ordered.

E

F

[As to variation of maintenance in divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 444, para. 999; and as to claim for maintenance by divorced wife who re-marries, see ibid., 432, para. 970; and for cases on the subject, see 27 DIGEST (Repl.) 622-624, *5803-5840*.

For the Matrimonial Causes Act, 1950, s. 24, s. 28 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 411, 414.

G

For the Matrimonial Causes Rules, 1957, r. 47, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 242.]

Cases referred to:

Fildes (*formerly Simkin*) v. *Simkin*, [1959] 3 All E.R. 697; [1960] P. 70; [1960] 2 W.L.R. 1; 3rd Digest Supp.

H

Fisher v. *Fisher*, (1861), 2 Sw. & Tr. 410; 31 L.J.P.M. & A. 1; 5 L.T. 364; 164 E.R. 1055; 27 Digest (Repl.) 613, *5740*.

Hayfield v. *Hayfield*, [1957] 1 All E.R. 598; [1957] 1 W.L.R. 473; 3rd Digest Supp.

Perkins v. *Perkins*, [1938] 3 All E.R. 116; [1938] P. 210; 107 L.J.P. 115; 27 Digest (Repl.) 624, *5833*.

Seabrook v. *Mervyn*, [1947] 1 All E.R. 295; 31 Digest (Repl.) 654, *7575*.

I

Sebag-Montefiore, Re, Sebag-Montefiore v. *Alliance Assurance Co., Ltd.*, [1944] 1 All E.R. 672; [1944] Ch. 331; 113 L.J.Ch. 280; 170 L.T. 395; 2nd Digest Supp.

Style v. *Style and Keiller*, [1954] 1 All E.R. 442; [1954] P. 209; [1954] 2 W.L.R. 306; 3rd Digest Supp.

Summons adjourned into open court.

The husband appealed against an order of Mr. Registrar FORBES dated June 14, 1961, whereby he discharged as from Sept. 27, 1959, a maintenance

order made on July 18, 1957, in favour of the wife but refused to order her to refund to the husband any payments made before Sept. 27, 1959. The facts appear in the judgment. A

Joseph Jackson for the husband.
Ogilvie Jones for the wife.

Cur. adv. vult. B

Oct. 6. **KARMINSKI, J.**, read the following judgment: The parties married in 1933. On May 20, 1957, a decree nisi was pronounced by this court in an undefended suit on the ground of the husband's cruelty. This decree was made absolute on July 4, 1957. An interim order for the wife's maintenance was made on July 18, 1957, whereby the husband was ordered to pay her £3 per week less tax during their joint lives until further order. The husband paid under this order until September, 1959, when he discovered that the wife had re-married and he stopped payments. The wife had in fact re-married on Sept. 30, 1957, but had not informed the husband of this fact. Indeed, she seems to have taken some pains to conceal it, since eleven days before her marriage she wrote to the husband saying that she had no intention of re-marrying. I do not, therefore, approach my consideration of this case with any kind of approbation of the wife's conduct in this respect. C D

On Mar. 7, 1961, the husband applied to vary the order of July, 1957. Affidavit evidence was filed, and on June 14, 1961, Mr. Registrar FORBES discharged the maintenance order as from Sept. 27, 1959, but made no order on the husband's application for a refund to him of payments made between Sept. 30, 1957, and Sept. 27, 1959. The husband now appeals from that part of the order which refused a refund. The power of this court to vary or discharge orders for maintenance is conferred by s. 28 (1) of the Matrimonial Causes Act, 1950. This power is conferred in the following very general terms: E

> "... to discharge or vary the order or to suspend any provision thereof temporarily and to revive the operation of any provisions so suspended."

Rule 47 of the Matrimonial Causes Rules, 1957, states simply that a party may apply for a modification order at any time. I have no doubt that the term modification covers the powers conferred by s. 28 (1) of the Act, namely, discharge, variation, suspension and revival, and no more. F

Counsel for the husband argued that the statutory word "vary" gives power to make an order for repayment, and submitted that if this court has that power it should certainly exercise it in a case of this kind. So far as the power of this court is concerned, counsel could produce no decision in direct support of his argument. But in deference to his interesting and careful argument it is right to say that he called my attention to a number of reported cases where the meaning of variation in other statutes was considered. I have duly considered *Re Sebag-Montefiore, Sebag-Montefiore* v. *Alliance Assurance Co., Ltd.* (1) where the use of the word "varied" in s. 25 (1) of the Finance Act, 1941, was construed, but I do not find myself helped by that decision in deciding the present case. Nor can I derive any help from *Seabrook* v. *Mervyn* (2) where the Court of Appeal had to consider a variation of a tenancy agreement under the Rent Restrictions Acts. G H

Both counsel for the husband and counsel for the wife had recourse to the dictionaries in order to ascertain the meaning of the word "vary". The result of these investigations was to make it clear that the essential feature of a variation is a change or alteration in the form or structure of the matter varied. The question here is whether a change or alteration can include a refund of past payments. The nearest decision on the facts to the present case is *Hayfield* v. *Hayfield* (3), and both counsel relied (though for different reasons) on that decision. I

(1) [1944] 1 All E.R. 672; [1944] Ch. 331. (2) [1947] 1 All E.R. 295.
(3) [1957] 1 All E.R. 598.

A In that case, SACHS, J., had to consider the position of a petitioner who had secured the prolongation of a maintenance order not (as here) merely by a certain lack of candour but by perjury. The question for decision there seems to have been whether or not the order for maintenance should have been discharged completely. After a full consideration of the facts, SACHS, J., reduced it to £1 per week. The question of a refund does not seem to have been raised, though B SACHS, J., referred (4) to ". . . payments made since the date of the relevant application which she is unable to refund." In that connexion I think that SACHS, J., was using the term " unable to refund " with reference to the fact that she had spent the money, and not to any power of the court to order repayment. The arguments of counsel are not reported, but it does not appear from the judgment of SACHS, J., that counsel for the husband were asking for a refund.

C Finally, I have to consider a judgment of the Divisional Court, *Fildes* (*formerly Simkin*) v. *Simkin* (5). There the question was whether justices had power under s. 76 of the Magistrates' Courts Act, 1952, to remit sums paid to a collecting officer for the wife before the date of the complaint for the discharge of a maintenance order on the ground of her re-marriage. It was held that there was no jurisdiction to order such repayment to the husband. LORD MERRI- D MAN, P., emphasised (6) the difference between money which had in fact been paid and the power of the court to remit arrears of unpaid maintenance. PHILLIMORE, J., called attention (7) to the position in this court under s. 24 (2) of the Matrimonial Causes Act, 1950, and to the observations of SINGLETON, L.J., in *Style* v. *Style and Keiller* (8):

> " Once notice of application is given to the wife, the court ought to E regard that as done which ought to have been done, if and when the court comes to a conclusion that the settlement ought to have been ordered."

JENKINS, L.J., pointed out (9) that the court under s. 24 (1) could order the settlement to take effect from some past date.

I feel no doubt that in exercising its powers to vary maintenance under s. 28 (1) of the Act of 1950, the court has power to go back in date beyond the date of F the application to vary. Indeed, on the present application, which was filed on Mar. 7, 1961, Mr. Registrar FORBES discharged the order for maintenance with effect from Sept. 27, 1959, and I have no doubt that he had power so to order. But this does not help me to determine the question of the court's power to order a refund of moneys already paid under this order.

As SACHS, J., pointed out in *Hayfield* v. *Hayfield* (4) there is no duty on a former G wife to disclose her re-marriage unless specifically ordered to do so. An order for maintenance dum sola is now unusual, though a century ago it was very frequently ordered: see *Fisher* v. *Fisher* (10). In any event the re-marriage of a former wife is likely to raise the question whether her fortune has increased, but it does not by itself terminate or extinguish her right to maintenance, though it may in effect reduce it: *Perkins* v. *Perkins* (11). Until an order for variation H is made, the former husband is bound to pay under the original order and the former wife is entitled to receive such payments. If the husband ceases to pay under the order, the wife may seek to enforce her rights by some form of execution, though in the event of her re-marriage she might find the court very reluctant to help her. In the present case the payments were received by the wife until September, 1959, under the order of July, 1957, which was expressed to be for I their joint lives until further order. I can find nothing in s. 28 which enables the court to order repayment by a wife of moneys lawfully received by her under an order of the court, even though she has been guilty of concealment or of

(4) [1957] 1 All E.R. at p. 601. (5) [1959] 3 All E.R. 697; [1960] P. 70.
(6) [1959] 3 All E.R. at p. 701; [1960] P. at p. 75.
(7) [1959] 3 All E.R. at p. 702.
(8) [1954] 1 All E.R. at p. 445; [1954] P. at p. 218.
(9) [1954] 1 All E.R. at p. 447; [1954] P. at p. 222.
(10) (1861), 2 Sw. & Tr. 410. (11) [1938] 3 All E.R. 116; [1938] P. 210.

deceit, nor can I find anything in the decided cases to support such a view. I think that Mr. Registrar FORBES was correct in refusing to order a refund on the grounds that no such power exists in the court. This appeal, therefore, fails and must be dismissed. A

Appeal dismissed.

Solicitors: *W. Timothy Donovan* (for the husband); *A. W. Kemp* (for the wife). B

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

WHITTAM *v.* W. J. DANIEL & CO., LTD. C

[COURT OF APPEAL (Donovan and Danckwerts, L.JJ.), October 10, 1961.]

Practice—Parties—Adding persons as parties—Defendant—Amendment of writ to change defendant "W. J. D. & Co. (a firm)" to "W. J. D. & Co., Ltd."—Whether a correction of a mere misnomer—Whether omission of "Limited" meant that no person was sued—Amendment sought after limitation period expired. D

On Sept. 10, 1957, the plaintiff, who was employed by W. J. Daniel & Co., Ltd., suffered an accident while at work and she was examined by a doctor on their behalf. On Sept. 9, 1960, a writ was issued for her against "W. G. Daniels and Company (a firm)", claiming "damages for personal injuries sustained by the plaintiff in the course of her employment with the defendants" caused, inter alia, by "the negligence of the defendants, their servants or agents". At that date no firm of that name was in existence. W. J. Daniels and Company, which was a partnership firm, ceased to exist in 1919, and was then carried on by one of the partners as sole proprietor until 1931 when it was taken over by W. J. Daniel & Co., Ltd. On Oct. 12, 1960 [i.e., after the period of limitation had expired*], the plaintiff was granted leave to amend the writ by changing the name of the defendants from "W. J. Daniels and Company (a firm)" to "W. J. Daniel & Co., Ltd." W. J. Daniel & Co., Ltd. applied for an order that the writ be set aside. E F

Held: (i) the amendment was a correction of a mere misnomer since, in all the circumstances of the case, there could have been no doubt who it was that the plaintiff intended to sue. G

Davies v. *Elsby Brothers, Ltd.* ([1960] 3 All E.R. 672) distinguished.

(ii) the mere omission of the word "Limited" did not mean that no person was sued and that, until that was corrected, there was no defendant to the proceedings.

Dictum of COHEN, L.J., in *Alexander Mountain & Co.* v. *Rumere, Ltd.* ([1948] 2 All E.R. at p. 484) applied. H

Appeal allowed.

[As to the disallowance of amendments which would defeat defences under the Limitation Act, 1939, see 24 HALSBURY'S LAWS (3rd Edn.) 200, para. 358, and 30 HALSBURY'S LAWS (3rd Edn.) 34, para. 72; and as to adding parties, see ibid., 394, para. 735; and for cases on the subject, see 32 DIGEST 534-537, *1873-1897.*] I

Cases referred to:

Davies v. *Elsby Brothers, Ltd.*, [1960] 3 All E.R. 672; [1961] 1 W.L.R. 170; 3rd Digest Supp.

Glanville (D.) & Co., Ltd. v. *Lyne*, [1942] W.N. 65; 86 Sol. Jo. 147; 9 Digest (Repl.) 729, *4845.*

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* The plaintiff's course of action would have become statute-barred on Sept. 10, 1960, three years after it accrued, by virtue of the Limitation Act, 1939, s. 2 (1), as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 2 (1).

A *Holmes Road, Kentish Town, Re Nos. 55 & 57*, [1958] 2 All E.R. 311; [1959] Ch. 298; [1958] 2 W.L.R. 975; 3rd Digest Supp.

Mountain (Alexander) & Co. v. *Rumere, Ltd.*, [1948] 2 All E.R. 144; *revsd.* C.A., [1948] 2 All E.R. 482; [1948] 2 K.B. 436; 2nd Digest Supp.

Appeal.

B Appeal by the plaintiff from an order of ELWES, J., in chambers, dated July 26, 1961, allowing an appeal by the defendants from an order of Master LAWRENCE, dated Mar. 24, 1961. The facts are set out in the judgment of DONOVAN, L.J.

Desmond Ackner, Q.C., and *B. J. Davenport* (*Brian Galpin* with them) for the plaintiff.

R. F. G. Ormrod, Q.C., and *D. J. Stinson* for the defendants.

C **DONOVAN, L.J.:** This is an appeal from an order of ELWES, J., made on July 26, 1961, whereby he reversed an order made by Master LAWRENCE on Mar. 24, 1961. Master LAWRENCE had decided against an application made by the defendants in the action to set aside the writ on the ground that an amendment which had been allowed by Master CLAYTON on Oct. 12, 1960, had the effect of substituting a new defendant. The importance of the matter is this, that, if a D new defendant were in fact substituted by the amendment which Master CLAYTON had allowed, then that new defendant would be deprived of the right to rely on the Limitation Act, 1939, which by that time had accrued to him. The writ in this case was issued on Sept. 9, 1960, by Mrs. Norma Gillian Whittam and was a claim for damages for personal injuries. The accident in which she suffered those injuries occurred on Sept. 10, 1957, so that the limitation period would expire E on Sept. 10, 1960. The writ, however, was issued in her name against "W. J. Daniels and Company (a firm)". The amendment which Master CLAYTON allowed was to strike out that description of the defendants and to substitute "W. J. Daniel & Co., Ltd.", and that amendment was allowed on Oct. 12, 1960, that is to say, just after the three-year limitation period had expired. ELWES, J., took the view, contrary to that adopted by Master LAWRENCE, that the effect of F that amendment was to substitute a new defendant and to deprive that defendant of the right to rely on the Limitation Act, 1939, which he would have enjoyed had the action been commenced on Oct. 12, 1960. The appeal before us is based on the argument that, in reality, the defendants could have been under no doubt that it was this limited company which was the intended defendant, and that the description of the defendants as "W. J. Daniels and Company (a firm)" was a G mere misnomer; and, as there was no such firm in existence and as the defendants could have been under no doubt that *they* were the intended defendants, therefore this (unlike *Davies* v. *Elsby Brothers, Ltd.* (1)) was a case of mere misnomer; the amendment was properly allowed, and the application to strike out the action should not have succeeded.

If the argument on behalf of the plaintiff had been met by a traverse of the facts H which she alleges, then one would have had to go into those facts at some little length; but that is not the case. Counsel for the defendants concedes that, if it were a case whether the defendants were merely misled, he could not contend that they were. What he says is this, that nobody was sued within the period of limitation and that the defendants were made a defendant for the first time on Oct. 12, 1960, when the amendment was allowed. He says that nobody had I been sued at all up to that date by the plaintiff, because "W. J. Daniels and Company (a firm)" were not in existence, and that this cannot be a case of mere misnomer because the word "Limited" is essential to the title of the company and, without that word being there, the company is not sued at all. I think it right (because this case apparently breaks new ground) to go over the facts in some, but not too great, detail. I have already given the date of the issue of the writ and the date of the accident, and there are a few further facts which I think

(1) [1960] 3 All E.R. 672.

it would not be unhelpful to relate. There was originally a partnership firm of W. J. Daniels and Company. We have an affidavit before us containing the result of somebody's researches into the Business Names Register, and it appears that that firm carried on business up to the year 1919. It was carried on by two partners, Walter James Daniel and William Lionel Dyce; and the affidavit proceeds to say that Dyce " retired from the business on May 31, 1919, leaving the said Walter James Daniel sole proprietor ". The affidavit goes on to say that, on Nov. 10, 1931, notice was given by Walter James Daniel that the business ceased to be carried on with effect from Nov. 10, 1931. Then other researches show that the present limited company, W. J. Daniel & Co., Ltd., was incorporated on Oct. 26, 1931, and apparently took over the business which, up to the time of the incorporation, had been carried on by Walter James Daniel as the sole proprietor. The effect of that, of course, is that the partnership firm of W. J. Daniels and Company ceased to exist in 1919. The plaintiff was not born until some time in 1936; on Sept. 10, 1957, she was an infant employed by this limited company, and it was on that day that she suffered an accident. There was correspondence about the liability for that accident, to be referred to in a moment, but, as she could get no satisfaction, she sought legal aid which was granted by a certificate dated Sept. 5, 1960. That certificate says that Mrs. Norma Gillian Whittam—by this time she had married—was granted legal aid

> " in connexion with the following proceedings, to bring an action for damages for personal injuries sustained in an accident on Sept. 10, 1957, against Messrs. W. J. Daniels & Co. Limited to further inquiries, counsel's opinion and the issue of a writ."

Time was running short by Sept. 5, 1960. There were only a few more days within which to issue a writ, if one was to be in time. Counsel for the plaintiff points out that, if there had been another " Limited " added after the words " W. J. Daniels and Co." in the legal aid certificate, this case would never have arisen; it may well be that there was " W. J. Daniels and Co., Limited " on the draft which the typist copied and she just omitted one of them by accident. Be that as it may, that apparently was the explanation of the misnomer on the writ. Correspondence followed; and in all that correspondence, which begins on Nov. 15, 1957, by a letter addressed by the plaintiff's then solicitors to Messrs. W. J. Daniels, Ltd. and which concludes, as far as our documents show, on Nov. 4, 1959, in every case and on every letter the name of the company is correctly given as " W. J. Daniel & Co., Ltd." Moreover, the plaintiff herself was medically examined by a doctor appointed by the insurance company acting on behalf of this limited company. Therefore, it is perfectly plain that the limited company knew precisely who the plaintiff was and were under no misapprehension that it was they whom she intended to sue. It is quite true that, in that correspondence, the name of the plaintiff is given as " Miss Norma Gillian Carver ". Apparently at that time she had not married, and there is nothing before us to show that any specific notice was given to the company of the marriage; but, nevertheless, she was the person who was examined by the doctor on their behalf, and no point is taken that they were misled about the identity of the proposed plaintiff.

It is because those facts show that the defendants were under no doubt at all that it was they who were intended to be sued that counsel for the defendants does not take the point that this case is covered by the decision in *Davies* v. *Elsby Brothers, Ltd.* (2). The facts in that case were that, a year before the accident, there was a partnership firm called " Elsby Brothers " who did employ the plaintiff in the action, and, therefore, there was room for reasonable doubt, when the limited company got a writ, whether it was they who were intended to be sued or whether it was the partnership firm that had ceased to exist only shortly before. Counsel takes a completely different point. Before I deal with it,

(2) [1960] 3 All E.R. 672.

A I should say that, in my view, if the test is whether there was reasonable doubt as to the identity of the proposed defendant, I should say there was none, and that this is a case of mere misnomer. DEVLIN, L.J., prescribes the test to be applied in cases such as the present in *Davies* v. *Elsby Brothers, Ltd.* (3) in these terms:

> "The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."

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Applying that test, there could have been no doubt in the mind of the defendants when they got the writ that it was they whom the plaintiff intended to sue and that she had simply got the name wrong.

D But now one has to deal with the much wider point which is taken by counsel for the defendants which is this, that the word "Limited" is an essential part of the name of a company and that, unless the word "Limited" is added, nobody is sued. He, therefore, says: "I was never sued in this case at all until my name was put on the writ by the amendment, and that was too late". That argument was, it seems, one of those advanced on behalf of the company in *Davies* v. *Elsby Brothers, Ltd.* DEVLIN, L.J., dealt with it in this way (4):

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> "Counsel for the defendants has argued that, when the distinction is between an entity such as a person or a firm and an entity such as a limited company, the omission of the word 'Ltd.' is fatal: it ceases to be a mere matter of description, he says: it is not like a case where one of the Christian names of the defendant has been got wrong: without the word 'Ltd.' a company cannot be identified as an entity at all. That means (as my Lord [that is PEARCE, L.J.] pointed out in the course of the argument) that, in the case of a very well known concern such as Harrods, if it were sued as 'Harrods' and the word 'Ltd.' was left out, the correction could not be made as the correction of a misnomer, notwithstanding that everybody would be aware that it was Harrods, Ltd. that was intended. I assume for this purpose (as I think we all assumed for the purpose of the illustration) that Harrods had been a limited company for a very long time and there was, therefore, nothing but the limited company that could be intended to be meant by the use of the word 'Harrods'. That argument seems to me to be rather extreme. I do not have to decide whether it is right, because I think that counsel for the defendants can succeed putting his case less high than that."

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So DEVLIN, L.J., without deciding whether that argument was right or wrong, thought it was rather extreme and he at least did not adopt it. PEARCE, L.J., who gave the first judgment, says this (4):

> "The case before us is not easy, but I am persuaded that counsel for the defendants is right in arguing that the entity of the limited company is not contained on the writ, and that to add the word 'Ltd.' would be to add a new party to this action. It is not correct to say that the company has taken the place of the firm. The firm no doubt assigned its business to the company; but it co-existed with the company, as the two companies in *Re Nos. 55 & 57, Holmes Road, Kentish Town* (5) co-existed. After the

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(3) [1960] 3 All E.R. at p. 676. (4) [1960] 3 All E.R. at p. 675.
(5) [1958] 2 All E.R. 311; [1959] Ch. 298.

company had taken over its business the firm could have been sued in respect of an accident that happened while the firm was still carrying on the business. If one of the deciding factors be whether the defendants, on looking at the writ, must have known that the writ, though the name was inaccurate, was addressed to them, then in my view it was not possible for them to say that the writ must have been intended for the company. The date of the accident is not specified in the writ. It was possible that the accident referred to in the writ was one which had occurred while the firm was still carrying on the business. Therefore, there being the two definite, separate entities, the firm and the company, it is not possible to say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company."

So there in that passage he gives the reason for his judgment. If he had intended to say that the omission of the word "Limited" by itself is fatal, of course he could easily have done so, and that would have been the end of the matter, but that he does not say; and, from the passages I have quoted, I do not think it is possible to say that PEARCE, L.J., approved or assented to the argument which is now being put before us.

It begins, for its support, with a quotation from s. 2 of the Companies Act, 1948, dealing with the requirements of the memorandum of association of companies. Section 2 provides that the memorandum of every company must state the name of the company, with "limited" as the last word of the name in the case of a company limited by shares or by guarantee. Then s. 19 provides that a company may get a licence from the Board of Trade to omit the word "limited" from its title in certain special cases, and s. 108 (1) provides:

"Every company—(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible; (b) shall have its name engraven in legible characters on its seal; (c) shall have its name mentioned in legible characters in all business letters."

Therefore, one can say, on the strength of those provisions, that the word "Limited" is, and must be, part of the title of every company incorporated under the Companies Acts and used in all those documents unless special exemption is obtained. That does not, of course, conclude the question whether it is fatal to omit it in any legal document, or in any writ such as we are concerned with; and there is a case, *Alexander Mountain & Co.* v. *Rumere, Ltd.* (6), to which counsel for the plaintiff drew our attention which seems to decide, I think, the contrary. The headnote says that, in the case of the mere misnomer of a plaintiff on a writ, the defendant, by a summons supported by an affidavit, can compel the plaintiff to amend. If the defendant does not exercise this power, and the matter proceeds to trial, the misnomer can then be amended, and in no circumstances can it affect the substantive judgment which the court is called on to pronounce. The brief facts in that case were that one Alexander Mountain carried on a business known as Alexander Mountain & Co., but he was the sole proprietor. He died on July 10, 1947, and appointed his wife one Doris Mountain as his executrix, and she proceeded to carry on the business in the name of Alexander Mountain & Co. Some three months after Alexander Mountain had died a writ was issued in the name of "Alexander Mountain & Co. (suing as a firm)" against the defendants Rumere, Ltd., in respect of some matter which arose during the lifetime of Alexander Mountain. Before the action came on for hearing, it was ascertained by the plaintiff's solicitors that, in fact, the business had been carried on by Alexander Mountain simply under the style of "Alexander Mountain & Co." and there really was no partnership firm. Accordingly, the writ had been issued in the wrong name. Then the

(6) [1948] 2 All E.R. 482; [1948] 2 K.B. 436.

A plaintiff's solicitors notified the defendants' solicitors that they proposed to apply to amend the writ when the action came on by substituting the name "Doris Mountain, widow, executrix of Alexander Mountain, deceased". The defendants objected that there was no power to make the amendment. LORD GODDARD, C.J., decided (7) that that was so, and dismissed the action, not allowing the amendment which was sought. The plaintiff appealed and the B appeal was allowed. COHEN, L.J., giving judgment, refers (8) to *D. Glanville & Co., Ltd.* v. *Lyne* (9), in which a writ had been issued on behalf of a corporation in a wrong name and judgment had been entered for the defendant on the ground of the non-existence of the plaintiffs. It was a case, therefore, like the present except that the name of the plaintiff was wrong. There was an article in the LAW JOURNAL of May 9, 1942, at p. 150, commenting on that decision, C and I had better read what was said, because COHEN, L.J., at the end of his judgment, indorses it. The author of the article said, referring to this decision in *D. Glanville & Co., Ltd.* v. *Lyne* (9):

> "... it is submitted that there never was a time, not even in the days before the rigour of the procedure at common law had been modified by statute, when such a judgment on the trial of an action could have been D appropriate in a mere case of misnomer. It may be doubted whether it would have occurred to anyone in the above case to suggest a judgment in this form if the plaintiff had been an individual, one of whose names had been omitted, or wrongly abbreviated, instead of a corporation. There is, however, no magic in the name of a corporation. It is true that a corporation, whether a limited company or otherwise, can sue only in its corporate name, but, E equally, an individual can sue only in his proper name."

The author then proceeds to quote from STEPHEN'S PRINCIPLES OF PLEADING (1st Edn.) (1824), at p. 320, to this effect:

> "'A mistake in the name of a party to the suit is ground for a plea in abatement only, and cannot be objected as a variance at the trial'... That F is to say, if the plaintiff's name did not correctly appear in the writ, the defendant could formerly plead this in order to defeat the action in the particular form in which it was originally brought, but this did not prevent the plaintiff bringing another action in proper form, and pleas in abatement had normally to be pleaded within four days of the delivery of the declaration. If the defendant, therefore, did not at once take advantage of a misnomer G in this way it was not open to him to take advantage of it at all."

After referring to one or two other authorities, the article continues:

> "This was the position up to the passing of the Civil Procedure Act, 1833, s. 11 of which abolished pleas in abatement for misnomer altogether. It gave the defendant the right, instead of pleading in abatement, 'to cause H the declaration to be amended, at the cost of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name'. This Act is now itself repealed, and all pleas in abatement are finally abolished by R.S.C., Ord. 21, r. 20. A plaintiff, whether an individual or a corporation, is, of course, still required to bring his action in his proper name. There does not appear to be any specific rule of court dealing with I the matter, nor do the rules of court deal with misnomer in any way. It, therefore, appears that R.S.C., Ord. 72, r. 2, applies; i.e., 'the present procedure and practice' (i.e., the practice in force when the rules of 1883 were framed) remains in force, and the defendant by summons, supported by affidavit, could compel the plaintiff to amend. If he does not do so, and the matter proceeds to trial, it is submitted that the misnomer can then

(7) [1948] 2 All E.R. 144.
(8) [1948] 2 All E.R. at p. 484; [1948] 2 K.B. at p. 441.
(9) [1942] W.N. 65.

be amended, and that in no circumstances could the misnomer affect the substantive judgment which the court is called upon to pronounce." A

Then COHEN, L.J., adds (10):

"That statement of law, with which I respectfully agree, was not brought to the attention of the Lord Chief Justice, and I cannot help thinking that, if it had been, a different result might have ensued. Having regard to the affidavits, I think we can properly treat this case as one of misnomer, and allow the writ to be amended by substituting the executrix as plaintiff. In my opinion, the appeal should be allowed." B

SCOTT, L.J., agreed.

By parity of reasoning, I think that it follows in this case that the mere omission of the word "Limited" is not fatal, in the sense that no person is described at all. One can have a case where the misdescription of a defendant corporation, whether it be by the omission of the word "Limited" or by calling it a firm or by a combination of both, as happened here, can be a mere misnomer. There may be other cases, such as *Davies* v. *Elsby Brothers, Ltd.* (11), where there is no such mere misnomer but the adding of a new defendant. Each case depends on its own facts. In this case, I think there is a mere misnomer; and I do not know of any rule of law which compels us to hold that the mere omission of the word "Limited" means that no person is sued at all, and that, until that is corrected, there is no defendant to the proceedings. In my opinion, the master took the right view in this case, and I would allow the appeal. C D

DANCKWERTS, L.J.: I agree. The present case is plainly distinguishable from the decision of this court in *Davies* v. *Elsby Brothers, Ltd.* (11), because, in the present case, there is no other entity to which the description in the writ could be taken to refer. On the other hand, counsel for the defendants' argument is that it is a description which describes nothing and, therefore, is an action against nobody, and, therefore, it would be improper and against the rules to put in the defendants in place of a person which did not exist. I cannot accept that argument. It seems to me that this is a case in which the description could only refer to the defendants and would not be taken by any reasonable person to refer to anybody but the defendants. In the words which were approved by COHEN, L.J., in *Alexander Mountain & Co.* v. *Rumere, Ltd.* (12), there is no magic in the name of a corporation. It seems to me that the name of the defendant inserted in the writ originally was merely a misdescription which was plainly directed to the defendants and it is a case in which such misdescription can be corrected. I agree that the order of the master should be restored. E F G

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe & Co.*, Ashford, Middlesex (for the plaintiff); *Gascoin & Co.* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(10) [1948] 2 All E.R. at p. 485; [1948] 2 K.B. at p. 442.
(11) [1960] 3 All E.R. 672.
(12) See [1948] 2 All E.R. at p. 484; [1948] 2 K.B. at p. 441.

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Re LANGLEY'S SETTLEMENT TRUSTS. LLOYDS BANK, LTD. *v.* LANGLEY AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Donovan and Danckwerts, L.JJ.), October 3, 4, 5, 1961.]

B

Conflict of Laws—Foreign judgment—Recognition—Status—Guardianship order conferring status of incompetence on settlor of English settlement and appointing guardian of his estate and person—Settlor not under incapacity by English law—Withdrawal of funds under power reserved to settlor by settlement—Notice of withdrawal executed by settlor and guardian—Whether notice effective—Extent to which English court will recognise effects of foreign order imposing status.

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A settlor made an English settlement dated Aug. 8, 1928. Since 1937 he had resided in California in the United States of America, and at all relevant times had a Californian domicil. He suffered from multiple sclerosis by reason of which he had little power of movement in his limbs but his mental capacity was unaffected. By letters of guardianship issued in the Superior Court of the State of California in 1956 his wife was appointed guardian of his estate and person under s. 1460* of the Californian Probate Code on the ground that he was an "incompetent" within the meaning of that section, viz., a person, whether insane or not, who by reason of old age, disease, weakness of mind or other cause was unable, unassisted, properly to manage and take care of himself or his property and by reason thereof was likely to be deceived or imposed on by artful or designing persons. Clause 8 of the settlement provided that the settlor might withdraw from the settlement and require the trustees to transfer to him as his absolute property any part of the trust fund subject to certain limitations. By an order of the Superior Court of California dated Apr. 9, 1957, his guardian was authorised, among other matters, to exercise all his powers under the settlement. By a notice of withdrawal, dated Oct. 12, 1959, the settlor declared that in exercise of the power of withdrawal conferred on him by the settlement he thereby withdrew part of the trust fund and authorised his wife to act as his agent to receive and give receipts for the amount withdrawn. The notice was executed by the settlor and his wife as his guardian and was delivered to the trustees of the settlement. The value of the property available for withdrawal was about £20,000.

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Held: the notice of withdrawal effectively exercised the power of withdrawal for the following reasons—

(i) (per LORD EVERSHED, M.R., and DONOVAN, L.J.) the court was not bound to give effect to the status of incompetency of the settlor under Californian law but had a discretion, which should be exercised with due regard to common sense and reasonable policy, to disregard such status; in the circumstances of the present case, particularly having regard to the facts that the settlor's incompetency was physical and not mental and that incapacity to exercise the power of withdrawal would have the consequence of depriving him of some £20,000, the court would disregard any status of incapacity by Californian law that the settlor might have (see p. 809, letters C, D and G, post).

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(ii) (per DANCKWERTS, L.J., and DONOVAN, L.J.) if the court were to accept the status of incompetency of the settlor by Californian law, it should accept it wholly, with the consequence that the execution of the notice of withdrawal by the settlor's guardian would be effective; and if the court were to disregard that status, the execution of the notice by the settlor would be effective (see p. 810, letters I and A, post; cf. p. 808, letter B, post).

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* For the relevant provisions of s. 1460, see p. 804, letter H, post.

Dictum of LORD GREENE, M.R., in *Baindail (otherwise Lawson)* v. *Baindail* ([1946] 1 All E.R. at p. 346) applied; *Worms* v. *De Valdor* ((1880), 49 L.J.Ch. 261) and *Re Selot's Trust* ([1902] 1 Ch. 488) followed.

Decision of BUCKLEY, J. ([1961] 1 All E.R. 78) affirmed.

[As to foreign judgments being unenforceable as contrary to the policy of English law, see 7 HALSBURY'S LAWS (3rd Edn.) 143, 144, paras. 253-255; and for cases on the subject, see 11 DIGEST (Repl.) 537, 538, *1471-1482*.]

Cases referred to:

Baindail (otherwise Lawson) v. *Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 11 Digest (Repl.) 457, *921*.

Selot's Trust, Re, [1902] 1 Ch. 488; 71 L.J.Ch. 192; 11 Digest (Repl.) 538, *1482*.

Waite's Settlement Trusts, Re, Westminster Bank, Ltd. v. *Brouard*, [1957] 1 All E.R. 629; [1958] Ch. 100; [1957] 2 W.L.R. 1024; 3rd Digest Supp.

Worms v. *De Valdor*, (1880), 49 L.J.Ch. 261; 41 L.T. 791; 11 Digest (Repl.) 538, *1481*.

Appeal.

This was an appeal by Edward Nicholas Langley, an infant, the seventh defendant, from an order of BUCKLEY, J., dated Nov. 30, 1960, and reported [1961] 1 All E.R. 78, declaring that by a notice of withdrawal dated Oct. 12, 1959, George Edward Downes Langley, the first defendant (hereinafter called "the settlor") had effectively exercised the power of withdrawal conferred on him by cl. 8 of a settlement dated Aug. 8, 1928. That clause read:

> "The settlor may at any time during his life withdraw from the settlement hereby made and require the trustees to transfer to him as his absolute property any part of the trust fund . . ."

The power conferred by cl. 8 was subject to certain conditions of which the only relevant one was that after withdrawal there should remain subject to the settlement property and stocks to the value of £33,000 excluding certain life insurance policies.

The settlor had lived since 1937 in the State of California, U.S.A., and it was conceded that at all relevant times he was domiciled in that country. He suffered from multiple sclerosis by reason of which he had little power of movement in any limb but his mental capacity was unaffected. He was seventy-five or seventy-six years old and there was no chance of his recovery. By letters of guardianship issued in the Superior Court of the State of California, dated Feb. 14, 1956, the second defendant, the settlor's wife, was appointed guardian of the settlor's estate under s. 1460 of the California Probate Code which provided:

> "Any superior court . . . may appoint a guardian for the person and estate . . . of an insane or an incompetent person. As used in this division of this code, the phrase 'incompetent person' . . . shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."

By a notice dated Feb. 14, 1957, addressed to the trustees of the settlement, the plaintiffs, the second defendant purported to exercise the power of withdrawal conferred by cl. 8 on behalf of the settlor. By an order made in the Superior Court of California dated Apr. 9, 1957, the second defendant was authorised and directed, inter alia, to exercise all powers over the trusts of the settlement that the settlor could have exercised had he been competent. By a notice of withdrawal, dated Oct. 12, 1959, the settlor declared that in exercise of the power of withdrawal conferred on him by cl. 8 of the settlement he thereby withdrew part of the trust fund and authorised the second defendant to act as

A agent to receive the amount withdrawn and give receipts therefor. The notice was executed by the settlor and by the second defendant as his guardian and was delivered to the plaintiffs on Oct. 17, 1959.

The third, fourth, fifth, sixth and eighth defendants were respectively Ruby Maude Pauline Langley, Claude Martin Langley, Richard Martin Langley, Christopher Downes Langley and Jacqueline Mary Purcell, all of whom were B entitled or contingently entitled to beneficial interests under the trusts of the settlement.

Michael Stranders, Q.C., and *B. T. Buckle* for the appellant, the seventh defendant.

J. W. Brunyate for the first and second defendants.

J. A. Armstrong for the plaintiffs, the trustees of the settlement.

C The third, fourth, fifth, sixth and eighth defendants did not appear and were not represented.

LORD EVERSHED, M.R., having stated the facts and found that under Californian law the effect of the orders of the Superior Court of the State of California was to place the management of the settlor's affairs for his benefit D and protection in the hands of the second defendant subject to the direction and control of that court, continued: The question which is raised in this case is whether that document, with its background of the orders of the Californian court, has been effective to require Lloyds Bank, Ltd. to make the transfers which the notice demands. The case has raised interesting points of law and we are much indebted to counsel for their assistance and I shall presently make E some references to the cases and text-books referred to. I must say that I am much impressed by this circumstance. It will be recalled from my reading of cl. 8 of the settlement that no particular form whatever as to writing or otherwise is required, oddly enough, for the exercise of the power of withdrawal. If I may repeat the opening words: "The settlor may at any time during his life withdraw from the settlement hereby made and require . . ." It cannot be doubted that F any trustee would properly want the exercise of the power to be made clear so that there should be no doubt that it had in fact been exercised; but it is equally plain that no particular form was requisite—no question of a deed or anything of that kind. In *Re Waite's Settlement Trusts, Westminster Bank, Ltd.* v. *Brouard* (1), DANCKWERTS, J., sitting at first instance, held in the circumstances of that case, which so far as relevant bear an analogy to those of the present, that for G the purpose of considering such a problem as we now have to consider, one should, subject to such qualifications as I shall later mention, apply English law. This settlement was an English settlement and its terms must be construed according to English law. There was a little debate before us on the question to what extent a power framed as this was could be exercised by anybody other than the settlor personally. A perfectly general power may be exercised by an attorney. H This is, perhaps, a somewhat unusual kind of power but it is, of course, general in this sense, that if the settlor chose to exercise it and effectively did so, then he could do what he liked with the funds which were withdrawn; it was a power in him for his own exclusive benefit. Now it may well be that if (and I am leaving aside altogether for the moment considerations of Californian decrees) a settlor, having a power such as this, appointed somebody as attorney under a perfectly I general power of attorney and such an attorney acting entirely on his own initiative purported to exercise a power of this kind, the courts would say that that was not an effective exercise within the terms of the paragraph. On the other hand, it cannot be doubted that if the settlor exercised personally the power in the sense that he made known to the trustees clearly and unequivocally that he desired to exercise and was purporting to exercise the power, he might well join with him some agent or attorney on his behalf who would do and be capable

(1) [1957] 1 All E.R. 629; [1958] Ch. 100.

of doing what might be called mechanical or ministerial acts consequent on the exercise of the power. If that is the right view, then it seems to me that unless objection can be raised on the grounds of private international law or otherwise, the document from which I have read, called the notice of withdrawal, would appear to constitute according to English law a valid and effectual exercise of the power which cl. 8 of this settlement conferred. I will not re-read it; it states what the settlor (being of perfectly sound mind and understanding) desired to do, that he did wish to exercise the power; it is validly and effectively executed by him and there is joined with him in the document his present wife as his guardian and to her by the terms of the notice are given what I have called all necessary ministerial or mechanical powers. On the face of it, then, it seems to me that we have here an effectual exercise of the power according to the law governing the settlement, that is English law; and if some other answer is to be given to the question posed, it will, at any rate, be evident at once that the result is a little startling. The effect of counsel for the appellant's argument, as will immediately appear, must be, if it is well founded, that because of a rule of international law which he invokes, the settlor is effectively deprived of any right whatever to the surplus funds which were his to withdraw by the terms of the settlement. The argument which counsel for the appellant has put forward is of this nature. He says that the effect of the Californian decrees which were made by the court of the state of the settlor's domicil was to affect vitally what is called the status of the settlor because by declaring him an "incompetent" by the terms of the order, the result is, according to counsel, that the settlor himself is incompetent, that is incapable, disabled altogether from any act which could be constituted or construed as an exercise of this power of withdrawal. I have already stated that the orders which I have read and which appointed the second defendant the guardian were ex facie made for the purpose of protecting the assets of the settlor and doing so under the control of the Californian court. When counsel for the settlor opened his argument he drew forcible attention to this rather strange anomaly. If, he said, one need look only at the English law, then beyond question the notice of withdrawal is (as I agree) on its face an effective exercise of the power in cl. 8 of the settlement. If, however, one is to look to Californian law, because the settlor at the relevant date was domiciled in California, then one finds that the court of California has expressly directed—not merely authorised but expressly directed—the guardian to exercise this power on behalf of and for the benefit of the settlor and that she has effectively done. So that looking at Californian law for that purpose, again you get the answer that there has been an effective exercise of the power. What counsel for the appellant's argument seems to produce in its result is that one looks for a limited purpose and to a limited extent at the Californian order, one looks at it in order to discover that the settlor is an "incompetent", that is disabled from doing anything himself, but having so done, one pays no further regard to the order, one pays no regard to that part of the order which was complementary to the first part, and one says as a consequence that the effect of the order has been to deprive the settlor altogether of the benefit which cl. 8 of the settlement has conferred on him. That, as I have earlier indicated, seems to me a very startling result—so startling that for my part I should require very cogent authority to persuade me that an English court should arrive at such a result. In so saying I am comforted by language used by my predecessor, LORD GREENE, M.R., in *Baindail (otherwise Lawson)* v. *Baindail* (2) which was before this court in 1946. The problem in that case, of course, was a very different one: it was whether a man who had married in India a Hindu woman according to the Hindu rites, could validly marry an Englishwoman in England while the Hindu marriage still subsisted, and it raised a question which at any rate is simple to state—at the date of the English marriage in May, 1939, did this gentleman have the

(2) [1946] 1 All E.R. 342; [1946] P. 122.

A "status", that is the essential characteristic, of a married man? If he had then it followed that he was incapable of marrying the Englishwoman. Accordingly the court considered the extent to which a "status" acquired in a foreign country must be regarded in all its consequences by the courts of this country. My predecessor posed the question (3):

B "The practical question in this case appears to be: Will the courts of this country, in deciding upon the question of the validity of this English marriage, give effect to what was undoubtedly the status possessed by the appellant? That question we have to decide wth due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter."

C Substituting for the opening question posed by LORD GREENE, M.R., the question in this case, I very respectfully adopt the second and third sentences which I have read, and applying common sense and giving attention to reasonable policy, there being no concluded decision on this matter, I unhesitatingly would conclude that we should hold, as did BUCKLEY, J., that the power has been, in the circumstances of this case, effectively exercised notwithstanding the D "incompetence" of the settlor under the two decrees of the Californian court.

We were very properly referred to passages in the classic book, DICEY'S CONFLICT OF LAWS (7th Edn.) and particularly to ch. 10 devoted to status and r. 28 and r. 29. Rule 28 at p. 223 reads:

"Subject to r. 29, the existence of a status under the law of a person's domicil is recognised by the court, but such recognition does not necessarily E involve giving effect to the results of such status."

I read at once r. 29 (at p. 227), which is:

"The court will not give effect to the results of a status existing under a foreign law which is penal."

To r. 29 I will revert presently, but the learned editors under the comments F which follow r. 28 refer to certain views or theories taken in regard to the acceptance as a matter of private international law by the municipal courts of England of the effects of status under the law of some person's domicil, and the third view which is favoured by the editors and which, as I conceive, justifies the last two lines of the rule which I have read. It is stated thus at p. 225:

"The existence, at any rate, of a status imposed by the law of a person's G domicil ought in general to be recognised in other countries, though the courts of such countries may exercise their discretion in giving operation to the results of such status."

I take that passage and the statement of the rule itself in the last two lines, which I repeat,

H "but such recognition does not necessarily involve giving effect to the results of such status",

with the passage which I read from the judgment of LORD GREENE, M.R., as justification for the conclusion, if it be necessary to rest it on this basis, that albeit the settlor was decreed an "incompetent" and had what might be called the status of an incompetent according to the country of his domicil, nevertheless this court would not necessarily give rigid, indeed I might say cynical, effect I to all the consequences of such a conclusion where the result would be (let me observe, in flat contradiction to the expressed purpose of the Californian order) to deprive the settlor of the right that he has under this settlement. If, as I have said, I apply that rule, I do so subject to the discretion, which it seems to me that this court has, not to carry the recognition of the status to the extreme which counsel for the appellant has suggested: indeed, so to do, as I indicated a moment

(3) [1946] 1 All E.R. at p. 346; [1946] P. at p. 129.

ago, would appear to me to be recognising only a part, and a very imperfect part, of what might be properly described as the true status of the settlor. It is true that the court has said that he is an " incompetent " and in this case that is clearly intended to mean and means that he is physically unable, without any disturbance of his mental powers, to look after his affairs, but that is not all: his status is also this, that under the supervision of the Californian court someone has been appointed, for his benefit and protection, to look after his affairs, including the collection of foreign assets. I think, therefore, that it may well be that if one does recognise the status here, one must recognise it in its totality, and such recognition would produce the same result as that which I earlier indicated, namely, that when one takes this settlement in one hand and the notice of withdrawal in the other, one concludes that the notice of withdrawal, at which no doubt one must look in the light of the Californian court's orders which produced it, is an effective exercise of the power under cl. 8.

Supposing, however, that that is not so and that one is bound to treat the settlor as disabled from exercising the power himself but cannot look further at the steps taken by the Californian court to protect his interests, what is the consequence? The consequence is that the settlor will have been deprived for good and all of a valuable right which I am given to understand is of the value of some £20,000. I realise that the order of the Californian court can be revoked, but from the medical evidence it appears clear that unfortunately there is no chance whatever of the settlor recovering. If that is the result, then one may as it seems to me invoke r. 29 which provides that " the court will not give effect to the results of a status existing under a foreign law which is penal ".

It was on that ground that BUCKLEY, J., decided the present case adversely to the appellant (4), and he relied particularly on two decisions, one of FRY, J., and one of FARWELL, J. The decision of FRY, J., was in *Worms* v. *De Valdor* (5). The later case of FARWELL, J., is *Re Selot's Trust* (6). Both those cases arose under a particular provision of the Code Napoleon in France, viz., s. 513, which was directed to prodigals. The section in the French language is set out in the first of the two cases and a translation is found in the case of FARWELL, J. (7). The section, as so translated, says that prodigals may be prohibited from suing and defending, compromising, borrowing, and various other things, without the assistance of an adviser appointed by the court. Both were cases of " prodigues " within the section and in both cases it was suggested that, the French courts having appointed a " conseil judiciaire ", it was not competent for the French " prodigue " to assert his rights in the courts of this country save under the direction of the French official, and that view was rejected in both cases. FRY, J., in the first case (8) expressed his personal view that the section of the Napoleonic Code was in its consequences, so far as relevant, penal and therefore could be rejected, though he then went on to say that on the facts of the case he did not think (and it was on this view that he really founded himself) that the French decree under the code did in truth affect the status of the individual concerned. In the second case FARWELL, J., took the view (9) that FRY, J., had founded himself on both grounds, first, that the decree was of a penal nature, and, second, that on the evidence it did not in truth affect the status. FARWELL, J., went on to say (9) that he doubted whether FRY, J., really had evidence to justify the second conclusion, though in *Re Selot's Trust* (6) he unhesitatingly did accept the evidence before him that the individual's status was not in truth affected within the meaning of that word in private international law. BUCKLEY, J., was of opinion that those cases being good law, the present Californian orders were no less of a penal character than the French decrees. It is true that the two decisions, *Worms* v. *De Valdor* (5) and *Re Selot's Trust* (6), have been subject to some criticism, particularly in WESTLAKE'S PRIVATE INTERNATIONAL LAW

(4) [1961] 1 All E.R. 78. (5) (1880), 49 L.J.Ch. 261. (6) [1902] 1 Ch. 488.
(7) [1902] 1 Ch. at p. 489. (8) (1880), 49 L.J.Ch. at pp. 261, 262.
(9) [1902] 1 Ch. at p. 492.

A (7th Edn.) at p. 48, and there is criticism of the decisions in Dr. Cheshire's book on PRIVATE INTERNATIONAL LAW (5th Edn.) at p. 158. I feel, however, that I can properly approach the present problem without having to express any final view whether all that was said in the two cases was justified or not justified. There is no magic in the word "penal". It is true that the common example given is the sort of penal consequence which you get from the status of slavery B or from some disability on religious grounds. As a matter of ordinary English, however, I would have thought that if counsel for the appellant does establish his first proposition, namely, that the status of incompetence must be accepted and recognised, and stop there, the result which is inevitably produced is that the status has deprived the settlor of an extremely valuable interest or right, and has done so, for reasons which I have given, for practical purposes for ever. If that is C so, I would not differ from BUCKLEY, J., in saying that as a matter of common sense, the "status" effected by the Californian orders is penal in its consequence. I have, I confess, preferred the earlier basis on which I have stated my conclusion. Looking at the whole circumstances and applying the test of common sense and attention to reasonable policy which LORD GREENE, M.R., laid down (10), looking at the whole of this matter broadly, I conclude for the reasons which I D have already tried to state that this notice of withdrawal was an effective exercise of the power in cl. 8, and if it were necessary I would exercise my discretion in limiting the recognition of the status in so far as it might have a different consequence. On those grounds, therefore, I conclude that the learned judge rightly decided this case and I would dismiss the appeal.

E **DONOVAN, L.J.:** I agree that this appeal should be dismissed. English courts are not in my opinion bound to recognise and give effect in full to the status of a person under the law of the country of his domicil in every case where that status is not penal, that is, has no penal results. Cases which raise this kind of problem are so diverse in their circumstances that the courts here must in my view retain some discretion. To adopt a hard and fast rule would no doubt F make the law more certain, and, therefore, easier to teach and easier to advise on, but while it might do justice in some cases, it would certainly do injustice in others. I, too, would adopt as correct the exposition of the law on this matter as set out in ch. 10 of DICEY'S CONFLICT OF LAWS (7th Edn.) at p. 225, under the heading: "Third view", a passage which LORD EVERSHED, M.R., has already read. I also would express my respectful concurrence with the remark of LORD G GREENE, M.R., in *Baindail (otherwise Lawson)* v. *Baindail* (11), already quoted by my Lord, to the effect that some common sense and regard for reasonable policy should be employed in the solution of these problems.

In the present case the court should in my opinion exercise its discretion to ignore the status of incompetency acquired by the settlor under the law of his domicil so far as that status affects his power of withdrawal under cl. 8 of the H settlement. The proper law of that settlement is English: the settlor is a sane adult person; his incompetency under Californian law is due solely to his physical as distinct from his mental condition, and the exercise of the power in question calls for a decision of the mind, not for some activity of the body except possibly for making his mark on a written notice of withdrawal. From start to finish there is no reason, either in law or equity, for depriving him of the valuable right I which is his under cl. 8 and which under English law he has validly exercised. Indeed, the Californian court itself clearly takes the view that he should have the benefit of it. The appellant asks the court to recognise the status of incompetency under foreign law in such a way that no person, either here or in California, can exercise this right of withdrawal under cl. 8. The power of the guardian under Californian law to do this should, it is said, be disregarded. This argument, if sound, would indeed make the status of incompetence penal, for it would deprive the settlor altogether, and for no good reason, of a right worth at the moment

(10) See p. 807, letter B, ante.
(11) [1946] 1 All E.R. at p. 346; [1946] P. at p. 129.

some £20,000. Apart from this, however, I see no justification for picking and choosing in this way between the incidents of incompetence. If this court were to recognise that status in this case, I think that it should do so comprehensively. That would lead to this, that the right of withdrawal would be found validly exercised already by the guardian pursuant to the order of the Californian court. I prefer, however, to say that in the exercise of its discretion the court should not in this particular case for the reasons I have given recognise the foreign status of incompetence so as to preclude the settlor from exercising his rights under cl. 8.

DANCKWERTS, L.J.: I also agree and I can express my reasons quite shortly in this case. It arises on a power of withdrawal contained in an English settlement dated Aug. 8, 1928, for the benefit otherwise of the settlor's former wife and children and issue. Under cl. 8 of the settlement the settlor may at any time during his life withdraw from the settlement and require the trustees to transfer to him as his absolute property any part of the trust fund provided that funds are left in the settlement of the then value of £33,000 excluding certain policy moneys. It is claimed on behalf of the settlor that this power has been duly exercised by a document executed on Oct. 12, 1959, by the settlor and his second wife, who had been appointed under the law of California in the United States of America (in which state the settlor was then domiciled) to be his guardian. The settlement does not specify any formalities for the execution of the power of withdrawal and this document was in writing and was signed, sealed and delivered by the settlor, who made his mark, and also by his wife who joined in the notice of withdrawal. Owing to multiple sclerosis the condition of the settlor was such that he could only make his mark with assistance. By reason of his physical condition the court of California had appointed the wife to be his guardian by an order of Feb. 14, 1956, and declared him to be "an incompetent" under the provisions of a Californian statute; and by a further order dated Apr. 9, 1957, the court authorised, empowered and directed the wife as guardian to exercise all or any of the powers under the settlement that the settlor could have exercised if he were competent. Under the terms of the relevant statutory provision, the court in California had power to appoint the wife to be guardian whether the settlor was sane or insane, and the learned judge was satisfied on the evidence that though physically helpless, the settlor was of sound mind at all material times, and this court has upheld that conclusion.

In these circumstances if the due execution of the power depends on English law, it is plain that the power of withdrawal was validly exercised by the document of Oct. 12, 1959, which was duly executed by the settlor as the principal party, it appears, with his wife as guardian joining in. The settlement is governed by English law and in my view the validity of the exercise of the power of withdrawal depends on English law, and that is the end of the matter.

It was contended, however, that as the settlor was domiciled in California at the material date, what is called his "status" is governed by the law of California. It was said that the expert evidence before the court on the law of California shows that as a result of the order of Feb. 14, 1956, the settlor was incapable of disposing of his property and so unable to exercise the power of withdrawal. It was further said that this being the situation under the law of California, English law prevents the wife as his guardian exercising the power on his behalf. If the first half of that proposition is correct, it is very odd that a form should have been adopted as a result of the order of Apr. 9, 1957, in which the settlor was the principal executing party. It seems to me quite illogical and unfair that this court should accept the disqualifying effects of the Californian law (if that is the effect) and refuse to apply the protecting powers of disposition conferred by the same law on the guardian. I do not believe that this court is bound to apply the law of California in such an absurd way, accepting part as applicable and rejecting the other part as of no force. Furthermore, the settlor's intention was clearly to exercise the power, and there is the authority of FARWELL ON POWERS that a general

A power can be exercised through an agent and it might well be said that the intention to withdraw being clear, the execution of the document was merely a ministerial act.

There is the final point that if only the disqualifying part, which prevents the settlor exercising his power to obtain back part of his property, is accepted and the relieving provisions designed to protect him are rejected, then as it seems B to me this foreign law is plainly penal, and on authorities of many years standing, such a provision under the law of the party's domicil would not be applied by an English court. On any of these grounds it seems to me that the conclusion must be that the power was duly exercised, and I think that the appeal should be dismissed.

Appeal dismissed.

C Solicitors: *Pothecary & Barratt* (for the appellant, the seventh defendant); *Coward, Chance & Co.* (for the first and second defendants); *Reynolds, Gorst & Porter* (for the plaintiffs, the trustees of the settlement).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

D

Re KOLB'S WILL TRUSTS.
LLOYDS BANK, LTD. *v.* ULLMANN AND OTHERS.

E [CHANCERY DIVISION (Cross, J.), October 4, 11, 1961.]

Will—Investment clause—Direction to invest in stocks, shares, and/or convertible debentures in the "blue chip" category—Uncertainty—Whether clause valid.

Trust and Trustee—Variation of trusts by the court—Investment—Extension of F *powers of investment—Discretion—Special circumstances to be shown to justify departure from scope enacted by Trustee Investments Act,* 1961—*Invalid clause in will showing testator's wish that his trustee should invest only in "blue chip" equities—Whether special circumstances established—Trustee Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 57—*Trustee Investments Act,* 1961 (9 *&* 10 *Eliz.* 2 *c.* 62), *s.* 15.

G By cl. 6* of his will dated Jan. 24, 1958, the testator directed his trustees to call in and convert into cash such portion of his residuary estate as did not consist of cash or "blue chip" industrial shares or securities of companies operating and/or domiciled in the United Kingdom and/or the United States of America or Canada and to invest the proceeds into such stocks shares and/or convertible debentures in the "blue chip" category as his H trustees should think fit. The testator expressly declared that his trustees should not invest any part of his estate in British or other government securities or any securities known as trustee securities or any fixed interest stocks or debentures (excluding convertible debentures). The ultimate residue of the testator's estate was given on charitable trusts. In proceedings brought by the trustees to determine the validity of the investment I provisions they applied, if the provisions were found to be void, to have conferred on them a wide power to invest in equities. The Attorney-General opposed this application.

Held: (i) the direction for investment in securities in the "blue chip" category was void for uncertainty because the description "first class" or "blue chip" constituted a standard applied by the individual using the description but did not establish an objective standard, and the testator

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* The terms of cl. 6 are set out at p. 812, letter H, post.

had not empowered the trustees to determine whether an investment was or was not within that description. A

(ii) the prohibition against investment in government and other securities was also void, since its efficacy was dependent on the direction for investment in blue chip investments being effective.

(iii) although the court had power under the Trustee Act, 1925, s. 57, to enlarge the investment powers of charity trustees beyond those conferred by the Trustee Investments Act, 1961, yet notwithstanding s. 15 of that Act, trustee investment powers ought not to be so enlarged unless there were special circumstances; it was doubtful whether the wishes of a testator would constitute special circumstances, and, as in the present case no sufficient special circumstances were shown and the court would not force an enlargement of investments on the Attorney-General, the application for enlargement of investment powers would be refused. B C

[**Editorial Note.** As regards the principle that since the enactment of the Trustee Investments Act, 1961, the court will authorise enlargement of trustee investment powers only in special circumstances, see *Re Cooper's Settlement, Cooper* v. *Cooper*, p. 636, ante.

As to the investment of trust funds, see 33 HALSBURY'S LAWS (2nd Edn.) 232, paras. 415 et seq.; and for cases on the subject, see 43 DIGEST 941-943, *3781-3806*. D

For the Trustee Act, 1925, s. 57, see 26 HALSBURY'S STATUTES (2nd Edn.) 138.

For the Trustee Investments Act, 1961, s. 15, see HALSBURY'S STATUTES (2nd Edn.) Interim Service 763.] E

Cases referred to:

Gresham's Settlement, Re, Lloyds Bank, Ltd. v. *Gresham*, [1956] 2 All E.R. 193; [1956] 1 W.L.R. 573; 3rd Digest Supp.

Sayer Trust, Re, MacGregor v. *Sayer*, [1956] 3 All E.R. 600; [1957] Ch. 423; [1957] 2 W.L.R. 261; 3rd Digest Supp.

Shipwrecked Fishermen and Mariners' Royal Benevolent Society Charity, Re, [1958] 3 All E.R. 465; [1959] Ch. 220; [1958] 3 W.L.R. 701; 3rd Digest Supp. F

Adjourned Summons.

This was an application by originating summons dated Apr. 7, 1961, by the plaintiffs, Lloyds Bank, Ltd. and Oscar Mason, the executors and trustees of the will dated Jan. 24, 1958, of the testator, Louis Michael Kolb, deceased, for the determination of the questions and the relief hereinafter mentioned. The testator died on May 2, 1959, and probate of his will was granted to the plaintiffs on Sept. 1, 1959. Clause 6 of the will was as follows: G

"As to the residue of my estate of whatsoever nature and wheresoever situate, I devise, give and bequeath the same unto my trustees to be held by them upon the following trusts, namely: To call in and convert into cash such portion of my estate as does not consist of cash or 'blue chip' industrial shares or securities in respect of companies operating and/or domiciled in the United Kingdom and/or the United States of America or Canada and to invest the proceeds into such stocks shares and/or convertible debentures in the 'blue chip' category as my trustees in their sole and unfettered discretion shall think fit and proper without in any way being responsible for loss or waste And I expressly declare that my trustees shall not invest any part of my estate at any time in British or other government securities or any securities known as trustee securities or any fixed interest stocks or debentures and for the purpose of this provision the expression 'debentures' shall not include convertible debentures. It is my desire that my trustees shall so soon as reasonably possible following my death ensure that my residuary estate, which is to be utilised in the H I

A manner hereinafter appearing, shall be or remain invested in between four and six companies, one-half domiciled and/or operating in the United States of America and/or Canada and the remainder operating and/or domiciled in the United Kingdom Provided that such companies shall always be regarded in their respective countries of operation and/or domicil as in the 'blue chip' class and may include investment trusts in both B countries of high class standing."

By cl. 7 of his will the testator directed his trustees to set aside £5,000 out of his residuary estate to be held on certain trusts, and by cl. 8 he settled the remaining residue on charitable trusts.

The questions for the court's determination were: (i) whether on the true construction of the will of the testator, the directions contained in cl. 6 of his C will for the investment of trust money in stocks, shares and/or convertible debentures in the "blue chip" category (a) authorised investment (subject to the other directions in cl. 6) in any stocks, shares and/or convertible debentures recommended to the trustees by a stockbroker as being in the "blue chip" category at the time of investment, or (b) authorised investment in some other and what class of securities, or (c) were void for uncertainty or otherwise. D (ii) If the said directions were held to be void, whether the prohibition contained in cl. 6 against investment in British or other government securities known as trustee securities or any fixed interest stocks or debentures (a) was likewise void or (b) was valid and effective.

By para. (iii) of the originating summons the plaintiffs asked that, if the said directions were held to be void, they might be empowered to invest trust money E in or on the investments therein described, which were a wide range of equities, subject to the proviso that if at any time the trustees of the will did not include a trust corporation a stockbroker or merchant banker of not less than fifteen years' standing should be employed to keep the trust investments under review. The relief asked for in para. (iii) was sought (if and so far as necessary) under the Trustee Act, 1925, s. 57.

F The defendants were Irene Ullman, Stephen Ullman, Agnes Erdos (all of whom were beneficially interested in the legacy settled by cl. 7 of the will) and the Attorney-General.

E. I. Goulding, Q.C., for the plaintiffs, the trustees.

J. L. Knox for the first three defendants, beneficially interested in the settled G legacy, a first charge on the residuary trust fund.

J. A. R. Finlay (*B. J. H. Clauson* with him) for the Attorney-General.

Cur. adv. vult.

Oct. 11. **CROSS, J.**, read the following judgment in which, after setting out the material provisions of the testator's will, he continued: Now, it is easy H enough to see in a general way what the testator meant by cl. 6 (1). He wished his residuary estate to be and remain invested in high-class ordinary shares or convertible debentures of industrial companies in the United Kingdom, the United States of America or Canada or in investment trusts of high standing in those countries and not at any time to be invested in what were at the date of his will "trustee investments" or any other fixed-interest stocks, shares or I debentures. Who is to say whether the shares of any given company are in the "blue chip" class or whether any given investment trust is of high-class standing? As a matter of construction of the clause it is, I think, clear that the opinion of the trustees whether any investment is or is not a "blue chip" is not to be decisive. The testator evidently considered "blue chip" investments to be a class of investments existing independently of the judgment of the trustees among which his trustees were to have a power of selection.

(1) The terms of cl. 6 are set out at p. 812, letter H, ante.

Mr. John Arnold Ellert, who has been a member of the Stock Exchange, London, for nearly thirty years, has made an affidavit in which he deals with the meaning of the expression " blue chip ". He says that this term is commonly applied by members of the Stock Exchange and financial journalists to the ordinary stocks and shares of industrial or commercial companies of the highest standing from an investor's point of view, but that there is no strict definition of the term and the opinions of different stockbrokers and others differ as to what stocks and shares can properly be called " blue chips " at any given time. He goes on as follows:

> " I myself am of opinion that the following essential conditions should be satisfied before an investment can be regarded as in the ' blue chip ' class:—(a) The company should have a paid-up capital of not less than £1,000,000. (b) The company should have a dividend record over at least ten years showing a progressive increase, either unbroken or broken only by a decreased dividend in one or two years easily explicable by reference to external conditions (such as a credit squeeze or period of dear money) and followed by resumed progress. (c) The dividend currently paid should be covered by profits of at least double the amount. I should not regard an investment as a ' blue chip ', even though fulfilling the above-mentioned conditions, if its price has for the time being been pushed in my opinion too high so as to over-discount the company's future prospects. Many conservative stockbrokers would restrict the term ' blue chip ' to the ordinary stocks and shares of companies dealing in the necessaries of life or other highly protected trades (for example, Cerebos, Ltd. or Reckitt & Coleman Holdings, Ltd.), but I personally feel that this is too narrow a view."

The conclusion which I draw is that, while there are, no doubt, many investments which all persons competent to judge of such matters would call " blue chips " and many others which no person competent to judge would call " blue chips ", there are a number of investments which some stockbrokers would class as " blue chips " but which other stockbrokers equally competent would not class as " blue chips ". It was argued that this fact does not affect the validity of the clause. A first-class investment is, it was said, a clear enough conception and in case of dispute the court would have to decide on the evidence of stockbrokers whether or not any given investment was or was not first-class, just as it has to decide on the evidence of surveyors whether or not a house is in good tenantable repair. The fact that the evidence of the experts might and probably would be conflicting is, it was said, just as irrelevant in the one case as in the other. The question whether some word or phrase in a legal document can be said to have an objective meaning so that the court can decide on evidence whether or not a particular state of facts falls within it, or whether on the other hand its meaning depends essentially on the views of the man who uses it, often comes before the court. Thus, to take recent examples, one may contrast the decision of HARMAN, J., in *Re Gresham's Settlement, Lloyds Bank, Ltd.* v. *Gresham* (2) where the phrase in question was " by or with whom [he] may . . . be . . . . residing ", with the decision of UPJOHN, J., in *Re Sayer Trust, MacGregor* v. *Sayer* (3), where the word in question was " dependants ".

In this case I feel no doubt on which side of the line the phrase in question falls. Whether or not an investment is " first-class " or " blue chip " depends essentially on the standards applied by the speaker and cannot be regarded as an objective quality of the investment. The testator might have made his trustees the judges; but, as he has not done so, that part of the clause is, in my judgment, void for uncertainty. It follows from this, I think, that the prohibition against investment in trustee or fixed interest investments is also ineffective. That

(2) [1956] 2 All E.R. 193. (3) [1956] 3 All E.R. 600; [1957] Ch. 423.

A prohibition only has a meaning on the footing that the provision for investment in " blue chips " is effective. If that were not so, the result would be that the trustees would have no powers of investment at all.

On the footing that I decided the question of construction as I have done, the summons goes on to ask that the trustees may be given power to invest all or any part of the capital in fully paid ordinary shares or convertible debentures B of companies operating in the United Kingdom, the United States of America or Canada with a paid-up capital of at least £1,000,000. There is no doubt that the court has jurisdiction to make such an order in the case of a charitable trust under s. 57 of the Trustee Act, 1925 (see *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society Charity* (4)) and if this summons had come on last term and the Attorney-General had raised no objection to the proposed C extension of the investment powers, the order asked for would probably have been made. But on Aug. 3 the Trustee Investments Act, 1961, was passed, under which trustees who have no power to invest in ordinary shares are given power to invest up to half of their trust fund in such shares if the company and the shares fulfil the conditions laid down in Parts 3 and 4 of Sch. 1 to the Act. Section 15 of the Act preserves the power of the court to widen the investment D powers of trustees beyond those conferred by the Act; but the powers given by the Act must, I think, be taken to be prima facie sufficient and ought only to be extended if, on the particular facts, a very special case for extending them can be made out.

It is suggested that this case is a special case because here the testator clearly wished his trustees to invest the whole fund in equities and nothing else and E it is only because of the unfortunate wording of cl. 6 that his trustees have not power to do so. For myself, I doubt very much whether the wishes of the testator standing alone would constitute such special circumstances as would justify an extension of the powers of investment beyond those given by the Act, even if the application was supported by all the defendants. It is not, however, necessary for me finally to decide this point, since the Attorney-F General takes the view that in this case the statutory powers are adequate and objects to any extension so far as concerns the ultimate residue. I should certainly not force any extension on him, even if I had power to do so.

So far as the £5,000 legacy is concerned, all the beneficiaries are, as I have said, sui juris and if they wish the trustees to have wider powers of investment with respect to the legacy than the law now gives them, they can confer such G powers themselves on the trustees. I shall therefore make no order on question 3 and leave the trustees to their statutory powers.

Order accordingly.

Solicitors: *Oscar Mason & Co.* (for the plaintiffs); *D. H. Kramer & Co.* (for all defendants other than the fourth); *Treasury Solicitor.*

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

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(4) [1958] 3 All E.R. 465; [1959] Ch. 220.

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JOHNSON *v.* REA, LTD.

[COURT OF APPEAL (Ormerod, Harman and Pearson, L.JJ.), October 5, 6, 1961.]

Dangerous Conditions—Creation of dangerous conditions—Duty to take precautions for the safety of others—Extent of duty, whether merely to warn or to take steps to protect others from injury—Stevedores loading cargo on to ship—Shed floor rendered slippery by soda ash in cargo—No steps taken to remedy this—Lorry man bringing cargo injured through slipping on floor.

B

Negligence—Contributory negligence—Appeal—Judge's reasons—Need for copy of judge's notes of evidence and of his reasons.

Stevedores, employed by shipowners for the loading of a ship at a dock berth, were in control (but not legally occupiers) of a large shed appropriated to the shipowners at a dock berth. A substantial part of this cargo consisted of soda ash, the loading of which had been going on for three or four days. The soda ash was contained in hessian bags, through which some of the soda ash had seeped on to the floor of the shed and become wet, making the floor very slippery. There was no evidence that the stevedores did anything to deal with the danger thus created, the sweeping out of the shed being left to the dock board. The plaintiff, who was not employed by the shipowners or the cargo owners or the stevedores, came to the shed in a lorry to deliver kegs of chemicals for loading into the ship. The employee who was in charge of the stevedores gave the plaintiff instructions for the kegs to be brought through the shed to a place at the wharf side. The plaintiff commented to the employee on the slipperiness of the floor. While carrying a keg on his shoulder through the shed the plaintiff slipped on the slippery floor and was injured.

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At the trial of the plaintiff's action against the stevedores for negligence, no shorthand note was taken. On appeal no note of the judge's reasons signed by him was provided, but the court had before it notes of counsel, which showed that the trial judge had said that he was quite satisfied that the plaintiff was negligent. From the notes reasons for the judge's finding of contributory negligence on the part of the plaintiff did not appear.

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Held: (i) in the circumstances, having regard particularly to the facts that the stevedores created the slippery condition of the floor and knew of the danger, and that they directed the plaintiff, who was there on lawful business in the course of an operation which was one in which the stevedores also were interested, to bring the kegs across the floor, the stevedores owed a duty to the plaintiff, not merely to warn him of the danger, but to take such reasonable steps as could be taken to protect him from injury as result of the danger that they had created (see p. 820, letter A, and p. 822, letter I, post); therefore, as there was no evidence that the stevedores had taken any such steps, nor that no such steps could be taken, the stevedores were liable for negligence.

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(ii) on the material available to the Court of Appeal there had been no sufficient evidence to establish contributory negligence on the plaintiff's part.

Appeal as to (i) dismissed, as to (ii) allowed.

I

[As to the duty of persons creating dangerous conditions to take precautions for the safety of others, see 28 HALSBURY'S LAWS (3rd Edn.) 14, para. 13; and for cases on the subject, see 36 DIGEST (Repl.) 24, 25, *102-112*.]

Case referred to:

Billings (A.C.) & Sons, Ltd. v. *Riden*, [1957] 3 All E.R. 1; [1958] A.C. 240; [1957] 3 W.L.R. 496; 3rd Digest Supp.

A **Appeal.**

The defendants appealed against an order of the presiding judge of the Liverpool Court of Passage made on Dec. 15, 1960, in favour of the plaintiff in an action for damages for negligence arising out of personal injuries sustained by the plaintiff. The presiding judge also held that the plaintiff had been guilty of contributory negligence, and apportioned the blame equally between the defendants and the B plaintiff. The grounds of the defendants' appeal were that the judge was wrong in law in holding, and there was no evidence to justify a finding, that the defendants were guilty of negligence or in breach of duty and that his apportionment of responsibility for the plaintiff's damage was wrong in that the plaintiff should have been found wholly to blame therefor or alternatively to blame to a greater extent than fifty per cent. The plaintiff served a cross-notice submitting C that the judge's order should be varied on the ground that the judge was wrong in holding that the plaintiff was to blame in any way for his accident or alternatively to the degree so found.

R. J. H. Collinson for the defendants.

J. E. Jones for the plaintiff.

D **ORMEROD, L.J.:** This case comes as an appeal against a decision of the presiding judge of Liverpool Court of Passage given on Dec. 15, 1960, when he held that the defendants were liable to the plaintiff in damages for injuries which the plaintiff sustained in an accident, but that the plaintiff himself was guilty of contributory negligence. The judge apportioned the blame between the plaintiff and the defendants equally and, therefore, the amount of the damages E awarded to the plaintiff was only one half. The total sum of damages awarded in the event of the defendants being wholly liable was £560 7s. 8d., and in consequence the sum awarded to the plaintiff was £280 3s. 10d. The quantum of damages in this case has not been challenged and the only issue is that of liability.

The appeal comes before this court in the first place as an appeal by the defendants. The grounds of their appeal are, first, that there was no breach of duty on F their part which was in any way responsible for the accident; and, secondly, that, if there was, the blame which was to be attached to the plaintiff was substantially higher than that attributed to him by the judge. In this court we gave counsel for the plaintiff (the respondent here) leave to file a cross-notice asking for the judgment of the learned presiding judge to be varied on the ground either that the plaintiff was not guilty of any contributory negligence or, if so, G that his share of the blame was substantially less than the fifty per cent. attributed to him by the judge. The matter therefore came before us to be argued on those two questions: whether, in the first place, a duty was owed by the defendants to the plaintiff and there had been a breach of it which was responsible for the plaintiff's injuries; and, secondly, if so, whether and in what proportion there H had been any contributory negligence on the part of the plaintiff.

Although the facts of the case may not be unusual, they give rise to matters which do not appear to have been discussed in this court before; at any rate, the industry of learned counsel has been unable to produce for us any assistance in the way of authority. The facts are as follows. There are in the Birkenhead docks sheds attached to the loading quays, and there was in particular a shed I which was appropriated to the Anchor Line, Ltd. It appears that the Anchor Line had used this particular shed and berth for a number of years; but that is not in evidence and, indeed, is not relevant to the matters which we have to decide. The Anchor Line had employed the defendants, a firm of stevedores, to do the necessary work of loading a ship at this berth with various commodities. These commodities were being stored during the process of loading either in the shed or on the wharf. The shed was a very large one. We have not been given in the evidence or the agreed plan anything like the full dimensions of it, and they may not be material; but it is agreed by both parties that the shed was very large.

At one end of it there was an office, which for the time being, if not always, was used by the defendants so that they could control the work of their stevedores. The man in charge of the stevedore operations at this particular time has been described in the evidence as the receiver of cargo, and his name was Armstrong. A

The accident occurred on June 10, 1959. The plaintiff was the second man of a lorry charged with the duty of delivering kegs of chemicals to the stevedores, which in due course were to be loaded on to the ship. The stevedores were not the occupiers of the shed or the quay, but were merely under contract with the owners of the ship. The plaintiff was not employed by the owners of the cargo (we know nothing about them) and certainly not by the owners of the ship or by the stevedores. On June 9, the lorry arrived at the shed with a load of kegs or drums of chemicals. The plaintiff, as was his duty, went into the shed and found Mr. Armstrong, the receiver of cargo, and obtained from him instructions for the placing of the kegs. B C

It appears that the kegs had to be placed on the quay itself, and the plaintiff said in evidence that he walked back to the doorway of the shed with Mr. Armstrong and he then commented on the slippery nature of the floor. The floor was slippery in this way and for this reason. A substantial portion of the cargo which at that time was being moved into the shed, and, presumably, eventually on to the ship, consisted of soda ash. It arrived in hessian sacks and was being transported by the defendants by means of a mobile crane into the shed and presumably on to the ship. The evidence is that, depending on the amount of moisture, soda ash can be a very fine dust, or it can be something a little more cohesive. If it is a very fine dust, it seeps through the hessian sacks in which it is packed and is deposited on the floor; and the evidence is that so deposited, although it is not as slippery as ice, on a floor of this kind it is slippery. If there is a little moisture in the soda ash it may be that a more cohesive substance is deposited on the floor; or the substance on the floor, after exposure to the damp and pressure being put on it, becomes more cohesive and is then more slippery. But, in any event, any deposit of soda ash, be it fine and dry or be it damp and therefore more cohesive, is a substance which makes the floor slippery. The plaintiff knew this, because he realised when he was walking back with Mr. Armstrong that the floor was slippery; he made some comment to that effect, and Mr. Armstrong agreed. There can be no doubt that both the plaintiff and the defendants' representative were aware of the fact that the floor was slippery and therefore dangerous. D E F

It appears from the evidence—it appears only sketchily, but the learned judge certainly has accepted it in his judgment—that this particular lorry had arrived at the gate of the shed and was going to be unloaded out of its turn. In the circumstances, perhaps it is natural that the driver of the lorry, who apparently wanted to get away, should feel the necessity of wasting no time in discharging his load. It appears from the driver's evidence that, as soon as the lorry was stopped in position, he put the kegs on the floor or deck of the lorry so that they could be removed easily, the idea being that he and his second man (this appears to be the custom in these docks) should deposit the kegs in the place where Mr. Armstrong had asked that they should be deposited, viz., on the wharfside. The kegs were two feet long and fifteen inches wide and weighed about one hundredweight each. The plaintiff picked up the first one and put it on his right shoulder and was carrying it into the shed with the intention of taking it to the place where he had been told to take it when he slipped. As a result of slipping, he fell to the ground, the keg fell on his hand and the injury of which he complains was then caused to his hand. The driver was intending to follow with the second keg, but, naturally, having regard to the accident, he did not do so. G H I

Those are the facts on which the case depends. The learned judge has found, as I have already said, first, that the plaintiff was guilty of contributory negligence to such an extent that he attributed half the blame to him. He had greater difficulty in coming to the conclusion on the other question, whether the defendants had been guilty of any breach, but in the end he decided that they had and

A awarded damages to the extent of £280 3s. 10d. The note of the judgment is not an agreed note, in the sense that it has not been submitted to the learned judge and he has not approved it. But, by the agreement of the parties, we have before us two separate notes, one being a copy of the notes of the judgment taken by counsel for the defendants (the note seems to be fairly complete, although shorn of all words which might not seem strictly necessary) and the other taken by B counsel for the plaintiff, in which he sets out rather more fully what was said by the learned judge. I think the parties are agreed that there is little, if any, difference between the two versions, apart from the fact that one is a little fuller than the other. I will read, purely as a matter of convenience, from the note of the judgment taken by the plaintiff's counsel. In the second paragraph the learned judge says:

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> "The plaintiff slipped on the dangerously slippery floor and fell and sustained an unpleasant injury. Were the defendants negligent? I am quite satisfied that the plaintiff was. The mere knowledge does not destroy negligence. I have to consider whether the defendants ought to have done something. In a short period I do not say they ought to have done anything, but in the time limit and the plaintiff having to carry a one hundredweight keg across a surface known to Armstrong to be dangerous nothing was done to minimise the risk. No one in the defendant firm applied his mind to the danger and it is time they did so."

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The evidence was that, although the defendants had been loading this soda ash for something up to four days and knew that it resulted in the deposit on the floor E which made it slippery, they had done nothing about it. They certainly had not swept the floor. That was done, so far as can be gathered from the evidence, by sweepers employed by the Mersey Docks and Harbour Board, the owners of the dock. That is what I think the learned judge had in mind when he said:

> "In a short period I do not say they ought to have done anything, but in the time limit and the plaintiff having to carry a one hundredweight keg"

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and so on. This was something which did not happen immediately after the soda ash was deposited on the floor. It had been deposited there over a matter of three or four days and, in the circumstances, the learned judge felt that something should have been done and that is why he found the defendants to be negligent.

G As I have said, the industry of learned counsel has been unable to produce for our assistance any other case on this question and we have to decide, therefore, whether any duty was owed by the defendants to the plaintiff; and, if there was, whether there was a breach of that duty. The facts are these. The defendants knew certainly before it happened that the plaintiff was going on to the premises to deliver these kegs of chemicals, if for no other reason, because the plaintiff H went to find Mr. Armstrong and obtained from him directions where they should be put. The defendants also knew (this again, I think, is clear from the evidence) that there was a deposit of soda ash on the floor which made it slippery. The evidence shows that to have been in the mind of Mr. Armstrong, because he and the plaintiff had a conversation about it. There was evidence also before the learned judge that the defendants did nothing at all about it. What they might I have done we do not know. But it has been said in the course of the case that sweeping the floor might have been an effective preventive of this accident. It was also suggested in the evidence that straw might have been put down. But, apart altogether from the evidence, it has been suggested by learned counsel that some form of rush matting or coconut matting could have been put down to make it safe. That is all speculation, of course, and we know not what might have been done to make the floor reasonably safe.

The point that we have to consider is this. Here were premises which quite clearly were not safe because this soda ash was being deposited on the floor and

nothing at all was done to obviate the danger which was bound to be there. The question which has to be posed in those circumstances is: were the defendants reasonable in taking no steps to obviate that danger? I think that the answer must be that they were not reasonable. If any person creates a danger, it is his duty to do something more than to warn people coming on to the premises or coming within the ambit of the danger that it exists. He must take reasonable steps, if such steps can be taken, to obviate the danger to people likely to encounter it. If the case for the defendants was that there was nothing that they could do to make these premises safe in the circumstances, then it was for them to go into the witness-box and say that; but there was no evidence of that kind. The only evidence was that they did nothing. The sweeping of the floor, as I have said, was left to the sweepers employed by the Mersey Docks and Harbour Board. In the circumstances, knowing as they did that the plaintiff was coming on to the premises and not only walking on the floor but carrying kegs of chemicals weighing something which even to an experienced man must be substantial, it seems to me that a duty must have been owed to the plaintiff which was not discharged by the defendants. I would, therefore, answer that question by saying that the learned judge was right in coming to the conclusion that there was on the part of the defendants a breach of their duty to take reasonable care for the safety of the plaintiff.

That is not an end of this case. The further question arises whether, in the circumstances of the case, there was contributory negligence on the part of the plaintiff. The learned judge has said in his argument: "Were the defendants negligent? I am quite satisfied the plaintiff was." I have searched the note of the evidence, which is the only material that we have before us, and have found nothing to indicate the reason for the certainty of the learned judge on this particular matter. It is true that only two lines before he had said:

> "The plaintiff having been shown where the kegs were to go took them. The driver was being done a favour. He tried to whip in the kegs; the driver wanted to get away."

That is the learned judge's interpretation, so far as I can understand it, of the evidence which was given by the driver, Davies, who said in examination-in-chief: "My object would be to get the vehicle out of the way and so not annoy the other drivers." That is common sense, of course. We have been told, and there is no reason to doubt it, that this driver had been done a favour and been given a place and an opportunity to unload in advance of the others, because, apparently, he wanted to get away; and it follows, in those circumstances, that he would be anxious not to waste time. But it was put to the plaintiff, both in examination-in-chief and in cross-examination, that he was moving without taking proper precautions, and his answer was, in the first place, that he moved with caution; and, secondly, knowing the floor was slippery, that he took precautions. Those are the only answers given by the plaintiff on these matters. They were given to the only questions put to him, and there was no reason why he should give any other answers than those.

It appears to me, therefore, that there is no evidence of negligence on the part of the plaintiff, apart from the two matters which have been raised. The first is that it was in any event a slippery floor; and the second, that it is reasonable to assume in favour of the learned judge's finding that the plaintiff was in a hurry and, therefore, moved more quickly on the floor, or took less precaution, than he otherwise would have done. I am bound to say, taking the evidence as it appears in this note, which, as I say, is the only document on which we can act in this court, that there is nothing to show that there was any hurry on the part of the plaintiff; and there is nothing to show other than that he took the precautions which he thought were proper precautions in the circumstances, carrying, as he was, this keg of chemicals on his shoulder. It was put to him that he could have got the kegs to this place in another way; i.e., by rolling them on the floor. He

A disposed of that by saying that had he done that it might have caused damage—meaning, presumably, damage to the keg—because we have been told that the floor of the shed was irregular. That appears to have been accepted by the learned judge and was certainly not raised by him: indeed, the learned judge gives no reason for saying why he was quite satisfied that the plaintiff was negligent.

B In those circumstances, I have come to the conclusion, though with some regret, that this court cannot accept the view of the learned judge that there was negligence on the part of the plaintiff. I would allow the plaintiff's cross-notice and say that there was no negligence on his part.

I will say one more thing. We have been handicapped in this case, as in other appeals from this court, by the fact that there is no transcript of a shorthand note C of the evidence and the judgment, no shorthand note having been taken. We have been given to understand that no shorthand writer is provided in the court and that, if a shorthand note is taken, it is only on the initiative and at the expense of one or other or both of the parties. In those circumstances, it is not for us to complain. I would say, however, that it would be much more convenient if this court had before it in a case of this kind, which depends so much on the evidence, D a transcript of a shorthand note of the evidence and of the judgment of the learned judge, or at least a copy of the judge's notes of evidence and a note of the reasons for his judgment signed by him. I say that because I feel—and I think the other lords justices feel the same—that in this case we have been handicapped in having to rely on notes, so far at least as the judgment is concerned, not approved by the learned judge.

E In the result, I would dismiss this appeal and allow the appeal on the cross-notice.

HARMAN, L.J.: I confess to having felt some little doubt from time to time as to the course which this court ought to take in this case. Here were premises under the control, it is true, of the defendants, but in which they had F no other interest and on which their only duty was to collect goods belonging to other persons (we do not know who) for the purpose of loading them on a vessel owned by the Anchor Line, Ltd. That collocation of circumstances, as I see it, is an unusual one for the lawyer to be confronted with, because there is no relationship of invitor and invitee, nor of employer and servant, nor of anything but the casual coming together of two licensees of a third party on the same G ground. The stevedores had no control over the driver of the lorry and no interest in the goods loaded on the lorry except that of stowing them on board a vessel. In those circumstances, the legal position seems to me to be very obscure. It is not even accurate to say that the slippery condition of the floor was caused by the stevedores. True, they were moving the soda ash over this floor by means of their mobile crane; but they neither owned nor had they packed the soda ash, H and the fact that it seeped through the bags was not in any way their fault or their responsibility. So that to say that they, being in control, had created the dangerous condition of the floor is only partially true. It was agreed by learned counsel, however, that they did owe some duty to whosoever might lawfully come on this shed, and that, I think, we all accept. The only question is as to the degree of duty. Was it only such a degree of duty as could be satisfied by I giving a warning to the other comer? Or was it necessary, in order to discharge their responsibility, to do something more than give a warning; and if so, what more? The evidence is very fragmentary and unsatisfactory on this point. It seems never to have occurred to these people that it was desirable to sweep this floor; they left that to the Mersey Docks and Harbour Board, who apparently did the sweeping between, and not during, the loading of cargoes. No evidence was called about the practice of the board in that respect.

The learned judge came to his conclusion on the ground that this state of things had gone on for four days. He said that, if it had only been temporary, he would

have taken a different view. I find that difficult to follow. How, if I had been the trial judge, I should have concluded this matter I do not feel confident to say; but, as the other lords justices take the view that they do, I do not think that it is for me, who was, after all, trained in another school, to set up my opinion against theirs. I do not dissent, therefore, from the view which I understand them to take, viz., that the learned judge was right and the appeal ought to be dismissed.

On the cross-notice also things are not very easy. The learned judge had no doubt in his mind that there was contributory negligence. The difficulty is to find out why he came to that conclusion. It may merely be that he thought that it was contributory negligence to walk across so slippery a floor at all; in other words, that the driver's mate took the risk with his eyes open and cannot, therefore, exact the full penalty of the damage done to him. I think that, in those circumstances and on the facts as we know them, there is no alternative but for us to say we are not satisfied that there was evidence justifying the learned judge's conclusion; but I must confess that I do not like the position, because, when a judge of this experience feels no doubt about a matter, I have a suspicion that he must have had some good reason for his view. However, it is not disclosed to us, and, situated as we are, our only course is to say that the cross-notice should be allowed, although there may be something to be said on the question of costs. Therefore, I do not dissent from what ORMEROD, L.J., has said on either branch of the case.

PEARSON, L.J.: I agree with the decision which my Lords have reached. In regard to the question arising on the appeal, in my view, there are strong reasons for saying that some duty of care was owing by the defendants, as stevedores, to the plaintiff. There are several factors which make it easy to find that there was such a duty. It is true that the defendants were not the employers of the plaintiff, and they were probably in law for some purposes not occupiers of the premises. But they were there as stevedores making use of the premises, and they had been making use of them in the same operation of moving soda ash to the place where it could be loaded on board ship for some three or four days. They had been in the course of their work as stevedores transporting that material by means of a mobile crane. I think the material was contained in hessian sacks, which were carried in slings; at any rate, the work was being done in such a way that some of the fine film or powder escaped on to the floor, and in the course of time, when that fine powder became wet, it became slippery. That was a danger which the defendants by their own operations had created and were continuing to create. The evidence does not show whether they were making it worse or not, though it is reasonable to suppose at least that the spread of the film of soda ash was becoming wider and wider in the course of their operations. They were thereby creating a dangerous condition of the floor which would be dangerous for any persons who might come there and walk on the floor.

It may be that they would owe a duty of care to anyone who came on lawful business of any kind, or perhaps to anyone who came lawfully as a mere visitor. But the plaintiff in this case was in a much stronger position in relation to the defendants. He was there on his own lawful business in the course of his employment to bring goods into this shed, and he was doing that in the course of an operation which was of interest to the defendants as well as to himself. These goods that he was bringing were to be loaded in the same ship by the defendants as stevedores. Thus what he was doing was a matter of interest to them as well as to him and his employers. Moreover, they not only knew what he was intending to do, but they actually directed him to do it. They, the defendants, directed him to bring the goods across the shed to put them down in a particular place. Having regard to that situation, it seems to me plain that the defendants owed to the plaintiff an obligation to take reasonable steps, if any reasonable steps could be

A taken, to protect him against harm which might result from the danger which they themselves had created.

That being the principle, it becomes a question of fact to be decided in all the circumstances of the case whether any reasonable steps could have been taken by the defendants to protect the plaintiff against the risk; or, putting it another way, whether a reasonable man in the position of the defendants would have taken B some steps for that purpose. That is a matter of fact, and, in my view, there is not strictly speaking any question of burden of proof arising with regard to it. But one can reasonably approach the question of fact in this way: that, if there is a situation of risk created by the defendants, and if it seems, as a matter of common sense, fairly obvious that there must be something that they can do to protect the incoming plaintiff against the risk which they have created, then presumably C they ought to do something. Prima facie they ought to do something, and, if their contention is that there is nothing they can do, then they ought to go into the witness-box and say so. In the absence of any evidence from them, it would be reasonable to arrive at a decision that the prima facie position is correct: that they must have been able to do something. They did not do anything. That, as I read the learned judge's judgment in this case, is the way in which he D approached the matter. He said:

> "I have to consider whether the defendants ought to have done something. In a short period I do not say they ought to have done anything, but in the time limit and the plaintiff having to carry a one hundredweight keg across a surface known to Armstrong to be dangerous nothing was done to minimise the risk. No one in the defendant firm applied his mind to the danger and E it is time they did so."

Quite manifestly, the learned presiding judge was taking the particular facts and circumstances of this case into account and was coming to the conclusion, on the evidence as it stood, that they presumably could and should have taken some steps; and, as they failed to do so, he held that there was a breach of duty on F their part. In my view, on the evidence, that was a perfectly reasonable conclusion to which the learned judge could come, and, indeed, it was the obvious conclusion to which he rightly came.

That is the position so far as the appeal is concerned, but before I leave it I would just mention that, although the case is very different on the facts, some assistance can be derived from *A. C. Billings & Sons, Ltd.* v. *Riden* (1). That was G a case in which the plaintiff's contention was much more difficult than in this case, because there the dangerous place existed on a piece of land to which the defendants had no access, and it was a dangerous place which they had not created. But, in spite of that, on the facts of the case it was held that a duty was owing by the defendants to the plaintiff and there was a breach of it. One can find in the headnote and in certain passages in the speeches (2), statements of H the principle involved. In my view, this case is a fortiori to that one.

As to the second point, which arises on the plaintiff's cross-appeal, the position is more difficult, as my Lords have said, because there was an apparently quite confident finding by the learned presiding judge, who knows a great deal of what goes on in the Birkenhead docks, that the plaintiff was negligent. One has inevitably an uneasy feeling that more facts could have been proved, or more facts I assumed by those who knew the situation very well, than appear in the material before us. I feel bound to concur, however, in the conclusion that, on the material before us, there is no evidence of contributory negligence on the part of the plaintiff. In my view, it cannot be said that he was at fault in continuing with his work. He knew that there was some risk, but it would appear to him to be a risk which he reasonably could and should take. Once that decision was taken, he had to walk with the keg on his shoulder over the slippery floor, and this

(1) [1957] 3 All E.R. 1; [1958] A.C. 240.
(2) [1957] 3 All E.R. at pp. 5, 10, 12, 13, 14; [1958] A.C. at pp. 250, 258, 262, 263, 264.

result happened. There is no evidence to show that he walked with undue haste, or that he failed to take care or to look where he was putting his steps, or that there were any precautions which he should have taken and failed to take. Therefore, on the evidence as it stands, I feel bound to agree that there is no proof of contributory negligence on the part of the plaintiff and that he should succeed on the cross-notice. I agree with the order proposed.

Appeal dismissed. Judgment varied on the cross-notice. Leave to appeal to the House of Lords refused.

Solicitors: *Hill, Dickinson & Co.* (for the defendants); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiff).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re SMITH'S WILL TRUSTS. BARCLAYS BANK, LTD. *v.* MERCANTILE BANK, LTD. AND OTHERS.

[Chancery Division (Wilberforce, J.), October 4, 1961.]

Charity—Uncertainty—Hospital—Gift to "hospital" and/or hospitals and/or charitable institutions—Whether gift void.

By cl. 8 of his will the testator directed his trustee, a bank, to hold certain funds on trust to pay or apply the same and the income thereof to or for the benefit of such hospital and/or hospitals and/or charitable institutions as the chairman for the time being of the bank should in his absolute and uncontrolled discretion think fit.

Held: although the word "hospital" commonly denoted an institution fulfilling charitable purposes, not all hospitals were charitable institutions, and the gift could not be construed as a gift for such charitable purposes as hospitals existed to perform; accordingly, as the clause was disjunctive in form, so that the gift might be applied to non-charitable hospitals to the exclusion of charitable objects, the whole gift was void for uncertainty.

Re White ([1893] 2 Ch. 41) distinguished.

Re Padbury ((1908), 7 C.L.R. (Aus.) 680) and *Dunne* v. *Byrne* ([1912] A.C. 407) considered.

[As to a gift to a charitable society being construed as a gift for the general purposes of the society, see 4 Halsbury's Laws (3rd Edn.) 267, para. 562; and for cases of gifts to such societies, see 8 Digest (Repl.) 334, 335, *148-156*.

As to the legal meaning of hospital in relation to charity, see 4 Halsbury's Laws (3rd Edn.) 391, para. 817.]

Cases referred to:

Dilworth v. *Stamps Comr.*, *Dilworth* v. *Land & Income Tax Comrs.*, [1899] A.C. 99; 8 Digest (Repl.) 319, *16*.

Dunne v. *Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest (Repl.) 392, *858*.

Grimond v. *Grimond*, [1905] A.C. 603 App.; (1904), 6 F. (Ct. of Sess.) 285; *revsd.* H.L., [1905] A.C. 124; 74 L.J.P.C. 35; 92 L.T. 477; 8 Digest (Repl.) 396, *882*.

Income Tax Special Purposes Comrs. v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 312, *1*.

Padbury, Re, Home of Peace for the Dying and Incurable v. *Solicitor-General*, (1908), 7 C.L.R. (Aus.) 680.

Royal Antediluvian Order of Buffaloes v. *Owens*, [1928] 1 K.B. 446; 97 L.J.K.B. 210; 138 L.T. 644; 13 Tax Cas. 176; 28 Digest (Repl.) 15, *54*.

White, Re, White v. *White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 8 Digest (Repl.) 334, *150*.

A **Adjourned Summons.**

This was an application by originating summons by the plaintiff, Barclays Bank, Ltd., the sole executor and trustee of the will dated Jan. 19, 1931, and codicils dated Sept. 21, 1933, and Feb. 9, 1938, of the testator, Alfred Brooke Smith, deceased, who died on Apr. 6, 1938, for determination of the question whether the trust in cl. 8 of the testator's will, to pay or apply the funds in the B clause mentioned and the income thereof to or for the benefit of such hospital and/or hospitals and/or charitable institutions as the chairman for the time being of Barclays Bank, Ltd., should in his absolute and uncontrolled discretion think fit, was a valid charitable trust. The defendants were five persons claiming to be entitled to interests in the testator's residuary estate on the footing that the trust declared by cl. 8 of his will was void, and Her Majesty's Attorney-C General.

E. G. Wright for the plaintiff, Barclays Bank, Ltd., sole trustee.
S. W. Templeman for the defendants other than the Attorney-General.
B. J. H. Clauson for the Attorney-General.

D **WILBERFORCE, J.:** The question which I have to decide on this summons relates to the validity or otherwise of a disposition contained in the will of Alfred Brooke Smith, deceased. That will was made on Jan. 19, 1931, and the testator died on Apr. 6, 1938. The relevant trust, however, only came into effect on the death of his widow on Aug. 8, 1959, she having enjoyed a life interest under the will. The trust in question is contained in cl. 8 of the will, which provides for the devolution of the testator's residuary estate in the event, which happened, E of his having no children who attained a vested interest. Apart from two small fractions which have been previously disposed of, the whole of the residuary estate, including also certain funds under the marriage settlement of the testator which was dated Dec. 9, 1918, were given to the trustees of the will on the following trusts:

F > "Upon trust to pay or apply the same and the income thereof to or for the benefit of such hospital and/or hospitals and/or charitable institutions as the chairman for the time being of Barclays Bank, Ltd. shall in his absolute and uncontrolled discretion think fit . . ."

Then there was a reference to a memorandum which the testator might leave G with his will, with which provision I am not concerned.

I should say at this point that no question (so it is agreed between the parties) arises here of the application of the Charitable Trusts (Validation) Act, 1954, and I am not concerned with any question of the application of that Act. The only question that I have to decide is whether the bequest which I have read is or is not a valid disposition.

H Now it is attacked on behalf of the next of kin on perfectly straightforward grounds. It is said that the chairman for the time being of Barclays Bank, Ltd. has a discretion to apply the whole or any part of the residuary estate for any of the objects mentioned. The clause is cast in a disjunctive form, although the expression "and/or" is employed, and it is clear that it is perfectly open to the chairman of Barclays Bank, Ltd. to devote the whole of the residue or any part I of it to one set of objects to the exclusion of the other. It is therefore open to him to give the whole or part of the residue to or for the benefit of such hospital and/or hospitals as he shall at his discretion think fit, and if it is the case, say the next of kin, that in so applying the residue some part of it might be given for non-charitable purposes then the whole gift is void. That proposition is perfectly sound, and it is followed, of course, by the further proposition that in fact in giving effect to the first part of this bequest, that part which relates to hospitals, it is open to the chairman of Barclays Bank, Ltd. to devote part of the residue or the whole of it to non-charitable purposes, the reason being that

hospitals, though many (indeed, most) are charitable institutions, are not necessarily charitable institutions, and consequently a devotion of the funds to non-charitable purposes is open under the terms of the will. A

The next of kin further point to the frame of the clause as lending support to the argument that under the first part of it non-charitable objects may be included. The clause reads "for the benefit of such hospital and/or hospitals and/or charitable institutions as the chairman . . . shall . . . think fit". The words used are not "and/or other charitable institutions"; and it is said that by making the disjunction between "hospitals" on the one hand and "charitable institutions" on the other the testator or his draftsman has indicated his view that hospitals are not by themselves within the class of charitable institutions. That is the argument for the next of kin, and it is a formidable one. B

Support is sought to be lent to it by authority in the form of a Scottish case, *Grimond* v. *Grimond* (1) which ultimately went to the House of Lords. The wording of the gift there was not at all dissimilar from the gift with which I am concerned. The direction given by the testator was to divide a portion of the residue of his estate "to and among such 'charitable or religious institutions and societies'" as his trustees might select. So that it is seen that there again is a gift in a disjunctive form, one limb of the disjunction being charitable, the other limb being something which might be charitable or which might not be charitable. It was held in the case in the House of Lords, reversing the decision of the Court of Session, that the bequest was void for uncertainty. The speeches in the House of Lords (2), which were apparently not considered speeches, are unfortunately extremely brief and do not afford much guide as to the principle on which the decision was based; but three of the learned Lords expressed their concurrence with the judgment given by LORD MONCREIFF in the court below (3). A reference to that judgment, which was a dissenting judgment, shows the basis on which the decision of the House of Lords must have proceeded. It seems clear from that report that the House of Lords (1), following LORD MONCREIFF, decided that at any rate so far as the law of Scotland is concerned a gift for religious purposes or to religious institutions is not of itself a charitable gift. LORD MONCREIFF, in giving his judgment (4), dissociated himself from certain English decisions, particularly from the Court of Appeal decision in *Re White, White* v. *White* (5), to which I shall later refer, and made it plain that so far as the law of Scotland was concerned he was not prepared to hold that the second limb of the gift in that case, namely the gift to "religious institutions", carried with it any specifically charitable implication. C D E F G

From that aspect of the decision it is apparent that no support can really be gained for the next of kin's argument here. However it is fair for them to rely on the decision to this extent, that it seems to have held or proceeded on the basis that a reference to charitable institutions and societies in the gift, or rather in one of the limbs of the gift, does not colour the rest of the gift in such a way as to help its validity if standing alone it would not otherwise be valid. To some extent, therefore, the decision in *Grimond* v. *Grimond* (1) can be invoked in aid of the next of kin's argument; but the main force of their contention rests, I think, on the wording of this particular gift and what would appear to be its natural interpretation. H

Now, against that, counsel for the Attorney-General puts forward a number of arguments in support of the contention that the whole of this gift is valid and that in effect no application of the residue for other than charitable purposes can be made. In the first place I was referred to a statutory provision which it was said indicated that in the view of the legislature hospitals are considered to be, prima facie at any rate, charitable institutions. That statutory provision in its present form is in s. 447 of the Income Tax Act, 1952, but a similar provision I

(1) [1905] A.C. 124. (2) [1905] A.C. at pp. 126, 127. (3) [1905] A.C. at p. 607.
(4) [1905] A.C. at p. 609. (5) [1893] 2 Ch. 41.

A seems to have been included in the income tax legislation from a very much earlier date (6). That is a section dealing with exemption of charities from various taxes. Subsection (1) (a) deals with exemption from tax chargeable under Sch. A or in certain cases under Sch. D. The exemption there is said to be available in respect of hereditaments belonging to hospitals, public schools or almshouses or vested in trustees for charitable purposes, so far as the same are applicable for B charitable purposes only. Now it seems to me, reading that subsection, that it does not lend any support to an argument, whatever might be the ultimate consequences of such an argument, that in the view of the legislature when it passed that section hospitals were regarded as necessarily charitable. On the contrary, the implication would to my mind seem to be the other way, because the exemption after having been given to hospitals is stated only to be available C so far as the hereditaments are applied to charitable purposes only. So it was in the contemplation of the legislature, it would seem to me, that it was possible for hospitals not to enjoy the benefit of this particular exemption.

That section or the corresponding provision in earlier legislation (7) was considered by the court in 1927 in *Royal Antediluvian Order of Buffaloes* v. *Owens* (8). That was a case of a friendly society; the question was whether an D exemption from Sch. A could be obtained, and ROWLATT, J., had to consider the scope of the exemption. In that case he decided that it was necessary for an institution, in order to enjoy the exemption, to possess what he called an eleemosynary character. In other words, he did not accept the proposition that it was enough for the institution to be specifically referred to in the section; it was necessary for the additional element of some eleemosynary character to E be added. ROWLATT, J., said (9):

> "There is one limitation which, it appears from authority, must be applied to the word 'hospital' in r. 1 (c), and that is that there must be some eleemosynary element about the maintenance of an institution to constitute it a hospital within the rule."

F He recognised three types of hospitals which might exist, not all of which were exclusively charitable, and it seems to me that he accepted an interpretation of the section by which "hospital" by itself was not necessarily charitable and did not get the benefit of the particular exemption unless there was an eleemosynary element added to it. So that s. 447 of the Income Tax Act, 1952, coupled with a consideration of it by the court, does not lend support to the proposition G that the word "hospital" has been given a prima facie charitable sense by the legislature.

Then reference was made to passages in the judgments in two other cases. The first case was *Income Tax Special Purposes Comrs.* v. *Pemsel* (10), and the passage invoked was from the speech of LORD HERSCHELL, who said this (11):

> "I am unable to agree with the view that the sense in which 'charities' H and 'charitable purpose' are popularly used is so restricted as this [viz., limited to the relief of persons from physical privations or suffering arising from poverty] I certainly cannot think that they are limited to the relief of wants occasioned by lack of pecuniary means. Many examples may, I think, be given of endowments for the relief of human necessities, which would be as generally termed charities as hospitals or almshouses, where, I nevertheless, the necessities to be relieved do not result from poverty in its limited sense of the lack of money."

Now it does not seem to me that the reference there to "hospitals or almshouses", which, LORD HERSCHELL said, would be generally termed charities, is to be

(6) See the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61.
(7) Income Tax Act, 1918, s. 37, Sch. A, No. 6, r. 1 (c).
(8) [1928] 1 K.B. 446.
(9) [1928] 1 K.B. at p. 451.
(10) [1891] A.C. 531.
(11) [1891] A.C. at p. 571.

taken as an expression of opinion that the word "hospital" or for that matter the word "almshouses" when they are used by themselves necessarily involve a charitable institution. His mind was not directed to that sort of point at all. He was only concerned to point out that there could be charitable purposes concerned with matters other than the relief of poverty, such as, for example, the care of the sick. It would be quite unjustifiable to draw from that passage an implication that LORD HERSCHELL thought that necessarily hospitals or almshouses were to be considered as charities.

Then there was *Dilworth* v. *Stamps Comr.*, *Dilworth* v. *Land & Income Tax Comrs.* (12) which is a Privy Council case on appeal from New Zealand. The following passage from the judgment of the Board, which was delivered by LORD WATSON was referred to (13):

> "'Hospital' is a word of wider and more variable meaning, and primarily signifies a place built for the reception of the sick or the support of the aged or infirm poor. It has been used in Great Britain, in some instances, to denote an institution in which poor children are fed and educated. But that is not the ordinary meaning of the word; . . ."

There the question which was being considered was quite a different one from that which is before me. The immediate question which had to be decided was whether a gift for the maintenance and education of boys who were orphans or the sons of parents in straitened circumstances was charitable within the meaning of a certain New Zealand tax exemption Act, and it was held that it was, notwithstanding that the institute to be formed was directed to be managed by the members, and its inmates to be instructed in the tenets, of a particular religious sect. In the passage in question LORD WATSON was examining an argument whether the gift was a charitable bequest within the meaning of s. 2 of the tax exemption Act. He pointed out (14) that there were two classes of objects, one of which had to be of a public and not a private character, and consisted of public institutions such as libraries, museums, and so on, and the second of which, introduced by the alternative "or", consisted of hospitals, orphan, lunatic, or benevolent asylums, dispensaries. The relevant point there was that the word "public" which applied to objects of the first class was not repeated in or connected with the objects of the second class. That was the disjunction or distinction which was relevant for the purposes of that case. The Privy Council, being there concerned with a different point, namely the question whether the institution was to be public or private, was not concerned with the question whether the word "hospital", particularly when used in a bequest in a will, necessarily and naturally meant an institution existing for charitable purposes.

The next case that was relied on is perhaps of more direct application here; at least, the passage which was cited and relied on is more nearly relevant. The case is a decision of the High Court of Australia which was decided in 1908, *Re Padbury, Home of Peace for the Dying and Incurable* v. *Solicitor-General* (15). The gift in that case was a gift to certain trustees for the time being of "the hospitals and lunatic asylums in the said colony", which was the colony of Western Australia, to be divided among them equally. It was held that the word "hospitals" included public hospitals existing at the date of the testator's death which had been proclaimed under the Hospitals Act of 1894, and hospitals then established which were governed by elected committees, but did not include hospitals which were wholly maintained at the public expense and were subject to the entire control of government officers. The relevant point on which the decision focused was that it could not be said that a gift to trustees of hospitals was appropriate to cover the case of hospitals not managed by trustees but managed by some public official or some public board. The decision, therefore,

(12) [1899] A.C. 99. (13) [1899] A.C. at p. 107. (14) [1899] A.C. at p. 106.
(15) (1908), 7 C.L.R. (Aus.) 680.

A is not relevant to the present case, but reliance was placed on a passage in the judgment of GRIFFITH, C.J., who said (16):

> "The term 'hospital' is not a term of art, and may have different meanings in different countries. In Australia it is commonly used to denote an institution for the medical or surgical treatment of persons suffering from bodily ailment or injury. Used without the adjective 'private' prefixed, it commonly means a charitable institution of that kind, whether supported wholly, or in part, or not at all, by voluntary contributions. Other charitable institutions which are in some countries included in the term 'hospital' are in Australia ordinarily called by other names."

B

He then goes on to point out that there were in Western Australia many institutions managed by boards or committees of management, while others were managed by government officers. Now, leaving aside the question whether that statement, applying as it does on its face to the use of the word "hospital" in Australia, is relevant to the use of that word in this country, it does not seem to me that it is in any way conclusive as to the meaning which should be placed on the word "hospital" where found in a will. No doubt, as GRIFFITH, C.J., says, the word is commonly used to denote an institution for medical treatment of persons suffering from bodily ailment, and it commonly means a charitable institution of that kind; but it does not seem to me that he goes to the length, or could go to the length, of saying that where the word "hospital" is found in a will it is to be construed, or even prima facie construed, as limited to charitable institutions. That point was not relevant to the decision, and I take it simply as a statement of fact which one can quite well accept, that at first sight one normally has in mind when referring to a hospital something of a public character fulfilling charitable purposes and that one is not thinking of private institutions; but it is not to my mind a decision or a dictum that as a matter of construction the word does not include, and is not normally capable of including, the non-charitable type of hospital. Therefore, while paying every respect to what has fallen from the Chief Justice in the High Court of Australia, I do not feel that it solves the problem which I have to deal with.

C D E F

I now come to a much more substantial argument, which indeed seems to me to be the main point of contest in this case and which has caused me considerable difficulty. It was pointed out that a somewhat analogous question to this came before the Court of Appeal in 1893 in *Re White*, *White* v. *White* (17) and I am invited to apply the principle of that decision by analogy to the present case. In that case the court was concerned with a gift to religious societies, not to hospitals, the gift in question being in the following terms: "To the following religious societies", then there followed a blank, "to be divided in equal shares among them". The question was whether, in view of the blank, the gift was void for uncertainty or whether the trust was one for charitable purposes which could be implemented by way of a scheme. The Court of Appeal, reversing KEKEWICH, J., reached the conclusion that the trust was an effective trust for charitable purposes. LINDLEY, L.J., who gave the only judgment in the Court of Appeal, first of all pointed out (18) that a religious society may or may not be a charitable society in the sense in which that expression is used; in exactly the same way as here a hospital may or may not be a charitable institution. He then went on to say (19):

G H I

> ". . . as all religious societies are not charitable, we should, in the absence of authority, be unable to come to the conclusion that 'charity' was intended, and we should, therefore, be of opinion that the result was an intestacy."

He, therefore, in effect accepted the same argument as is put forward here by the next of kin, namely, that since it was possible for a non-charitable application

(16) (1908), 7 C.L.R. (Aus.) at p. 686.
(17) [1893] 2 Ch. 41.
(18) [1893] 2 Ch. at p. 51.
(19) [1893] 2 Ch. at p. 52.

to be made, the gift was void. However, he then went on to refer to authority, and after referring to a number of cases he came to the conclusion that there was authority on the question of religious societies and religious purposes which enabled, and indeed bound, the court to hold (20) that the gift in question must be treated as a gift for religious purposes, and once that point had been reached he was able to hold that, being a gift for religious purposes, it was within the ambit of the Statute of Elizabeth (21) and was therefore charitable.

I am therefore invited by analogy to follow the same type of process and to say that although the gift here is a gift to hospitals it should be interpreted as a gift for the charitable purposes for which the hospitals exist, namely, the relief of the aged or impotent, and consequently a gift for valid charitable purposes.

Now that case has been commented on by the Privy Council in *Dunne* v. *Byrne* (22), decided in 1912. That was the case of a bequest to an archbishop to be expended in the way most conducive to the good of religion in a particular diocese. It was held that that was not a good charitable bequest. The decision mainly went, as I understand it, on the word " conducive " being held to fail to connect the bequest sufficiently with a charitable purpose and in particular with religious purposes. But the judgment in that case delivered by LORD MACNAGHTEN does consider with some care *Re White* (23). After referring to the decision of KEKEWICH, J., and the Court of Appeal, LORD MACNAGHTEN says (24):

> " The Court of Appeal held that the gift was in substance a gift to ' religious societies for religious purposes ', and so holding they considered themselves bound by a long stream of authority to determine that the bequest was a good charitable gift. Whether they were right in so construing the unfinished sentence before them may perhaps be doubted, but it is perfectly clear that they did not mean to lay down any new law, or to extend the law as laid down in former decisions. All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although the Master of the Rolls did observe that (25) ' a religious society may or may not be a charitable society in the sense in which that expression is used.' "

That passage undoubtedly indicates a certain lack of enthusiasm for the decision in *Re White* (23), and the point which LORD MACNAGHTEN clearly considered doubtful was whether the Court of Appeal was justified in interpreting a gift to religious societies as a gift for religious purposes. However, the decision was accepted, as indeed it had been put by the Court of Appeal, as following from previous decisions.

Now, should I extend, in the face of those two authorities, the decision of the Court of Appeal to the gift in the present case? It seems to me that I should not do so. It may be very well to interpret a gift to religious societies as a gift for religious purposes, but to invite me, as here, to interpret a gift to or for the benefit of hospitals as a gift for specified charitable purposes goes considerably further. The charitable purposes in question for which the gift might be said to be made could only be extracted from the Statute of Elizabeth and would have to be phrased as a gift for purposes of the relief of the aged or impotent. To interpret the gift in that way seems to me to involve a much more strained construction even than that which was adopted in *Re White* (23), a construction which itself was evidently considered by the Privy Council as justified by authority, but apart from authority as being perhaps open to question. If a gift of this kind, namely a gift to such an institution as a hospital, is to be rephrased as a gift for such charitable purposes as hospitals exist to perform, one may ask whether a gift to schools would similarly be phrased, namely a gift for such charitable purposes connected with education as schools exist to perform. To embark on

(20) [1893] 2 Ch. at p. 53.
(21) 43 Eliz. 1 c. 4.
(22) [1912] A.C. 407.
(23) [1893] 2 Ch. 41.
(24) [1912] A.C. at p. 411.
(25) *Re White*, [1893] 2 Ch. at p. 51 per LINDLEY, L.J.

A such a course seems to me to open the door to very great difficulties, and I do not think that such a radical reinterpretation of this part of the clause is here justified.

Giving, therefore, full consideration to *Re White* (26), which is, of course, binding on me, and avoiding (as I hope I do) any unjustifiable or unduly narrow distinction from that case, it does seem to me that the principle of it does not B extend to such a phrase as I have here, and that I ought to interpret these words at their face value in their natural sense as enabling the trustees to give the residue, or some part of it, to hospitals, such hospitals being, as is really not disputed, either charitable or non-charitable institutions.

That being so, I have come to the conclusion that the gift is not a valid charitable gift and that the bequest is void for uncertainty.

C *Order accordingly.*

Solicitors: *Corbin, Greener & Cook*, agents for *Beaumont & Sansom*, Coggeshall, Essex (for the plaintiff, Barclays Bank, Ltd.); *Sanderson, Lee, Morgan, Price & Co.* (for the defendants other than the Attorney-General); *Treasury Solicitor.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

D

E

NOTE.

GARDINER *v.* MOTHERWELL MACHINERY AND SCRAP CO., LTD.

F [HOUSE OF LORDS (Lord Reid, Lord Cohen, Lord Hodson and Lord Guest), May 31, June 1, July 6, 1961.]

Master and Servant—Liability of master—Causation—Presumption—Disease contracted by servant after being subjected to conditions likely to cause it—Servant not having previously suffered from the disease.

G [**Editorial Note.** The present decision may be considered with the incidence of the burden of proof stated in *Bonnington Castings, Ltd.* v. *Wardlaw* ([1956] 1 All E.R. at p. 618, letters F, G).

As to the need to establish that the breach of duty caused the injury, see 25 HALSBURY'S LAWS (3rd Edn.) 510, para. 976, text and note (a).]

H **Appeal.**

The appellant was employed by the respondents from May to August, 1955, being engaged on demolishing buildings and boilers. The nature of the work was liable to cause dermatitis, for he was working among dust, dirt, oil and grease. He contracted dermatitis. The disease started on the back of his right hand and spread to both hands and all over his body. On Aug. 24, 1955, he visited a doctor, I Dr. Dunlop, who found that he was suffering from the skin disease. Between Aug. 24 and Aug. 30, 1955, the appellant, on Dr. Dunlop's instruction, applied Castellani's paint, which was a red paint, to his arms, legs, abdomen and feet. Dr. Dunlop sent the appellant to Stobhill clinic with a letter, dated Aug. 30, 1955, which said "This man started off with a condition resembling cheiropompholyx of his hands. It has now spread to his arms and body and despite treatment with Pig. Magnet and Debiston the lesion progresses." The appellant was

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(26) [1893] 2 Ch. 41.

seen at the clinic by Dr. Dewar, and on Sept. 13 by Dr. Logan. Both had to rely on Dr. Dunlop's report and were unable to make any independent diagnosis owing, it seemed, to the red paint. There were recurrences of the disease in and after 1958, in which year the appellant returned to the clinic and was again seen by Dr. Dewar and Dr. Logan and also by a Dr. Fergusson. The appellant brought an action against the respondents at common law on the ground that the nature of his work was liable to cause dermatitis and that they ought to have provided him with proper washing facilities as a preventive against the disease. It appeared from the medical evidence at the trial that there were many forms of skin disease or dermatitis and that certain forms were unlikely, as others were likely, to arise from contact with dust, dirt, oil and grease. At the trial, three witnesses gave expert evidence for the respondents that the kind of dermatitis which was diagnosed was not caused by the nature of the appellant's work. These witnesses were Dr. Dewar, Dr. Logan and Dr. Fergusson. Against this evidence, the appellant contended that their opinions were based not on their own observations, but on inadequate or misleading information originally supplied to them. The alleged misunderstanding appeared to have arisen, so it was contended, out of the mention in Dr. Dunlop's report of cheiropompholyx. Two specialists gave evidence at the trial for the appellant, but of these the evidence of one was not material; the other (Dr. Harvey) did not see the appellant until June, 1958, and his opinion was in favour of the appellant. He diagnosed dermatitis and, having been informed of the nature of the appellant's work, expressed the opinion that the dermatitis had been caused by the dirt and other substances amongst which the appellant had been working. At the trial, the Lord Ordinary (LORD KILBRANDON) held that the respondents had failed to provide proper washing facilities and that the appellant's disease and disability must be attributed to this failure; damages were assessed at £3,000. On appeal, the respondents did not dispute the failure of duty or the assessment of damages, but contended that the disease was not caused by the appellant's work. The First Division of the Court of Session allowed the appeal. The appellant appealed to the House of Lords. The appeal is reported only on the point of the presumption referred to in the opinion of LORD REID.

G. G. Stott, Q.C., and *I. MacDonald* (both of the Scottish bar) for the appellant.

I. H. Shearer, Q.C., and *W. A. Elliott* (both of the Scottish bar) for the respondents.

The House took time for consideration.

July 6. The following opinions were read.

LORD REID, having stated the nature of the proceedings and having reviewed the medical evidence, concluded as follows: I can now sum up my view in this way. The appellant never suffered from dermatitis before he was exposed during his employment by the respondents to conditions liable to cause that disease. His original symptom—an outbreak on the back of his hand—is admittedly typical of industrial dermatitis. Dr. Dunlop's use of the term "cheiropompholyx" to describe a condition which started in this way misled the specialists at Stobhill clinic into thinking that it had started in a different way which would be a strong indication that the condition was not due to an industrial irritant, and that misunderstanding continued to influence their view throughout. It is true that they all say that the whole picture points to a non-industrial origin, but they say that for different reasons and none has taken into account the way in which we now know that the disease first showed itself.

In my opinion, when a man who has not previously suffered from a disease contracts that disease after being subjected to conditions likely to cause it, and when he shows that it starts in a way typical of disease caused by such conditions, he establishes a prima facie presumption that his disease was caused by those conditions. I think that the facts proved in this case do establish

A such a presumption. That presumption could be displaced in many ways. The respondents sought to show, first, that it is negatived by the subsequent course of the disease and, secondly, by suggesting tinea pedis as an equally probable cause of its origin. I have found the case difficult but, on the evidence as it stands, I have come to the opinion that they have failed on both points. If the appellant's disease and consequent loss should be attributed to the work which B he was doing in the respondents' service, it was not argued that they were not liable. Accordingly, in my judgment, this appeal should be allowed and the interlocutor of the Lord Ordinary restored.

LORD COHEN: I have had an opportunity of reading the speech of my noble and learned friend, LORD REID. I agree entirely with his reasoning and C conclusion. [HIS LORDSHIP referred to a reason given by the Lord Ordinary for his conclusion at the trial, and concluded:] I agree with the Lord Ordinary and LORD REID that the hypothesis on which the respondents' dermatologists proceeded was wrong and that, for the reasons given by LORD REID, this appeal should be allowed.

LORD HODSON: As Dr. Logan, one of the respondents' medical witnesses, D said, this is a most puzzling and difficult case, and, at the conclusion of the hearing, I was not satisfied that, on consideration of the whole of the evidence, the appellant had made out his case. I am now, however, persuaded by the speech of my noble and learned friend, LORD REID, that the appeal should be allowed for the reasons which he has given. [HIS LORDSHIP then went on to refer to the evidence of the medical witnesses for the respondents being based on E the assumption that the initial diagnosis of cheiropompholyx was correct.]

LORD GUEST delivered an opinion allowing the appeal, in which he considered the medical evidence but did not express any view on the existence of the presumption referred to at p. 832, letter I, ante. He concluded: The evidence of the respondents' doctors is, in my opinion, not sufficiently convincing to persuade F me that the appellant did not contract the disease through his employment. On the contrary, the facts of the case taken with Dr. Harvey's evidence are, in my view, sufficient proof that his contraction of the disease was due to his employment.

Appeal allowed.

Solicitors: *Campbell, Hooper & Todd, Fournier & Roberts,* agents for *Harold Dykes & Co.*, Glasgow, and *Courtney & Co.*, Edinburgh (for the appellant); *Blakeney & Co.*, agents for *Biggart, Lumsden & Co.*, Glasgow, and *Campbell Smith Mathison & Oliphant*, Edinburgh (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

A

L. *v.* L.

[COURT OF APPEAL (Willmer and Davies, L.JJ.), October 20, 23, 1961.]

Divorce—Maintenance—Wife—Dismissal by consent—Acceptance of lump sum in full satisfaction of present and future rights—Subsequent application by wife for maintenance and secured provision—Whether subsequent application competent—Whether subsequent application precluded by agreement —Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 19 (2), (3) (*as amended*) *—Matrimonial Causes* (*Property and Maintenance*) *Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 35), *s.* 1 (1).

B

When once a divorced wife's application to the court for permanent maintenance and secured provision has been dismissed, there is not jurisdiction, either under s. 1 (1) of the Matrimonial Causes (Property and Maintenance) Act, 1958, or otherwise to entertain a fresh application (see p. 838, letter H, p. 839, letter G, and p. 841, letter E, post).

C

Mills v. *Mills* ([1940] 2 All E.R. 254) followed.

Where an agreement disposing of a wife's claim for maintenance is brought before the court and sanctioned, the principle that the court's jurisdiction to award maintenance cannot be ousted by agreement no longer applies and, in the absence of fraud, the wife will be held to the sanctioned agreement (see p. 840, letter D, and p. 842, letter E, post).

D

Dicta of DENNING, L.J., in *Bennett* v. *Bennett* ([1952] 1 All E.R. at p. 422) and of JENKINS, L.J., in *Russell* v. *Russell* ([1956] 1 All E.R. at p. 470) applied.

E

The parties were married in 1930 and in 1938 the husband left the wife. In 1953 the husband entered into a deed of covenant to pay maintenance to the wife during their joint lives or for a period of seven years, whichever should be the shorter period. In March, 1955, the wife filed a petition for divorce in which she prayed for maintenance and a secured provision. The wife was granted a decree which was made absolute in June, 1955, but no order for maintenance was made in her favour. In 1958 the husband and wife agreed to commute the payments under the deed by a lump sum payment of £660 (being the amount payable for the remaining portion of the seven-year term) on condition that the deed be cancelled and that the wife's prayer for maintenance contained in her petition be dismissed. The husband accordingly paid £660 and on Feb. 13, 1958, an order was made by consent dismissing the wife's application for maintenance and secured provision as contained in her petition, she "having accepted the said sum in full satisfaction of all present and future rights to maintenance for herself". At that date, the Matrimonial Causes Act, 1950, s. 19 (2) and (3), provided that orders for maintenance and secured provision could be made "on" the making of a decree but after Jan. 1, 1959, the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 (1), gave the court power to make such orders at any time after the making of a decree. In March, 1961, the wife applied for maintenance and a secured provision.

F

G

H

Held: the court had not jurisdiction to entertain the new application by the wife, who was bound by her sanctioned agreement to accept the lump sum in satisfaction of all present and future rights to maintenance.

Decision of MARSHALL, J. (ante, p. 20), reversed.

I

[**Editorial Note.** The Matrimonial Causes (Property and Maintenance) Act, 1958, was brought into operation on Jan. 1, 1959, by the Matrimonial Causes (Property and Maintenance) Act (Commencement) Order, 1958 (S.I. 1958 No. 2080).

As to the effect of a previous consent order on an application for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 439, para. 985, note (g); and for a case on the subject, see 27 DIGEST (Repl.) 615, *5759*.

A For the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 441.

For the Matrimonial Causes Act, 1950, s. 19, see 29 HALSBURY'S STATUTES (2nd Edn.) 407.]

Cases referred to:

B *Bennett* v. *Bennett*, [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp.

Benyon v. *Benyon*, (1890), 15 P.D. 54; 59 L.J.P. 39; 62 L.T. 381; 27 Digest (Repl.) 659, *6223*.

Hyman v. *Hyman*, [1929] All E.R. Rep. 245; [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 27 Digest (Repl.) 235, *1888*.

Mills v. *Mills*, [1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272; 27 Digest (Repl.) 615, *5759*.

C *Russell* v. *Russell*, [1956] 1 All E.R. 466; [1956] P. 283; 120 J.P. 140; [1956] 2 W.L.R. 544; 3rd Digest Supp.

Appeal.

This was an appeal by a divorced husband against an order of MARSHALL, J., made on June 27, 1961, and reported ante, at p. 20, granting leave to the wife, D pursuant to s. 1 (1) of the Matrimonial Causes (Property and Maintenance) Act, 1958, and r. 3 (3) proviso (ii) of the Matrimonial Causes Rules, 1957, to file a notice of application for an order for maintenance against her former husband. The facts are set out in the judgment of WILLMER, L.J.

John Latey, Q.C., and *A. C. H. de Piro* for the appellant husband.

J. P. Comyn, Q.C., and *J. B. Mortimer* for the respondent wife.

E

WILLMER, L.J.: The parties were married on July 23, 1930, and there was one child of the marriage, now grown up. In 1938 the husband left the wife, and the parties have not cohabited since. On Oct. 31, 1953, the husband executed a deed of covenant whereby he covenanted to pay to the wife during their joint lives, or the period of seven years (whichever should be the shorter F period), monthly sums of £40 during the first year, and thereafter monthly sums of £20. On Mar. 4, 1955, the wife filed a petition for divorce on the ground of her husband's desertion, and included a prayer for maintenance and a secured provision. The husband did not defend, and a decree nisi was pronounced on May 13, 1955, which was made absolute on June 27, 1955. As the husband was at that time paying the monthly sums due under the deed of covenant, the G prayer for maintenance was not then proceeded with. At the end of 1957, the wife was in financial difficulties, in addition to which she desired to leave England for good. She accordingly opened negotiations with a view to obtaining a lump sum payment in substitution for the monthly payments still remaining to be paid under the deed of covenant. The husband agreed to make a lump sum payment of £660, subject to four conditions set out in a letter from his H solicitors of Feb. 3, 1958. Those conditions were as follows:

> " (i) That the existing deed of covenant is cancelled by mutual agreement. (ii) That [the wife's] application for maintenance which was contained in her petition dated Mar. 4, 1955, should be dismissed on receiving payment of the sum of £660. (iii) That [the wife] should make no further attempt to get in touch with [the husband] after the transaction has been completed. I (iv) That she should make no attempt to find out her former husband's whereabouts through us."

Those conditions were accepted by the wife as appears from the letter of Feb. 7, 1958, from her solicitors. In pursuance of the agreement between the parties, a consent summons was issued by the husband's solicitors, and, on Feb. 13, 1958, an order was made by Mr. Registrar KINSLEY in the following terms:

> " Upon hearing the solicitor for the [husband], the [husband] having paid to the [wife] the sum of £660 and the [wife] having accepted the said

sum in full satisfaction of all present and future rights to maintenance for herself and by consent It is ordered that the [wife's] application for maintenance and secured provision as contained in the prayer of the petition herein be and the same is hereby dismissed. [Wife's] costs."

Two days later the wife executed a deed of revocation of the previous deed of covenant, and also signed a written undertaking to abide by conditions (iii) and (iv) of the agreed conditions. The agreed sum of £660 was duly paid by the husband to the wife.

The learned judge was satisfied that the wife was independently advised, and that, through her solicitor, she must be taken to have consented to the order. He pointed out, however, that the consent summons did not set out all the terms of the agreement, and he expressed some misgivings whether the learned registrar was fully informed with regard to the agreement. For myself, I see no ground for suspecting that the learned registrar did not know everything that he was required to know. Moreover, there is no reason to suppose that the wife did not fully understand the effect of the order that was being made. It gave her precisely what she appears to have wanted, and, in material respects, it put her in a better position than that in which she would have been under the original deed of covenant; for (a) she obtained a substantial acceleration of payment of what would have been due to her; (b) she avoided the risk of the death of the husband before the expiration of the seven years; and (c) she obtained by way of a capital sum, free of tax, an amount equal to the sum total of the remaining monthly payments instead of receiving the monthly payments as income subject to tax. The order made by the learned registrar was in the form approved in this court in *Mills* v. *Mills* (1)—a form which, we were informed, has been repeatedly followed in a number of cases during the years that have elapsed since then. Pursuant to that decision there can, in my judgment, be no room for doubt that, as the law then stood, the making of the order, coupled with the payment of the agreed capital sum, put an end once and for all to any further right on the part of the wife to obtain maintenance from the husband.

The question raised by this appeal is whether the position in this respect has been altered by the Matrimonial Causes (Property and Maintenance) Act, 1958, which came into force on Jan. 1, 1959 (2). The material provisions of that Act are as follows. Section 1:

"(1) Any power of the court, under the enactments mentioned in the next following subsection, to make an order on a decree for divorce, nullity of marriage or judicial separation shall (subject as mentioned in sub-s. (3) of this section) be exercisable either on pronouncing such a decree or at any time thereafter.

"(2) The said enactments are the following provisions of the Matrimonial Causes Act, 1950 . . ."

There are then set out a number of provisions of the Matrimonial Causes Act, 1950, of which the only ones relevant to this case are sub-s. (2) and sub-s. (3) of s. 19, whereby the court may order a husband to make a secured provision for his wife or to pay her a monthly or weekly sum. Subsection (3) of s. 19 of the Act of 1950 provides in para. (a):

"any reference in sub-s. (1) of this section to a decree shall be construed as a reference to a decree nisi, and the reference to any time after a decree shall be construed as a reference to any such time whether before or after the decree has been made absolute."

Subsection (4) provides that certain provisions of the Act of 1950, including s. 19 (2) and (3), shall have effect subject to the amendments specified in the Schedule to the Act of 1958. Subsection (5) provides:

(1) [1940] 2 All E.R. 254; [1940] P. 124.
(2) Matrimonial Causes (Property and Maintenance) Act (Commencement) Order, 1958 (S.I. 1958 No. 2080).

A "Nothing in this section, or in any amendment made by this section to any of the enactments referred to therein, shall be construed as requiring the court, in determining any application for an order under any of those enactments, to disregard any delay in making or proceeding with the application."

The effect of the amendments to s. 19 (2) and (3) specified in the Schedule is B shown in RAYDEN ON DIVORCE (8th Edn.) at p. 1186, where the subsections are conveniently set out both in their original and in their amended form. In its original form sub-s. (2) read:

"On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife . . ."

C

I need not read any further. As amended, the subsection reads:

"Subject to the provisions of s. 29 of this Act, on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute, the court may, if it thinks fit, order . . ."

D

The amendment to sub-s. (3) is precisely the same.

Relying on the new Act, the wife, towards the end of 1960, instructed her present solicitors, who initiated on her behalf a fresh claim for maintenance. Eventually, after some correspondence between the solicitors, the present summons was issued on Mar. 8, 1961. The material part of it asks that:

E "Having regard to the provisions of s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, and the Maintenance Agreements Act, 1957, the [husband] should, to the satisfaction of the court, secure to the [wife] such gross or annual sum of money for her by way of maintenance as may be just, and that he should pay to the [wife] during their joint lives such monthly or weekly sums of money for her maintenance as may be reasonable."

F

It should be said at once that, as is now conceded, nothing turns on the Maintenance Agreements Act, 1957. The matter was referred by the registrar to the learned judge, who, on June 27, 1961, granted the wife leave to file a notice of application for an order, and referred the application to the registrar for consideration of what order (if any) should be made in all the circumstances. The learned G judge held (3) that, in consequence of the passing of the Act of 1958, "the law on which the decision in *Mills* v. *Mills* (4) was based no longer stands", and that the petitioner wife "is no longer precluded by that decision from bringing a claim for maintenance". He further held (3) that, since there was then no application for maintenance in the petition—this having been dismissed by the order of Feb. 13, 1958—the leave of a judge was required, pursuant to H proviso (ii) to r. 3 (3) of the Matrimonial Causes Rules, 1957, before a new claim for maintenance could be filed. Such leave, however, he was in his discretion prepared to grant.

Counsel for the husband has argued that the learned judge fell into error in granting leave for a fresh application for maintenance to be filed. He presented his argument in the form of three propositions and contended that, if he succeeded I on any one of them, he was entitled to succeed on the appeal. First, he contended that, on its true construction, the Act of 1958 does not confer any new jurisdiction which did not exist before; it merely extends the time during which an existing jurisdiction can be exercised. Under the law as it stood before, there was no jurisdiction to entertain a plurality of applications for maintenance, and no such jurisdiction is conferred by the Act of 1958. Secondly, counsel contended that, assuming there is jurisdiction to entertain a second application by a wife after her

(3) Ante, p. 23. (4) [1940] 2 All E.R. 254; [1940] P. 124.

first has been dismissed, the fact that the previous application was dismissed in pursuance of an agreement, sanctioned by the court, to compromise her claim by the payment of a lump sum, would in any case be conclusive to prevent her from reopening the matter now by presenting a fresh claim. Thirdly, counsel argued that the learned judge, if he had a discretion, exercised it on wrong principles and failed to take into consideration all the relevant matters which he should have considered. In particular, it was argued that he should have had regard (a) to the delay in presenting the present claim—see s. 1 (5) of the Act of 1958—(b) to the fact of the previous agreement pursuant to which the wife's earlier claim was dismissed, and (c) to the fact that there was no proof of any relevant change in the circumstances of the parties since the dismissal of the previous application.

Counsel for the wife, on the other hand, submitted in the forefront of his argument in support of the learned judge's judgment that, whereas in the ordinary way the law requires that contracting parties be held strictly to their bargain, the same does not by any means apply as between husband and wife; see, for instance, *Hyman* v. *Hyman* (5). This is due, he contended, partly to the fact that it may be the duty of the court to protect wives from themselves, and partly to the overriding interest which the state has in all disputes between husband and wife. He did not agree that, under the law as it stood before the Act of 1958, there was no jurisdiction to entertain a second application for maintenance after the dismissal of a previous one. He argued that the reason why such a second application failed in *Mills* v. *Mills* (6) was not because of any lack of jurisdiction, but because the new application could not be said to be made "on" a decree for divorce within the meaning of the statutory enactment then in force, namely, s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. The effect of the new Act, therefore, by enabling the court to entertain an application either *on* pronouncing a decree *or at any time thereafter*, is to get rid of the decision in *Mills* v. *Mills* (6). As to counsel for the husband's second point, counsel for the wife contended that the fact of the previous maintenance claim being dismissed as the result of an agreement sanctioned by the court could not be regarded as conclusive against the wife, in the absence of proof that the court was put in full possession of the facts, or that a full investigation was made by the court as to the circumstances of the agreement, the means of the parties, and so forth. In the present case, for all that was known to the contrary, the sanction of the court was a mere formality. Lastly, on the question of discretion, counsel for the wife argued that no error of principle on the part of the learned judge was shown. The considerations relied on by counsel for the husband, he contended, were relevant not so much to the granting of leave to file the application as to the type of order (if any) which ought to be made by the registrar on the hearing of the application.

Having carefully considered the forceful arguments of counsel on both sides, which I have attempted briefly to summarise, I am satisfied that the husband is entitled to succeed on this appeal on the basis of counsel for the husband's first point. In my judgment, once an application for maintenance has been dismissed by the court, jurisdiction does not exist to entertain a fresh application. I entertain no doubt that this was the position on the law as it stood before the Act of 1958. Were it not so, there would be no point in following the regularly adopted practice of making a nominal order in favour of a wife for the purpose of reserving her right to claim maintenance in the future, where it is not possible to show any present ground for awarding maintenance. For, where a maintenance order is in existence, application can always be made to vary it in accordance

(5) [1929] All E.R. Rep. 245; [1929] A.C. 601.
(6) [1940] 2 All E.R. 254; [1940] P. 124.

A with s. 28 of the Act of 1950. In *Mills* v. *Mills*, SIR WILFRID GREENE, M.R., said (7):

> " . . . the proper—and, indeed, the only—method of preserving some right in the wife, in such circumstances, was to provide what I have called a peg upon which subsequent applications could be hung. Such a peg could be provided by making an order for periodic maintenance, in a nominal B sum, which order would remain in force, and would be susceptible of variation if the circumstances called for it. In the absence of such a peg, however, no future order could be made . . ."

A little later he said (8): " Once the order is discharged, the jurisdiction of the court disappears ". No case has been brought to our attention in which, in the years before the Act of 1958, the court assumed jurisdiction to award maintenance on a second application where the original application has been dismissed. C

If, as I think, jurisdiction to entertain such a second application did not exist before, I cannot construe the provisions of the Act of 1958 as conferring it. All that is provided by s. 1 is that any power of the court to award maintenance under s. 19 of the Act of 1950 may be exercised *either* on pronouncing the decree of divorce, *or* at any time thereafter. That is to say, the section merely enlarges D the time within which an existing power of the court may be exercised. I agree with the submission of counsel for the husband that, if the legislature had intended to confer a new right to make a second application for maintenance in a case where a previous application had been dismissed, it would be reasonable to expect that such a provision would have been expressed in clear and unambiguous terms. It might also have been expected that some safeguards would have been intro- E duced to cover cases where orders had already been made before the passing of the Act, as was done, for instance, when in 1949 provision was made for the first time for the variation of an order for a secured provision; see the proviso to s. 6 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. Some analogy may also be found in the power, first conferred by s. 5 of the Matrimonial Causes Act, 1859, to make orders with reference to ante-nuptial or post-nuptial settle- F ments *after* a final decree of nullity or divorce. It was held in *Benyon* v. *Benyon* (9) that an order made under the power conferred by this section was a once-for-all order. This may be contrasted with the power conferred by s. 26 of the Act of 1950 to make orders with respect to the custody, maintenance and education of children, which power, it is expressly provided, may be exercised " from time to time ". In these circumstances, I do not see anything in the G provisions of the Act of 1958 to warrant the court assuming jurisdiction to entertain a claim for maintenance where a previous claim has been the subject of a final order dismissing it. This is enough to dispose of the appeal; but in case I am wrong, and in deference to the arguments which have been presented to us, I think it right to express my views as briefly as possible with regard to the other points that have been argued.

H It is, of course, well established that the jurisdiction of the court to award maintenance to a wife cannot be ousted by any private agreement between the parties; see *Bennett* v. *Bennett* (10), following *Hyman* v. *Hyman* (11). Such an agreement is unenforceable against the wife as being contrary to public policy. But it is otherwise when the agreement is brought before the court and an order of the court is made giving effect to its terms. Such an order was made in *Mills* I v. *Mills* (12), where by consent the wife's claim for maintenance was dismissed on payment by the husband of an agreed lump sum. The principle involved was succinctly stated by DENNING, L.J., in *Bennett* v. *Bennett* (13) as follows:

(7) [1940] 2 All E.R. at p. 260; [1940] P. at p. 133.
(8) [1940] 2 All E.R. at p. 261; [1940] P. at p. 134.
(9) (1890), 15 P.D. 54.
(10) [1952] 1 All E.R. 413; [1952] 1 K.B. 249.
(11) [1929] All E.R. Rep. 245; [1929] A.C. 601.
(12) [1940] 2 All E.R. 254; [1940] P. 124.
(13) [1952] 1 All E.R. at p. 422; [1952] 1 K.B. at pp. 262, 263.

"If the parties do not oust the jurisdiction of the Divorce Court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid." A

Then, missing out three sentences, the learned lord justice continued:

"Its sanction should, I think, be obtained in this way. If the parties agree on a figure for maintenance, the court should be asked to make an order for that figure. If they agree on a secured provision, the court should be asked to approve the deed which contains the provision. If they agree on a lump sum in composition of maintenance, the court should be asked to dismiss an application for maintenance or to discharge the existing order, as the case may be: *Mills* v. *Mills* (14); but it would, I think, be entitled to refuse to do so if it did not think it proper to permit the composition." B C

To the same effect was the observation of JENKINS, L.J., in *Russell* v. *Russell* (15):

"The principle in *Hyman* v. *Hyman* (16), be it remarked, is satisfied by any bargain which is brought before the court for approval and approved by the court."

Here, the agreement between the parties was brought before the court, was sanctioned by the court, and became the subject of an order of the court whereby the wife's claim for maintenance was dismissed. The principle of *Hyman* v. *Hyman* (16) does not, therefore, apply, and in these circumstances I confess that I find it difficult to see why the wife should not be held to her agreement. If the agreement is binding on her, it seems to me that her present attempt to claim maintenance for a second time constitutes a clear breach of it. I am not impressed by the argument of counsel for the wife that the sanction of the court for such an agreement is not properly obtained unless there is a full investigation by the court of all the circumstances, with affidavits of means filed on both sides. We are dealing here with a case in which both parties were competently advised by solicitors, one of whom was present on the hearing of the summons. The summons was heard by an experienced registrar, and it is to be presumed that he did not make the order giving effect to the terms of the agreement without satisfying himself that it was proper in all the circumstances to do so. I do not think that it is right, therefore, to dismiss the making of the consent order as a mere formality equivalent (to use counsel for the wife's phrase) to no more than putting a rubber stamp on the agreement of the parties. It seems to me that everything necessary to be done to give binding effect to the agreement was done in this case. The wife, therefore, is, in my judgment, precluded by the agreement from making this second attempt to obtain an order for maintenance against her husband. D E F G

Lastly, I would add a few words with regard to the exercise of the learned judge's discretion on the assumption that (contrary to my view) he had jurisdiction to entertain the application. I do not feel disposed to accept counsel for the husband's submission that there was in this case such a delay on the part of the wife that the learned judge in his discretion ought to have refused the application on that ground. The Act of 1958 only came into force on Jan. 1, 1959, and we know from the correspondence that the wife was already putting forward her present claim before the end of 1960. Allowance must also be made for the fact that she had to obtain legal aid before doing so. There is, I think, more force in the contention that the existence of the agreement, freely entered into by the wife with competent advice, even if it did not deprive him of jurisdiction, was a factor which should have been very carefully weighed by the learned judge before he exercised his discretion. It does not appear from what he said in his judgment that he did give due weight to it. On the contrary he appears to have H I

(14) [1940] 2 All E.R. 254; [1940] P. 124.
(15) [1956] P. at p. 295; [1956] 1 All E.R. at p. 470.
(16) [1929] All E.R. Rep. 245; [1929] A.C. 601.

A minimised its importance on the ground (which I do not think was well founded) that it was not adequately explained to the learned registrar at the time when the consent order was made. Nor does the learned judge appear to have taken into consideration the fact that there was no evidence of any relevant change in the circumstances of the parties since the making of the consent order. We were informed that the husband, who is now a man aged sixty, has retired from B business, and is living on a modest pension. Be that as it may, it is no doubt the fact that he has ordered his own financial affairs on the faith of the dismissal of the wife's application for maintenance being final, and in the belief that he was quit of any further financial obligation towards her. It appears to me that this is a consideration which should have been anxiously weighed by the learned judge before he exercised his discretion whether or not he should grant leave C to file the new application for maintenance. I do not accept counsel for the wife's submission that these are matters which are only relevant to the question what order (if any) should be made. In my view, they were highly relevant to the question whether leave should be granted to file the application at all. On the whole, therefore, I am disposed to accept counsel for the husband's submission that the learned judge fell into error by failing to take these relevant D matters into consideration before exercising his discretion.

For all these reasons I am of the opinion that the learned judge came to a wrong conclusion. The appeal should, in my judgment, be allowed and the wife's summons dismissed.

DAVIES, L.J.: I agree that this appeal should be allowed. Counsel for E the wife submits that the effect of s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, and the amendments made by that section to s. 19 (2) and (3) of the Matrimonial Causes Act, 1950, is that there is now no limit to the number of applications which may be made by a wife for permanent maintenance or a secured provision. His argument goes, and must go, as far as saying that, if a wife has made, for example, fifteen applications for maintenance, each F one of which has been dismissed, either on the figures or in the light of the circumstances and the conduct of the parties, she is nevertheless entitled to make thereafter a subsequent application with a view to re-litigating the question all over again. In effect, that would mean that the words "at any time thereafter" would be almost equivalent to "at any number of times thereafter". In my judgment, that is plainly wrong. The effect of the Act is to empower the court G to make an order for maintenance on or at any time after the decree instead of, as formerly, on the decree. The previous power, according to the authorities, was exercisable on or within a reasonable time after the decree. The present power is exercisable on or at any time after the decree. There is nothing in the statute to empower the court, once it has decided the matter, to enter on a fresh inquiry whether such an order should be made.

H It is perfectly true that there is no authority which decides that, under the pre-1958 statutes, there was no power, once the first application had been dismissed, to entertain a second application. The old practice of making, in appropriate circumstances, a nominal order may well have been designed to secure the wife's right, if circumstances should alter, to make use of the variation provisions, so that any subsequent order should still be made on the decree. In I *Mills* v. *Mills* (17), SIR WILFRID GREENE, M.R., twice refers to "a new application". But those references cannot, in my view, be taken to be any authority for the proposition that, under the pre-1958 law, more than one application for maintenance was competent. The Court of Appeal in that case was not concerned to consider whether, once an application for maintenance was dismissed, any subsequent application was permissible. They were concerned to point out that such a subsequent application would normally not be "on a decree". It is

(17) [1940] 2 All E.R. at p. 260; [1940] P. at p. 133.

equally true that the pre-1958 Act practice of making a nominal order in appropriate cases is not decisive of this question. For, in the absence of such an order, any subsequent application or an order thereon might well be said not to be made " on the decree ". But I find it impossible to believe that, in the days when an application for maintenance was made by petition, any wife whose petition for maintenance was dismissed would ever be permitted thereafter to proceed with a fresh petition for the relief which had been previously finally denied to her.

There is great force in the argument of counsel for the husband based on the decision of the court in *Benyon* v. *Benyon* (18). The court there held that the power to vary settlements after a decree was a power exercisable once and for all and emphasised the difference between that power (now contained in s. 25 of the Matrimonial Causes Act, 1950) and the power (now contained in s. 26 of that Act) to make orders with regard to children, which latter power is expressly exercisable from time to time. At one stage of the argument, I was rather impressed by the concluding words of s. 1 (5) of the Act of 1958, to which the learned judge did not refer, the words being " any delay in making or proceeding with the application ". But, on re-consideration, I do not think that it can be reliably concluded from those words that they point to one application only.

In view of this conclusion that no second application for maintenance is competent, counsel for the husband's second point, namely, that, if such application is competent, the wife in the present case had agreed to abandon her right to make such an application, and that such abandonment had been approved and sanctioned by the court in the order of Feb. 13, 1958, does not strictly arise. All that I would say, therefore, is that it seems to me plain according to the authorities (see, in particular, *Bennett* v. *Bennett* (19), per DENNING, L.J., and *Russell* v. *Russell* (20), per JENKINS, L.J.) that the wife here clearly abandoned all and any rights which she might have thereafter to apply for maintenance, and that that abandonment was approved and incorporated in the court's order. It is, as I think, quite impossible to accept counsel for the wife's argument that that order was a mere rubber stamp nullity. It would be quite wrong and quite improper to disregard the order of the court or to embark in any particular case on an inquiry whether the consent order (in the absence, of course, of fraud) was or was not properly made.

I conclude with a reference, which might or might not have been relevant on the question of discretion if we had come to the conclusion that the court had jurisdiction to entertain the wife's application, to the merits of this case. The learned judge said (21): (i) that he was far from satisfied that the terms of the agreement between the parties made it clear that the sum of £660 was anything more than a commuting of the payments due for the unexpired portion of the seven-year period covered by the deed of covenant; (ii) that he was not satisfied that the full terms of the agreement were ever called to the attention of the registrar; (iii) that the case was unfortunate; and (iv) that he was happy to be able to order a fresh inquiry. With the greatest respect to the learned judge, I disagree with those observations. The agreement was made at the instance of the wife. It is now admitted that she entirely understood its import. As a result of it, she obtained as a lump sum free of tax the total of the payments which she would have received less tax during the remaining 2¾ years of the life of the deed; and she avoided the risk (such as it was) of the prior decease of the husband. All the material terms of the agreement were before the registrar. And I can see nothing unfortunate whatsoever in the transaction save that, in the events that have happened, it might have been better for the wife not to have made the bargain which she plainly did.

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(18) (1890), 15 P.D. 54.
(19) [1952] 1 All E.R. at p. 422; [1952] 1 K.B. at pp. 262, 263.
(20) [1956] 1 All E.R. at p. 470; [1956] P. at p. 295. (21) Ante, pp. 22, 23.

A For these reasons, in addition to those fully stated by WILLMER, L.J., I agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Gamlen, Bowerman & Forward* (for the husband); *Calvert Smith & Sutcliffe* (for the wife).

B [*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BOWES-LYON *v.* GREEN.

[HOUSE OF LORDS (Lord Reid, Lord Morton of Henryton, Lord Cohen, Lord Morris of Borth-y-Gest and Lord Hodson), July 10, 11, 12, October 26, 1961.]

C *Landlord and Tenant—Lease—Business premises—Continuation—Reversionary lease granted by head lessor to person then the tenant of an intermediate landlord—Whether intermediate landlord the "landlord"—Whether interest of intermediate landlord a tenancy which would not expire within fourteen months of the grant of the "reversionary tenancy"—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 28, *s.* 44 (1) (*b*).

D R. was the head lessor, under a long lease, of a building including a ground floor shop and basement. W. held a sub-lease of the whole building from R. expiring on Apr. 4, 1959. The respondent held a sub-lease from W. of the ground floor shop and basement which expired on Apr. 1, 1959. On Mar. 19, 1958, R., the head lessor, granted the appellant a reversionary lease of the E shop for seven years beginning on Apr. 5, 1959, viz., just after the expiration of W.'s lease, conditional on the appellant first obtaining a lease of the shop until Apr. 1, 1959. On Mar. 19, 1958, the appellant was in occupation of the shop under a tenancy from the respondent. In fulfilment of the condition of the reversionary lease the appellant obtained a sub-lease of the shop from the respondent until Mar. 31, 1959. The appellant occupied the shop under the F sub-lease for business purposes. The respondent occupied the basement under her lease from W. for business purposes. By virtue of s. 24 of the Landlord and Tenant Act, 1954, the tenancies of both the respondent and the appellant were continued beyond their contractual termination (on Apr. 1 and Mar. 31, 1959, respectively), the statutory continuation of the respondent's tenancy applying both to the basement which she occupied and G to the ground floor shop. The respondent claimed £187 10s. rent being a quarter's rent in advance due on June 24, 1959, in respect of the appellant's tenancy of the shop under the sub-lease. The appellant admitted that her tenancy from the respondent would have continued during the quarter beginning June 24, 1959, and the rent sued for would have been due to the respondent but for the reversionary lease of Mar. 19, 1959, which the appell- H ant contended had the effect, by virtue of s. 28* of the Act of 1954, of ending her tenancy from the respondent on Apr. 5, 1959, when the reversionary lease began.

Held (LORD COHEN dissenting): the respondent was entitled to recover the £187 10s. rent in advance for the quarter beginning June 24, 1957, as her tenancy was then continuing, for the following reasons—

I (i) (per LORD REID, LORD MORRIS OF BORTH-Y-GEST and LORD HODSON)—

(a) at the time of the grant of the reversionary lease on Mar. 19, 1958, the respondent, not R., was the appellant's "landlord" within s. 44 (1)† of the Landlord and Tenant Act, 1954, since the respondent's tenancy, being then continuing by virtue of the Act of 1954, was a tenancy which would

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* The terms of s. 28 of the Landlord and Tenant Act, 1954, are printed at p. 845, letter G, post.

† The terms of s. 44 (1) of the Landlord and Tenant Act, 1954, are printed at p. 845, letter I, to p. 846, letter B, post.

" not come to an end within fourteen months or less by effluxion of time . . ." within s. 44 (1) (b) (see p. 847, letter B, p. 852, letter A, p. 854, letter E, and p. 854, letter I, to p. 855, letter A, post).

Cornish v. *Brook Green Laundry, Ltd.* ([1959] 1 All E.R. 373) applied on the meaning of " landlord ".

Dictum of DENNING, L.J., in *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* ([1956] 3 All E.R. at p. 626) approved (cf., p. 854, letter A, post).

(b) accordingly, the grant of the reversionary lease was not an agreement between the " landlord " and tenant within s. 28 of the Act of 1954 which had not, therefore, operated to determine the appellant's tenancy.

(ii) (per LORD MORTON OF HENRYTON) s. 28 of the Landlord and Tenant Act, 1954, applied only to an agreement between a landlord and a tenant holding immediately under him and, therefore, s. 28 was inapplicable in relation to the reversionary lease of Mar. 19, 1958, because the appellant was not then an immediate tenant of R., but held under the respondent; the facts, however, fell within s. 65 (3) of the Act of 1954, whereby the appellant's reversionary tenancy took effect subject to the respondent's tenancy continued by virtue of the Act of 1954 (see p. 848, letter I, and p. 849, letters E to G, post).

Decision of the COURT OF APPEAL (sub nom. *Green* v. *Bowes-Lyon*, [1961] 1 All E.R. 13) affirmed.

[**Editorial Note.** LORD COHEN, though dissenting from the conclusion of the majority, agreed that the " tenancy " referred to in s. 44 (1) (b) of the Landlord and Tenant Act, 1954, was not confined to the contractual tenancy but included the common law tenancy, originally created contractually, continued by s. 24 (1) of the Act of 1954 (see p. 850, letter A, post).

As to the statutory continuation of a tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 887, para. 1709.

For the Landlord and Tenant Act, 1954, s. 28, s. 44 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 413, 427.]

Cases referred to:

Bolton (H. L.) (Engineering) Co., Ltd. v. *Graham (T. J.) & Sons, Ltd.*, [1956] 3 All E.R. 624; [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; 3rd Digest Supp.

Cornish v. *Brook Green Laundry, Ltd.*, [1959] 1 All E.R. 373; [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; 3rd Digest Supp.

Appeal.

Appeal by Edith Katherine Bowes-Lyon from an order of the Court of Appeal (SELLERS, PEARCE and DEVLIN, L.JJ.), dated Nov. 17, 1960 (reported sub nom. *Green* v. *Bowes-Lyon*, [1961] 1 All E.R. 13), dismissing an appeal by the appellant from a judgment given by PEARSON, J., on Dec. 21, 1959 (reported [1960] 1 All E.R. 301), whereby the respondent, the plaintiff in the action, Olga Mary Green, recovered against the appellant £187 10s. as rent due from the appellant on June 24, 1959, in respect of her tenancy of the ground floor shop at 64, South Molton Street, London, W.1.

H. A. P. Fisher, Q.C., and *John Wilmers* for the appellant.

C. L. Hawser, Q.C., and *C. Lawson, Q.C.*, for the respondent.

Their Lordships took time for consideration.

Oct. 26. The following opinions were read.

LORD REID: My Lords, the respondent sues the appellant for £187 10s. being the rent for the quarter beginning on June 24, 1959, of a ground floor shop in South Molton Street, London, sub-let by her to the appellant. The appellant's defence is that during that quarter she occupied those premises not as the sub-tenant of the respondent but as the tenant of a Mr. Rye: the reason

A why she says that will appear later—it depends on the proper interpretation of the Landlord and Tenant Act, 1954, and in particular on ss. 28 and 44 of that Act.

The facts can be stated briefly. The first relevant date is Mar. 19, 1958. At that time Rye held a long lease from the City Corporation of the whole building and other subjects. Wells held a sub-lease of the whole building from Rye for a B term which expired on Apr. 4, 1959. The respondent held from Wells a sub-lease of the ground floor and basement for a term which expired on Apr. 1, 1959, and occupied the basement for business purposes. The appellant occupied for business purposes the ground floor as sub-tenant of the respondent (1). On Mar. 19, 1958 (2), Rye granted to the appellant a reversionary lease of the ground floor for a term of seven years from Apr. 5, 1959. This lease was conditional on C the appellant obtaining a lease of the premises until Apr. 1, 1959, and the appellant in fact obtained such a lease from the respondent on June 17, 1958. It was not argued that this condition is of any importance; it was suggested that June 17 and not Mar. 19 is the important date but the argument is the same whichever date is taken and I shall consider the case as if an unconditional reversionary lease had been granted on Mar. 19.

D Apart from s. 28 of the Act this reversionary lease could have no effect so long as the respondent's tenancy of the ground floor continued but the appellant maintains that by reason of the statutory provisions her sub-tenancy from the respondent and the respondent's tenancy of the ground floor ceased on Apr. 5, 1959.

The position on Apr. 4, 1959, was that Wells' tenancy had come to an end, but E the tenancies of both the respondent and the appellant had been continued beyond their contractual termination by the provisions of the Act of 1954. It was admitted that the statutory continuation of the respondent's tenancy applied both to the basement which she occupied and to the ground floor. Accordingly, on that date the appellant occupied the ground floor as the sub-tenant of the respondent. Unless the reversionary lease was effective to alter that position by bringing F to an end the appellant's tenancy from the respondent it is admitted that that tenancy must be held to have continued during the quarter beginning on June 24, 1959, and therefore this rent sued for is due to the respondent.

The appellant says that the reversionary lease had that effect by reason of the provisions of s. 28, which are:

> "Where the landlord and tenant agree for the grant to the tenant of a G future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies."

This is a difficult section to apply to the circumstances of the present case. It cannot apply at all unless Rye was "the landlord" within the meaning of H the Act on Mar. 19, 1958, and therefore the first point which the appellant must establish is that Rye was "the landlord" at that date. "Landlord" is defined by s. 44 in such a way that in some cases the landlord of a sub-tenant is not the person from whom he holds the premises and to whom he pays rent but is either the freeholder or some tenant or sub-tenant further up the chain. In this case the appellant says that neither the respondent nor Wells was her statutory landlord I but that Rye was. So the provisions of s. 44 (1) must be most carefully examined. They are:

> "Subject to the next following subsection, in this Part of this Act the expression 'the landlord', in relation to a tenancy (in this section referred

(1) The contractual sub-tenancy of the appellant was for a fixed period ending on Mar. 31, 1959, rent being payable quarterly in advance on the four usual quarter days.

(2) On Mar. 19, 1958, the appellant's tenancy of the ground floor shop was "the relevant tenancy" within s. 44 (1) of the Act of 1954 (see p. 851, letter G, post).

to as 'the relevant tenancy'), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions."

In construing this section one must have in mind the general scheme of Part 2 of the Act. Its purpose is to afford protection to business tenants first by providing that, if a tenant carries on business in any part of the premises, his tenancy is continued notwithstanding the expiry of his contractual term or the giving of a notice to quit, and then by affording an opportunity for a new lease. The statutory continuation is a continuation of the whole of the existing tenancy, including any part of the subjects sub-let by the tenant, and it goes on until some step is taken under the Act which terminates it. Then, unless the landlord objects for one of the reasons stated in the Act, the tenant gets a new lease for a term not exceeding fourteen years, but the new lease does not include any part of the subjects which the tenant has sub-let.

It may often happen that the immediate landlord is himself a tenant whose term will expire within a comparatively short time, so it was necessary to provide for the case where the tenant's new lease might be for a term longer than his immediate landlord's unexpired term. In addition to provisions safeguarding other interests in the property the Act by s. 44 introduces a more radical method by by-passing the immediate landlord if his tenancy will come to an end within fourteen months and enacting that for the purposes of the Act another person shall be "the landlord". Section 44 (1) does this by defining "the landlord" as the owner of that interest in the property which for the time being fulfils two conditions. If the interest of the tenant's immediate landlord does not fulfil them then one goes back until one finds someone whose interest does fulfil them. In order to succeed the appellant must show that s. 28 applies to the reversionary lease granted by Rye; she must therefore show that Rye was "the landlord" when he granted it in March, 1958. If the respondent's interest in the property at that time fulfilled the two conditions then she was "the landlord" and Rye was not. If the respondent's interest did not fulfil those conditions then, as it is not disputed that Wells' interest did not fulfil them, Rye was "the landlord."

The argument turned on whether the respondent's interest fulfilled the second condition and in particular whether it was "a tenancy which will not come to an end within fourteen months or less by effluxion of time". The first argument for the appellant was that the tenancy there referred to is only the contractual tenancy. In this case the respondent's contractual term came to an end on Apr. 1, 1959, i.e., within fourteen months of the relevant date, Mar. 19, 1958, so it is said that her interest could not fulfil the condition. But that is confusing term and tenancy: no tenancy came to an end on Apr. 1, 1959. At the relevant date the respondent's tenancy was protected by the Act, and if it remained a protected tenancy it could not come to an end on the expiry of the contractual term. I could understand the argument if the Act allowed the contractual tenancy to expire and created a new one to follow it. But that is not what it does. I agree with the course taken by the Court of Appeal in *Cornish* v. *Brook Green Laundry, Ltd.* (3) in following earlier opinions of DENNING, L.J. (4), and HARMAN, J. (5),

(3) [1959] 1 All E.R. at p. 382; [1959] 1 Q.B. at pp. 408, 409.

(4) In *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.*, [1956] 3 All E.R. at p. 626; [1957] 1 Q.B. at p. 168.

(5) In *Re Bleachers' Association, Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.*, [1957] 3 All E.R. at p. 667; [1958] Ch. at p. 445.

A to the effect that the common law tenancy subsists with a statutory variation of the mode of determination or continuance by way of statutory extension. When the words have to be applied to an unprotected tenancy—in the present case to the tenancy of Wells—then the tenancy does come to an end at the end of the contractual term. But when they have to be applied to a protected tenancy—in the present case to the tenancy of the respondent—then the tenancy B does not come to an end at the end of the contractual term but remains in existence as the same tenancy for an indefinite time until terminated in one of the ways provided by the Act. I see no ground for reading into the Act words to make it read " a tenancy of which the contractual term will not come to an end within fourteen months ".

A variation of this argument was attractively developed by counsel for the C appellant in the course of the argument before your Lordships. He stressed the words " *will not* come to an end " and argued that during the contractual term you can never say with certainty that any tenancy—protected or not—will not come to an end on the expiry of the term: the tenancy may lose the protection of the Act before that time comes either because the tenant disclaims the protection by means of s. 27 or because the tenant ceases to use any part of D the premises for business purposes. But there appear to me to be two ways of looking at this provision. It may be that you must consider all future possibilities as the appellant argues. Or it may be that you must determine the question in light of the position at the relevant date—the date when it is necessary to decide who is " the landlord ". I prefer the latter view for two reasons. In the first place para. (b) (of s. 44 (1)) is dealing with two kinds of leases, those which at E common law come to an end on the expiry of the term and those which must be terminated by notice to quit. The concluding words of para. (b) deal with the latter kind—" a tenancy which will not come to an end . . . by virtue of a notice to quit *already* given by the landlord " (which here means the immediate landlord whether he is " the landlord " or not). That plainly refers to the position at the relevant date alone, and prevents any regard being had to the possibility that a F notice to quit might be given the next day which would terminate the tenancy within fourteen months. If it is not relevant to have regard to a future possibility in this case it would be extremely odd if it were relevant to do so in other cases. And I am reinforced in my view by the fact that what you are directed by the earlier part of the section to look for is an interest which *for the time being* fulfils the conditions. That must, I think, mean an interest which fulfils the conditions G on the day with regard to which it must be determined who is " the landlord ". On that day in this case the respondent held a protected tenancy because she was carrying on business in a part of the premises let to her and it was only a future possible act on her part which could convert it into an unprotected tenancy. Unless that occurred it could be said with certainty that her tenancy would not come to an end by effluxion of time within fourteen months because it would be con- H tinued for an indefinite time by the Act. On this view you look at the position on the relevant day and you can say definitely that, unless that position changes, any particular tenancy will or will not come to an end within fourteen months by effluxion of time. On the other view there is no such clear cut answer; all you can say is either that the tenancy cannot come to an end by effluxion of time within fourteen months or that it may or may not do so depending on events I which may be likely or extremely unlikely to happen.

It follows that, in my judgment, the respondent's interest for the time being on Mar. 19, 1958, fulfilled the second condition (6). It was not seriously argued that it did not fulfil the first condition (7). Accordingly she was " the landlord " and Rye was not.

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(6) Viz., that it was a tenancy which would not come to an end within fourteen months or less by effluxion of time within the meaning of para. (b) of s. 44 (1); see p. 846, letter G, ante.

(7) Viz., of para. (a) of s. 44 (1).

That is sufficient to dispose of this appeal but I think I ought to mention some other matters. Arguments were addressed to your Lordships that various anomalies or injustices would result. I do not doubt that in choosing between two possible constructions of a statute it may be an important or even decisive factor that one construction produces anomalies which the other avoids. But in this case neither construction avoids anomalies: the most that can be said is that one produces more than the other, and without deciding questions which are not before us it would be impossible to determine how serious these are. I have therefore given little weight to these arguments. Next I must note that the Court of Appeal (8) held themselves bound by the decision in *Cornish's* case (9) although the arguments submitted in this case had not been before the Court of Appeal in that case. I need say no more about *Cornish's* case (9) than that I think the decision was right but the ratio decidendi was inadequate. PEARSON, J. (10), decided the present case on a ground not now maintained. He accepted an argument based on s. 65 (3). I do not think that that section is in competition with s. 28. If s. 28 applies it must terminate the respondent's tenancy of the ground floor at the date when the reversionary lease takes effect and so make s. 65 (3) inapplicable. It is only if s. 28 does not apply that s. 65 (3) could come in and I need not consider what is the proper construction of its provisions.

The other matter is whether, even if Rye were "the landlord", s. 28 would apply to this case. Taking it by itself I would think that the "tenant" in s. 28 must mean a tenant who holds immediately of the landlord and would not include a sub-tenant like the appellant. But it is said that the provisions of Sch. 6 make it necessary to hold that "tenant" in s. 28 includes "sub-tenant". The provisions of that schedule would be difficult to apply to the present case because so much would have to depend on implication. For example, before the reversionary lease could take effect and make the appellant Rye's immediate tenant of the ground floor the respondent's tenancy of the ground floor would have in some way to be brought to an end because it seems impossible for two different people at the same time to hold the same subjects as immediate tenants of the same landlord. Section 28 would terminate the appellant's tenancy but it does not touch the respondent's tenancy. Undoubtedly the respondent continued to hold the basement under her tenancy from Rye. So the reversionary lease must in some way have split the respondent's tenancy leaving her tenant of part of the premises but with her obligations to Rye under the tenancy unaltered. Whether all that can be regarded as implicit in the provisions of Sch. 6 seems to me a difficult question, and, as I do not have to solve that problem, I prefer to reserve my opinion about it.

In my judgment this appeal should be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, in order to succeed the appellant must convince your Lordships: (1) that on Mar. 19, 1958, Rye was "the landlord", within the definition contained in s. 44 of the Landlord and Tenant Act, 1954; (2) that the granting of the reversionary lease of Mar. 19, 1958, by Rye to the appellant was a transaction which falls within s. 28 of the same Act.

My Lords, I incline to the view that Rye was "the landlord" at the relevant date, for the reasons which will be given by my noble and learned friend LORD COHEN, but I find it unnecessary to express a concluded opinion on this question since I am satisfied that s. 28 of the Act does not apply to the reversionary lease of Mar. 19, 1958. In my opinion that section only applies to an agreement made between a landlord and a tenant who holds immediately under him. When the reversionary lease was granted the appellant was not Rye's tenant; she was a sub-tenant of the respondent. It is convenient, at this point, to set out the words of s. 28:

(8) [1961] 1 All E.R. 13. (9) [1959] 1 All E.R. 373; [1959] 1 Q.B. 394.
(10) [1960] 1 All E.R. 301.

A "Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies."

My reasons for the opinion which I have expressed are as follows:

B (a) The immediately preceding s. 27 is dealing throughout with matters arising between a landlord and his immediate tenant. So the opening words of s. 28—"Where the landlord and tenant agree"—would most naturally refer to the same parties. Otherwise one would expect s. 28 to begin—"Where *a* landlord and *a* tenant holding directly or indirectly under him".

(b) The words "the current tenancy" would be quite inappropriate to include C a tenancy between some other party and the tenant. If they were intended to include such a tenancy one would expect to find some such words as "any tenancy of the holding existing at the date of such agreement between the landlord and the tenant or between any other party and the tenant."

(c) I find nothing in Sch. 6 to the Act of 1954 which compels your Lordships to put a strained and artificial construction on s. 28, and I gratefully adopt the D comments on Sch. 6 which have just been made by my noble and learned friend LORD REID.

(d) It seems to me most unlikely that the legislature intended s. 28 to have the extremely unfair result that two parties, by agreement between themselves, can deprive a third party, namely the respondent, of the protection which she would otherwise have obtained under the Act.

E In my opinion this case is covered by s. 65 (3), which is as follows:

"Where by virtue of any provision of this Act a tenancy (in this subsection referred to as 'the continuing tenancy') is continued beyond the beginning of a reversionary tenancy which was granted (whether before or after the commencement of this Act) so as to begin on or after the date on which apart from this Act the continuing tenancy would have come to an F end, the reversionary tenancy shall have effect as if it had been granted subject to the continuing tenancy."

The result is that the tenancy which the respondent held from Rye was still continuing during the quarter beginning on June 24, 1959, and so was the sub-tenancy which the appellant held from the respondent. Thus the respondent became entitled to the sum of £187 10s. which she claims in the action, and this G appeal should be dismissed.

LORD COHEN: My Lords, the first question to be decided is whether the respondent was at the material time "the landlord" of the appellant within the meaning of s. 44 (1) of the Landlord and Tenant Act, 1954.

The material time is, I think, Mar. 19, 1958, the date of the reversionary H lease, but it might perhaps be June 17, 1958, when the condition imported into the grant of the reversionary lease was fulfilled by the grant of the sub-lease by the respondent to the appellant. It is common ground that it does not matter to the decision of this case which of these two dates is the material date.

The respondent was the immediate landlord of the appellant but counsel for the appellant says that having regard to the artificial definition of the term I "the landlord" in s. 44 (1), not the respondent but the superior landlord Mr. Rye was the landlord within the meaning of that subsection. He bases this submission on two grounds. He points out that no one can be the landlord within the definition unless the interest which he owns in the property comprised in the relevant tenancy fulfils two conditions the second of which (see para. (b) of s. 44 (1)) is as follows:

"(b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord."

The tenancy there referred to must, says counsel for the appellant, be the contractual tenancy and not the continuing tenancy extended beyond the contractual period by the Act because that is the more natural meaning of the words and because of the definition of "notice to quit" in s. 44 (2). I agree with the noble Lord on the Woolsack that it is impossible to place this limited meaning on the expression "tenancy" and I cannot usefully add anything to the reasons he has given for reaching this conclusion.

Counsel for the appellant argues in the alternative that even if this be so, on the facts of this case the respondent cannot be the landlord. Even if her continuing tenancy appears prima facie to be a tenancy within the meaning of s. 44 (1) (b) it does not in fact satisfy the conditions of that subsection since it cannot be said that it "*will* not come to an end within fourteen months or less by effluxion of time". At the material time it was still possible that the respondent might give the notice referred to in s. 27 (1). If she did so not later than three months before the date on which apart from the Act the tenancy would come to an end, i.e., Apr. 1, 1959, the tenancy would come to an end on that date by effluxion of time, i.e., within fourteen months of the material date whether it be Mar. 19, 1958, or June 17, 1958.

This argument depends on the meaning given to the word "will". It imposes a considerable burden on that word but it seems to me to accord with its natural meaning and I can see no sufficient reason for placing any other construction on it.

Their Lordships in the Court of Appeal (11) felt that they were not at liberty to consider this argument on its merits since they were precluded from doing so by the decision of the Court of Appeal in *Cornish* v. *Brook Green Laundry, Ltd.* (12). I respectfully agree with the Court of Appeal (11) in this case that having regard to the construction placed on s. 44 (1) in that case their Lordships were bound to dismiss the appeal in the present case, but for the reasons that I have given I am unable to accept that construction. In my opinion, when, as in the present case, the interest of the immediate landlord may cease by effluxion of time within fourteen months of the material date, the immediate landlord cannot be the landlord within s. 44 (1).

If the respondent is not "the landlord" within s. 44 (1), Mr. Rye undoubtedly satisfies the conditions of that subsection and the question then arises as to the effect of the reversionary lease.

Counsel for the appellant relied on s. 28 of the Act, which is in the following terms:

> "Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding . . . on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies."

The first question is whether s. 28 applies to the facts of the present case. PEARSON, J. (13), held that it did not and PEARCE, L.J., in the Court of Appeal (14) was inclined to agree with him though having regard to his conclusion that the Court of Appeal was bound by *Cornish* v. *Brook Green Laundry, Ltd.* (12) he did not find it necessary to decide the point.

PEARSON, J. (13), held that s. 28 was not applicable. That section in his own view is only applicable where the document under consideration is an agreement for the grant of a future tenancy. If it creates an estate and not merely a set of contractual rights and obligations, then s. 28 is not applicable. I am unable to accept this argument. An unconditional agreement for the grant of a future tenancy in my opinion creates in equity an estate and it could be enforced by a decree of specific performance. The position is quite different from that under consideration in *Cornish* v. *Brook Green Laundry, Ltd.* (12) where the agreement

(11) [1961] 1 All E.R. 13.
(12) [1959] 1 All E.R. 373; [1959] 1 Q.B. 394.
(13) [1960] 1 All E.R. 301.
(14) [1961] 1 All E.R. at p. 17.

A to grant a new tenancy was subject to a condition precedent which had not been fulfilled.

In my view, therefore, an agreement for a grant of a reversionary lease can fall within the ambit of s. 28. But that does not dispose of the matter. It was suggested that having regard to the reference to " current tenancy " and to the fact that the expression used was " the landlord and tenant ", not " the landlord B and a tenant ", s. 28 could only apply where the agreement under consideration was between two parties who were already before the agreement in the direct relationship of landlord and tenant. This is an attractive argument and were it not for three points which appear from a perusal of the statute I should have been inclined to accept it. These points are as follows:

(1) " The landlord " is defined in s. 44 (1) and that section does not limit C the definition by the common phrase " unless the context otherwise requires ".

(2) Where the draftsman means to confine the expression to the immediate landlord, he says so. See s. 27 (1) and (2).

(3) Although it seems strange that an agreement between A and C should be allowed to modify the relations between B and C, as varied by the Act, (i) this will only occur where the immediate landlord cannot satisfy the conditions in D s. 44 (1), and (ii) Sch. 6 plainly contemplates that the immediate landlord's rights may be modified by agreement between his tenant and the superior landlord without his consent. It provides for compensation being paid in that event to the intermediate landlord by the superior landlord, and (iii) para. 3 of Sch. 6 read with para. 1 provides for the case of an agreement made under Part 2 of the Act between the s. 44 (1) landlord and a sub-tenant as to the granting E of a future tenancy; and such an agreement can only be made under s. 28.

For these reasons I think that s. 28 applies to the reversionary lease granted on Mar. 19, 1958, and that under that section the current tenancy between the respondent and the appellant expired on Apr. 5, 1959. I would therefore allow the appeal.

F **LORD MORRIS OF BORTH-Y-GEST:** My Lords, it is contended by the appellant that when on Mar. 19, 1958, she and Mr. Rye made an agreement Mr. Rye was " the landlord " within the meaning of that expression as defined in s. 44 (1) of the Landlord and Tenant Act, 1954. She further contends that on such basis s. 28 had the effect that her sub-tenancy from the respondent of the ground floor continued until Apr. 5, 1959, and that thereafter she held the ground G floor from Mr. Rye under the terms contained in the agreement of Mar. 19, 1958. If these contentions prevail the respondent would not be entitled to the rent which she claimed and which she has recovered in these proceedings.

It has not been in dispute that on Mar. 19, 1958, the appellant was in occupation of the ground floor under a " tenancy " from the respondent which, for the purposes of s. 44, was " the relevant tenancy ". The question is raised as to H who was the owner of " that interest " in the ground floor which " for the time being " fulfilled the conditions laid down in the section. On the facts of this case the answer will be the same whether Mar. 19, 1958, is regarded as the date by reference to which to consider the question or whether the date of June 17, 1958 (when the condition imposed by the agreement of Mar. 19, 1958, is taken to have been satisfied) is so regarded. If the respondent was the owner of that interest I in the ground floor which fulfilled the conditions of the section then the concluding words of sub-s. (1) would denote her and not Mr. Rye as " the landlord ". It has not been in contest that the respondent was the owner of an interest that fulfilled condition (a) of sub-s. (1) and the question remains whether she was the owner of an interest that fulfilled condition (b). Was she on Mar. 19, 1958, the owner of an interest in the ground floor of which it could then have been said that it was a tenancy which " will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord "? She was the owner of an interest in the ground floor: She was such an

owner because she had been granted a sub-tenancy of the ground floor and basement to Apr. 1, 1959: she occupied the basement for business purposes: she had therefore (see s. 23) a "tenancy" to which Part 2 of the Act applied. Was it a tenancy which would not come to an end within fourteen months (or less) of Mar. 19, 1958, by effluxion of time or by virtue of a notice to quit already given? The answer must be that it was such a tenancy inasmuch as it would not come to an end within fourteen months or less: it would not so come to an end because s. 24 (1) provides that:

> "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

It was submitted that on Mar. 19, 1958, it could not have been asserted with positive certainty that events might not later occur which as a result would bring it about that the respondent's tenancy might end on Apr. 1, 1959: it was said that the respondent might later have given a notice under s. 27 or might later have ceased to occupy the basement. This submission is, in my judgment, based on a wrong approach. The inquiry denoted by s. 44 is an inquiry as to who is "the landlord" at a particular date. It involves considering an interest which "for the time being" fulfils certain conditions. In the present case the inquiry was one which was made in relation to the "tenancy" from the respondent to the appellant of the ground floor and it raised a question concerning the respondent's "tenancy" of the ground floor and basement. The question as to such latter tenancy was to be posed and answered as at and by reference to the circumstances existing on Mar. 19, 1958. If on that date the question had been asked—"Will it come to an end within fourteen months or less by effluxion of time?", the then existing circumstances would have called for a definite negative answer. Accordingly the respondent was on Mar. 19, 1958, the owner of an interest in the ground floor which "for the time being" fulfilled the statutory conditions. The possibility that events might later occur which might bring about the result that at such later date the respondent might cease to be the owner of an interest fulfilling the conditions was immaterial.

In my judgment therefore Mr. Rye was not "the landlord" on Mar. 19, 1958, and s. 28 did not become applicable. The tenancies both of the appellant and the respondent were continued by virtue of the operation of the Act and the reversionary tenancy granted to the appellant (on Mar. 19, 1958) must have effect as if it had been granted subject to the respondent's continuing tenancy.

I would dismiss the appeal.

LORD HODSON: My Lords, this appeal raises a question under Part 2 of the Landlord and Tenant Act, 1954, which has to do with business tenancies.

The action is a claim for rent by the respondent in respect of the ground floor shop at 64, South Molton Street; the rent (£187 10s.) is said to be due on June 24, 1959.

The respondent is the sub-tenant not only of the ground floor but also of the basement of 64, South Molton Street, under a sub-lease expiring on Apr. 1, 1959. She occupied the basement for business purposes so that her sub-tenancy was continued by the effect of s. 24 of the Act and Part 2 applied to her.

The appellant occupies the ground floor for business purposes so that her sub-tenancy was also continued in the same way. It was admittedly continued until Apr. 5, 1959, but the question is whether it continued thereafter.

On Mar. 19, 1958, the head lessor of the premises, a Mr. Rye, granted a reversionary lease to the appellant for a term of seven years from Apr. 5, 1959, conditional on her obtaining a lease of the demised premises until Apr. 1, 1959. The condition was fulfilled on June 17, 1958.

The question is whether the effect of the reversionary lease was to bring the appellant's tenancy to an end as from Apr. 5, 1959, so that it thereafter ceased to be a tenancy to which this Part of the Act applies.

A Section 28 provides:

> "Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies."

B The appellant claimed that her sub-tenancy from the respondent was the "current tenancy" referred to in s. 28 and continued only until Apr. 5, 1959, and thereafter was not a tenancy to which this Act applies.

PEARSON, J. (15), rejected this contention on the ground that s. 28 had no application since it dealt with agreements for the grant of a future tenancy and C not with a reversionary tenancy. A reversionary tenancy having been granted the situation was governed by s. 65 (3) of the Act, which provides:

> "Where by virtue of any provision of this Act a tenancy (in this subsection referred to as 'the continuing tenancy') is continued beyond the beginning of a reversionary tenancy which was granted (whether before or after the commencement of this Act) so as to begin on or after the date on which apart D from this Act the continuing tenancy would have come to an end, the reversionary tenancy shall have effect as if it had been granted subject to the continuing tenancy."

Unless the appellant can rely on the operation of s. 28 she continued as sub-tenant of the respondent under the continuation of the latter's sub-tenancy.

PEARSON, J.'s solution (15) of the problem by drawing a distinction between an E agreement for the grant of a future tenancy and a reversionary lease so as to exclude the operation of s. 28 is not, in my opinion, acceptable. Tenancy may be created by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement (see s. 69 (1) of the Act) and I cannot regard the expressions which the learned judge distinguished from one another as other than synonymous for the purpose of this Act.

F Section 28 can operate provided the necessary conditions are fulfilled. The first question which arises is: Who is the landlord for the purpose of the section? "Landlord" is defined in s. 44 (1) as follows:

> "Subject to the next following subsection, in this Part of this Act the expression 'the landlord', in relation to a tenancy (in this section referred to as 'the relevant tenancy'), means the person (whether or not he is the G immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue H of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions."

Mr. Rye admittedly is the landlord within this definition unless his interest is itself in reversion expectant on an interest which fulfils those conditions. Accordingly in this case the appellant may be in a position to say that s. 28 operates I unless the respondent is her landlord.

She contends that the definition does not apply to the respondent at all for it is directed to the common law contractual landlord and not the statutory landlord who is such by virtue only of the continuance of his tenancy under the Act. She relies particularly on the language of s. 44 (1) (b) which refers to "effluxion of time" and "a notice to quit already given by the landlord" and points to a contractual conception and not to a statutory continuance of the contract.

(15) [1960] 1 All E.R. 301.

This argument is attractive in that it goes to show that the draftsman of the section had contractual obligations in mind but I do not think it goes far enough. As DENNING, L.J., said in *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* (16), the true view of a continuance of a tenancy under the Act "is that the common law tenancy subsisted with a statutory variation as to the mode of determination". The continuing tenancy is still the same tenancy as before and the relationship of landlord and tenant created by the contract still subsists so that it appears to me to be necessary to treat the word "landlord" in s. 44 as being the landlord not only of a contractual tenancy but also of such a tenancy in its continued statutory operation.

The appellant contended that this interpretation produces an anomalous result having regard to the transient quality of the statutory landlordship of a person in the position of the respondent. In applications for a new lease, for example, if such a person opposes the granting of a new lease, on the grounds provided for in s. 30 of the Act this person's intentions will alone be relevant and the superior landlord will be bound and may not even, if he receives no notice of the proceedings, have an opportunity of being heard so as to resist the granting of a new lease up to as much as fourteen years.

I think it is true that there are anomalies though many of them will still arise on the appellant's construction of s. 44 (1) of the Act but that they are not such as to drive one to the conclusion that the interpretation of the word "landlord" should be limited to contractual landlord on the footing that any other interpretation would lead to results so wholly unreasonable as to be in effect impossible.

I conclude that for the purposes of s. 44 (1) of the Act the expression "landlord" covers the landlord of a continuing tenancy. The same conclusion was also reached, in my opinion rightly, by the Court of Appeal in *Cornish* v. *Brook Green Laundry, Ltd.* (17).

The appellant, however, took a further point saying that even if wrong on her first submission and the respondent could qualify as landlord if she had a "continuing tenancy" nevertheless the words of exclusion in s. 44 (1) (b) disqualified her. It was said that it could not be predicted of her tenancy that it "will not come to an end within fourteen months or less by effluxion of time". This argument runs as follows:—The position must be looked at as at Mar. 19, 1958, the date of the execution of the reversionary lease. At that date there were less than fourteen months to run so that the respondent's term would flow out before their expiration. True that her tenancy was a "continuing tenancy" and the contractual date no longer necessarily determined her tenancy, nevertheless, if she ceased to carry on business before the end of the contractual tenancy the protection of the Act would be lost and the tenancy would end by effluxion of time. Similarly, if she gave three months' notice in accordance with s. 27 (1) of the Act that she did not desire the tenancy to be continued, the same result would be reached.

It was argued that one must look at the situation as one does when considering problems arising under the rule against perpetuities or contracts not to be performed within a year under the Statute of Frauds (18). Emphasis was placed on the words "will not". How, it was said, can it be predicated in these circumstances that the respondent's tenancy will not come to an end within fourteen months or less by effluxion of time? The argument is an attractive one but on consideration I think that it should be rejected.

Looking at the position of the respondent at the material date (Mar. 19, 1958) I think it is true to say that the tenancy was a continuing one by virtue of the statute and not one which would expire by effluxion of time. The landlord

(16) [1956] 3 All E.R. at p. 626; [1957] 1 Q.B. at p. 168.
(17) [1959] 1 All E.R. 373; [1959] 1 Q.B. 394.
(18) The relevant provisions of s. 4 of the Statute of Frauds (1677), were repealed by the Law Reform (Enforcement of Contracts) Act, 1954, s. 1.

A could not prevent the continuance and the fact that the tenant could by his own act either by ceasing to carry on business or by giving a notice that he did not desire the tenancy to be continued does not, in my opinion, produce the result that one must not say that it " will not " come to an end by effluxion of time.

On the conclusions which I have reached it is unnecessary to consider the reconciliation of s. 28 with s. 65 (3) for, Mr. Rye not being the landlord of the appellant, B the reversionary lease does not operate to bring the appellant's tenancy to an end by virtue of s. 28.

A further difficulty arises in construing s. 28 when one considers what is meant by the expression therein " landlord and tenant ". Either it includes landlord and sub-tenant (as if the indefinite article preceded the word " tenant ") or it is confined to a landlord and his immediate tenant so that the " current tenancy " C will be a tenancy granted by the landlord to the same person as the person with whom he has entered into the agreement. The provisions of Sch. 6 are said to be such as to make the expression "landlord and tenant" cover landlord and sub-tenant as the appellant contends but I should not have reached that conclusion on reading the section by itself.

It is unnecessary to express a view on this last point since, having come to the D conclusion for other reasons that s. 28 has no application, the rent claimed from the appellant is, in my opinion, due and payable to the respondent.

I would dismiss the appeal.

Appeal dismissed.

Solicitors. *Layton & Co.* (for the appellant); *Tringhams* (for the respondent).

E [*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

WINTER AND OTHERS (Executors of SIR ARTHUR MUNRO SUTHERLAND (*deceased*)) *v.* INLAND REVENUE COMMISSIONERS.

F [HOUSE OF LORDS (Lord Reid, Lord Tucker, Lord Birkett, Lord Hodson and Lord Guest), June 29, July 3, October 26, 1961.]

Estate Duty—Company—Shares—Valuation—Allowance for contingent liabilities—Balancing charge—Liability not existing at the date of death—Finance Act, 1940 (3 *&* 4 *Geo.* 6 *c.* 29), *s.* 50 (1), *s.* 55—*Finance Act,* 1894 (57 *&* 58 *Vict.* G *c.* 30), *s.* 7 (5)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 292.

A liability may be a " contingent liability " without being an existing legal liability (see p. 860, letter H, p. 862, letter C, and p. 868, letter E, post; contra p. 864, letters H and I, and p. 861, letter D, post).

Dictum of LORD GREENE, M.R., in *Re Duffy* ([1948] 2 All E.R. at p. 760) H disapproved on this point.

S., who died on Mar. 29, 1953, owned shares in a company which for the purposes of estate duty had to be valued in accordance with s. 55* and s. 50* of the Finance Act, 1940, that is to say, the net value of the assets of the company had to be ascertained. The net value was by s. 55 (2) the principal value estimated in accordance with s. 7 (5) of the Finance Act, 1894 (viz., I the price that the assets would fetch if sold in the open market at S.'s death), less the value of liabilities, including " contingent liabilities ", estimated in accordance with s. 50 (1) of the Act of 1940. At S.'s death the assets of the company included five ships, the value of which at that date for the purposes of estate duty was £1,150,000. That figure was considerably in excess of the value to which the ships had been written down by reason of capital allowances received under Part 10 of the Income Tax Act, 1952.

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* The relevant terms of s. 55 and s. 50 are printed at p. 863, letters D to I, post.

Consequently if the ships had been sold at the date of S.'s death a balancing charge under s. 292 of the Act of 1952, giving rise to liability for income tax and profits tax, would have arisen. In fact, the ships were sold after S.'s death for a sum approximating to the value estimated for estate duty purposes, and a balancing charge was made on the company. The question arose whether in valuing, under s. 55 and s. 50 of the Finance Act, 1940, the assets of the company at the date of S.'s death any allowance should be made for additional tax under a balancing charge which might arise on a sale of the ships.

Held (LORD TUCKER and LORD HODSON dissenting): where a person had accepted statutory income or profits tax allowances on the basis that, on selling something at a price exceeding a certain sum, he would come under statutory obligation to pay tax on the excess (if the taxes remained still exigible), he thereby incurred a "contingent liability" for that tax, because he had committed himself to the payment if he made the sale; accordingly the tax under the balancing charge was a contingent liability, and a reasonable estimation of it, pursuant to s. 50 (1) of the Finance Act, 1940, was deductible in ascertaining the net value of the company's assets for estate duty purposes.

Re Duffy ([1948] 2 All E.R. 756) considered.

Decision of the COURT OF APPEAL (sub nom. *Re Sutherland* (*decd.*), [1960] 3 All E.R. 270) reversed.

[As to balancing allowances and charges, see 20 HALSBURY'S LAWS (3rd Edn.) 501-504, paras. 964-969; and as to valuation of assets of companies deemed to pass on death, see 15 HALSBURY'S LAWS (3rd Edn.) 33-37, paras. 63-69.

For the Finance Act, 1894, s. 7 (5), and the Finance Act, 1940, s. 50, s. 55, see 9 HALSBURY'S STATUTES (2nd Edn.) 362, 478, 483; and for the Income Tax Act, 1952, s. 292, see 31 HALSBURY'S STATUTES (2nd Edn.) 283.]

Cases referred to:

British Transport Commission v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; [1956] 2 W.L.R. 41; 3rd Digest Supp.

Duffy, Re, Lakeman v. *A.-G.*, [1948] 2 All E.R. 756; [1949] Ch. 28; [1949] L.J.R. 133; 2nd Digest Supp.

Southern Railway of Peru, Ltd. v. *Owen* (*Inspector of Taxes*), [1956] 2 All E.R. 728; [1957] A.C. 334; 36 Tax Cas. 602; [1956] 3 W.L.R. 389; 28 Digest (Repl.) 75, *285.*

Whitney v. *Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 88; 28 Digest (Repl.) 357, *1578.*

Appeal.

Appeal by the taxpayers, the executors of the will of Sir Arthur Munro Sutherland, Bart., deceased, from an order of the Court of Appeal (LORD EVERSHED, M.R., WILLMER and UPJOHN, L.JJ.), dated July 22, 1960, and reported sub nom. *Re Sutherland* (*decd.*), [1960] 3 All E.R. 270, dismissing an appeal by the taxpayers from an order of DANCKWERTS, J., dated June 19, 1959, and reported [1959] 2 All E.R. 682, declaring that on the true construction of s. 50 (1) of the Finance Act, 1940, as applied by s. 55 (2) (a) of that Act for the purposes of s. 55, and in the events which had happened, no allowance fell to be made in valuing for estate duty at the date of the death of Sir Arthur Munro Sutherland the shares of B. J. Sutherland & Co., Ltd., on the basis of the net value of the assets of the company including certain ships, by taking into account balancing charges (giving rise to income tax and profits tax) attaching to a sale of the ships by reason of and up to the amount of capital allowances previously received by the company in respect of the ships. The facts and the relevant statutory provisions are stated in the opinion of LORD REID.

A *Sir John Senter, Q.C.*, and *R. A. Watson* for the appellants, the taxpayers. *Viscount Bledisloe, Q.C.*, and *E. Blanshard Stamp* for the respondents, the Crown.

Their Lordships took time for consideration.

Oct. 26. The following opinions were read.

B **LORD REID:** My Lords, the appellants are the executors of the deceased Sir A. M. Sutherland who died on Mar. 29, 1953. He owned 98,700 shares in B. J. Sutherland & Co., Ltd., and he controlled that company. Accordingly these shares had to be valued for estate duty purposes by reference to the value of the assets of the company and not by reference to the market value of the shares at the date of his death. The company owned five ships of which the C value at that date is agreed to have been £1,150,000. The cost of these ships had been considerably less and the company had received large capital and annual allowances so that the expenditure unallowed within the meaning of s. 297 of the Income Tax Act, 1952, was only £290,749. Accordingly, if these ships had been sold when the deceased died there would have been a balancing charge which would have given rise to liabilities for income tax and profits tax D amounting to £270,079. In fact the ships were sold somewhat later and then the balancing charge gave rise to a liability of £370,000 for income tax and profits tax.

The question in this case is whether any account has to be taken of the fact that if these ships were sold for a price exceeding the unallowed expenditure the excess would be subject to a balancing charge. I need not consider profits E tax because the argument is the same as for income tax with a minor difference which in my view is not material in this case. The question depends ultimately on the proper construction of the words "contingent liabilities" in s. 50 (1) of the Finance Act, 1940, but before coming to that subsection I must briefly refer to certain other provisions.

Section 55 of that Act provides by sub-s. (1) that, where there pass shares of a F company of which the deceased had control, the principal value of the shares

> "... shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding sub-section.
>
> "(2) For the purposes of such ascertainment as aforesaid—(a) the net G value of the assets of the company shall be taken to be the principal value thereof estimated in accordance with the said sub-s. (5) [of s. 7 of the Finance Act, 1894], less the like allowance for liabilities of the company as is provided by s. 50 (1) of this Act in relation to the assets of a company passing on a death by virtue of s. 46 of this Act, but subject to the modification that allowance shall be made for such a liability as is mentioned in para. (b) of H that subsection unless it also falls within para. (a) thereof; ..."

Section 50 (1) provides:

> "In determining the value of the estate for the purpose of estate duty the provisions of s. 7 (1) of the Finance Act, 1894, as to making allowance for debts and incumbrances shall not have effect as respects any debt or I incumbrance to which assets of the company passing on the death by virtue of s. 46 of this Act were liable, but the commissioners shall make an allowance from the principal value of those assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) other than—(a) liabilities in respect of shares in or debentures of the company; and (b) liabilities incurred otherwise than for the purposes of the business of the company wholly and exclusively."

I need not set out the section of the Income Tax Act, 1952, dealing with balancing charges (1) because there was no dispute about their nature. If a trader claims and receives an initial allowance or annual allowances in respect of anything which he uses in his trade there must be a reckoning with the revenue when for any reason he ceases to use it in his trade. He may sell or scrap it: it may perish: or he may cease to carry on his trade. In any of these events the expenditure unallowed must be compared with any " sale, insurance, salvage or compensation moneys " (2) received. If the latter exceed the former that shows that he has been allowed too much and a balancing charge will be made. If the former exceeds the latter he has been allowed too little and he will get a balancing allowance.

So the position of the company at the date of the deceased's death was that, by applying for and accepting allowances in respect of these ships, it had become bound by the statute to pay tax under a balancing charge when it ceased to use these ships in its trade, if the moneys which it received for them exceeded any expenditure on them which was still unallowed. And I should add, because importance was attached to this in argument, the company would only have to pay tax if the law had not been altered, and if when the question arose there was in existence a Finance Act determining the rate of income tax. So there were two contingencies which had to be fulfilled or conditions which had to be purified (3) before tax could be demanded from the company: the sums received for the ships must exceed the unallowed expenditure, and there must be no relevant change in the law and no failure to enact a Finance Act. The question is whether in these circumstances there was a contingent liability of the company to pay tax.

No doubt the words " liability " and " contingent liability " are more often used in connexion with obligations arising from contract than with statutory obligations. But I cannot doubt that if a statute says that a person who has done something must pay tax, that tax is a " liability " of that person. If the amount of tax has been ascertained and it is immediately payable it is clearly a liability; if it is only payable on a certain future date it must be a liability which has " not matured at the date of the death " within the meaning of s. 50 (1). If it is not yet certain whether or when tax will be payable or how much will be payable why should it not be a contingent liability under the same section.

It is said that where there is a contract there is an existing obligation even if you must await events to see if anything ever becomes payable, but that there is no comparable obligation in a case like the present. But there appears to me to be a close similarity. To take the first stage, if I see a watch in a shop window and think of buying it, I am not under a contingent liability to pay the price: similarly if an Act says I must pay tax if I trade and make a profit, I am not before I begin trading under a contingent liability to pay tax in the event of my starting trading. In neither case have I committed myself to anything. But if I agree by contract to accept allowances on the footing that I will pay a sum if I later sell something above a certain price I have committed myself and I come under a contingent liability to pay in that event. This company did precisely that, but its obligation to pay arose not from contract but from statute. I find it difficult to see why that should make all the difference.

It would seem that the phrase contingent liability may have no settled meaning in English law because in this case DANCKWERTS, J. (4), thought it necessary to resort to a dictionary and in *Re Duffy, Lakeman* v. *A.-G.* (5) (a case much relied on by the respondents) the Court of Appeal (6) regarded its meaning as an open question. But the Finance Acts are United Kingdom Acts and there

(1) Viz., s. 292 of the Income Tax Act, 1952.
(2) See s. 292 (3) of the Income Tax Act, 1952. (3) See p. 859, letter C, post.
(4) [1959] 2 All E.R. at p. 684; [1960] Ch. at p. 140.
(5) [1948] 2 All E.R. 756; [1949] Ch. 28.
(6) [1948] 2 All E.R. at pp. 759, 760; [1949] Ch. at pp. 36, 37.

A is at least a strong presumption that they mean the same in Scotland as in England. A case precisely similar to this case could have come from Scotland and your Lordships would then have considered the meaning of this phrase in Scots law. So I need make no apology for reminding your Lordships of its meaning there. Perhaps the clearest statement is in ERSKINE'S INSTITUTE OF THE LAW OF SCOTLAND, Vol. 2, when he says (Book III, title I, s. 6):

B "Obligations are either pure, or to a certain day, or conditional . . . Obligations in diem . . . are those in which the performance is referred to a determinate day. In this kind . . . a debt becomes properly due from the very date of the obligation, because it is certain that that day will exist; but its effect or execution is suspended till the day be elapsed. A conditional obligation, or an obligation granted under a condition the existence of which C is uncertain, has no obligatory force till the condition be purified; because it is in that event only that the party declares his intention to be bound, and consequently no proper debt arises against him till it actually exist: so that the condition of an uncertain event suspends not only the execution of the obligation, but the obligation itself . . . Such obligation is therefore said in the Roman law to create only the hope of a debt. Yet the granter D is in so far obliged that he hath no right to revoke or withdraw that hope from the creditor which he had once given him."

So far as I am aware that statement has never been questioned during the two centuries since it was written and later authorities make it clear that conditional obligation and contingent liability have no different significance. I would, therefore, find it impossible to hold that in Scots law a contingent liability E is merely a species of existing liability. It is a liability which, by reason of something done by the person bound, will necessarily arise or come into being if one or more of certain events occur or do not occur. If English law is different —as to which I express no opinion—the difference is probably more in terminology than in substance.

I must now turn back to the provisions of s. 50 (1) of the Finance Act, 1940. F It directs the commissioners to make an allowance for (or deduction in respect of) all liabilities of the company, and it divides liabilities, as one might expect, into three classes. First where the liability is a sum immediately payable there is no need for computation and the whole is deducted. Secondly the liability may be one which has not matured: that would include a sum payable at a definite future date or a sum payable on an event which must occur some G time, e.g., the death of A. There the commissioners are to take the present value of the debt. The third class is "contingent liabilities" which must mean sums, payment of which depends on a contingency, i.e., sums which will only become payable if certain things happen and which otherwise will never become payable. There calculation is impossible so the commissioners are to make such estimation as appears to be reasonable.

H The last class appears to me to cover exactly the conditional obligation dealt with by ERSKINE in the passage I have quoted. I agree with the respondents' argument to this extent, that this class can only include liabilities which in law must arise if one or more things happen, and cannot be extended to include everything that a prudent business man would think it proper to provide against. That is the distinction which I have already tried to explain. But I I cannot agree with the respondents for their argument that there must be an existing obligation because that would exclude at least all Scottish conditional obligations.

This argument was based on certain observations in the Court of Appeal in *Re Duffy* (7), so I must now examine that case, as to which I may say at once that I am satisfied that the decision was right although I cannot accept all the reasons given. There, as in this case, s. 50 of the Act of 1940 had to be applied.

(7) [1948] 2 All E.R. 756; [1949] Ch. 28.

Duffy died on June 24, 1942, and therefore his company's assets had to be valued at that date. But instead of doing that the parties adopted the convenient course of valuing those assets at the end of the financial year of the company on Jan. 31, 1942, and adding a proportion of the company's profits for the year 1942-43. This artificial method of valuation led to trouble. The taxpayer sought to bring in as a contingent liability of the company a proportion of its income tax for the year 1943-44, because the earning of profits during the year 1942-43 had engendered a contingent liability for tax for 1943-44. As pointed out by ROXBURGH, J., in a judgment (8) which I find convincing, it had done nothing of the kind. Whether the company would have to pay tax for the year 1943-44 depended entirely on whether they chose to carry on trade during that year and the profits for 1942-43 were merely the measure of their tax liability if they chose to do so. I doubt if the taxpayer could even have stated a plausible case if the old three years average rule had still applied. It seems to me to be verging on the absurd to say that a trader had in June, 1942, incurred a contingent liability to pay tax for a year which only began nine months later.

But the importance of *Duffy's* case (9) to the respondents lies in certain general observations of LORD GREENE, M.R., in the Court of Appeal. Dealing with s. 50 (1) he said (10):

> "... the words in brackets ... deal with two sub-classes of liabilities. Neither of those sub-classes can go beyond the head class of liabilities",

and then he went on (11) to consider the "natural and ordinary meaning" of the words apparently on the assumption that "contingent liabilities" is not a phrase of known meaning in the law of England. Then he went on to say (12):

> "... taking the construction of these words, I find it impossible to give them a meaning extending beyond what is always ascertainable without any doubt whatsoever, namely, an existing legal liability—a liability actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision, but which in law does not become a liability until a subsequent date."

I agree with the last sentence of this quotation and it applied to the facts of *Duffy's* case (9). The taxpayer had already been allowed to deduct tax for 1942-43 and he sought in addition a deduction of something which was only "morally certain" to become the measure of taxation in the next year—if indeed it could be said to be morally certain that the company would continue trading. But as a general statement of the law I think that the passage is inadequate because it appears to me to deprive the category of contingent liabilities of all content. That this category is in a special position is made clear by the Act which, in contrast to the provision for computing other kinds of liability, only requires for a contingent liability "such estimation as appears to the commissioners to be reasonable". I cannot reconcile this with a requirement that such a liability must always be perfectly ascertainable as a legal liability actually existing in law at the relevant date. The essence of a contingent liability must surely be that it may never become an existing legal liability because the event on which it depends may never happen.

There appears to me to be no further difficulty and therefore I am not bound to hold that no deduction can be made in respect of the company's contingent liability to pay tax under a balancing charge and not bound to hold that estate duty has to be paid on a fictitious sum. I say a fictitious sum because in fact it was impossible for the company to realise the value of the ships without having

(8) Unreported; cf. p. 865, post. (9) [1948] 2 All E.R. 756; [1949] Ch. 28.
(10) [1948] 2 All E.R. at p. 759; [1949] Ch. at p. 36.
(11) [1948] 2 All E.R. at p. 760; [1949] Ch. at p. 36.
(12) [1948] 2 All E.R. at p. 760; [1949] Ch. at p. 37.

A immediately to pay away as tax a large proportion of what it received. So it would be a fiction to say that the full value of the ships could be regarded as swelling the assets of the company.

But the deduction will not be the sum of £270,079 which would have been payable in tax if the ships had been sold at the date of the death of the deceased. I agree with your Lordships and the Court of Appeal (13) in rejecting the B appellants' argument for this. In my view the case must go to the commissioners in order that they may make the estimation required by s. 50 (1) on the footing that at the date of death liability to pay under a balancing charge was a contingent liability which would become an immediate liability of the company if they sold or otherwise ceased to trade with the ships and received sums exceeding the expenditure still unallowed. It would not be right for me to suggest to the C commissioners how they should carry out their task: they will no doubt have regard to all relevant facts. In my judgment this appeal should be allowed and the case remitted to a judge of the Chancery Division to proceed as accords.

LORD TUCKER: My Lords, I have had the advantage of reading in print the speech which is to be delivered by my noble and learned friend LORD HODSON. I am in complete agreement with the conclusion he has reached that this appeal D should be dismissed, and the reasoning by which he has arrived at that result. In particular I would wish to emphasise and adopt what he says with regard to the meaning of the words " contingent liabilities " in s. 50 (1) of the Finance Act, 1940. To construe these words as wide enough to include a prospective or foreseeable liability, there being at the material date no contract or statute in existence under which such liability could or would in certain contingencies E arise, cannot, in my opinion, be justified and would be contrary to the reasoning of LORD GREENE, M.R., in *Re Duffy, Lakeman* v. *A.-G.* (14), which should, I think, be applied in the present case.

I would dismiss this appeal.

LORD BIRKETT: My Lords, I have had the opportunity of reading and F considering the speeches of my noble and learned friend on the Woolsack, LORD REID, and of my noble and learned friend LORD GUEST. I agree with their conclusions and would allow the appeal and remit the case to the commissioners to make the estimation referred to in s. 50 (1) of the Finance Act, 1940. The facts of the case and the relevant sections of the various statutes have been so fully set out in the speech of my noble and learned friend LORD REID, that G there is no necessity to repeat them, and I can confine myself to stating quite briefly the reasons which have led me to the conclusion that the appeal ought to be allowed.

The decisive question is whether in the circumstances of this case there was a " contingent liability " within the meaning of s. 50 (1) of the Finance Act, 1940. When Sir Arthur Sutherland died in March, 1953, he had controlled the company H of B. J. Sutherland & Co., Ltd., for some years and owned 98,700 shares in the company. To ascertain the value of these shares for estate duty purposes it was necessary, first of all, to ascertain the net value of the assets of the company at the date of his death, in accordance with the provisions of s. 55 (1) and (2) of the Finance Act, 1940. Section 55 (2) of the Act of 1940 expressly provides that in estimating the value of the assets, the allowance for the liabilities referred I to in s. 50 (1) of the Finance Act, 1940, must be taken into account. Those liabilities include contingent liabilities which are to be computed by the commissioners on a reasonable estimation.

It is clear that these contingent liabilities are of a very special kind, which are not capable of precise ascertainment, but are capable of reasonable estimation. The contingent liability for which the appellants contend in this case arises in this way. At the date of Sir Arthur Sutherland's death the assets of the company

(13) [1960] 3 All E.R. 270; [1960] Ch. 611.
(14) [1948] 2 All E.R. 756; [1949] Ch. 28.

which fell to be valued included five ships which had cost the company £847,907 but were then worth over a million pounds. The company had received capital allowances under the provisions of the Income Tax Act, 1952, and the amount of the capital expenditure still unallowed was £290,749. In the light of the provisions of s. 292 of the Act of 1952 it was clear that if the ships were sold for anything like their true value, a balancing charge would be imposed, and a liability for income tax and profits tax would follow as a matter of course. The ships were not sold at the date of the death of Sir Arthur but were sold some months later. A balancing charge was imposed with the result that an assessment was made for income tax and profits tax amounting to £370,114 13s. The question is: Was this liability to pay tax arising out of the balancing charge a contingent liability within the meaning of s. 50 (1) of the Finance Act, 1940? It was clearly in accordance with the provisions of the Income Tax Act, 1952, and I am of opinion that it was a contingent liability within the meaning of s. 50 (1) of the Finance Act, 1940, and that the commissioners should have made the reasonable estimation authorised by the Act. It was argued that an existing legal liability was essential to the creation of a contingent liability and that no such legal liability existed in this case at the date of Sir Arthur's death. In my view this is to take too narrow a view of the true meaning of contingent liability. It must have been apparent to everybody concerned with the calculation of estate duty in this case that on the sale of the ships a balancing charge was certain to arise and that additional duty would have to be paid. The appellants had raised the question with the commissioners before any legal proceedings were begun for it was clear to them that on the happening of a certain event, i.e., the sale of the ships, the provisions of the Act of 1952 would come into operation as the event later proved. They never doubted the existence of a liability but it was a contingent liability. It was no less a contingent liability because the sale of the ships might not take place. The true legal position was that from the moment the appellants accepted capital allowances they were at once under a liability to pay tax in the circumstances provided for in the Income Tax Act, 1952. That liability was a contingent liability and was within the meaning of those words in s. 50 (1) of the Finance Act, 1940. I am confirmed in this view by the citations from the law of Scotland made by my noble and learned friends, LORD REID and LORD GUEST. I also agree with their observations on *Re Duffy, Lakeman* v. *A.-G.* (15) and I would allow the appeal.

LORD HODSON: My Lords, at his death on Mar. 29, 1953, the deceased, Sir Arthur Munro Sutherland, was the owner of 98,700 £1 shares in the capital of B. J. Sutherland & Co., Ltd., of which company he had had control during the five years ending with his death. Consequently, for purposes of estate duty, the shares had to be valued by reference to the net value of the assets of the company in accordance with the provisions of s. 50 and s. 55 of the Finance Act, 1940, instead of by reference to the then open market value of the shares pursuant to s. 7 (5) of the Finance Act, 1894.

The assets of the company at the date of the deceased's death included five ships, the value of which at that date had been agreed with the Estate Duty Office to be £1,150,000. The cost of these ships to the company for income tax purposes had been agreed to be £847,907, and at the date of the deceased's death the company had received capital allowances under the provisions of Part 10 of the Income Tax Act, 1952, leaving "expenditure unallowed" (as defined by s. 297 of the same Act) of £290,749. In the event of a sale of the ships for a sum in excess of the amount of such expenditure unallowed, under s. 292 of the Income Tax Act, 1952, a balancing charge would be imposed of an amount equal to such excess, resulting in an assessment to income tax and profits tax at the rates appropriate to the year in respect of which such assessment was made.

(15) [1948] 2 All E.R. 756; [1949] Ch. 28.

A The ships were in fact sold between November, 1953, and February, 1954, for sums amounting in the aggregate to £1,070,505. This gave rise to balancing charges of £548,318, resulting in an additional income tax assessment on the company for the year 1953-54 at 9s. in the pound, amounting to £246,743 2s., and an additional profits tax assessment at the rate of 22½ per cent. for the chargeable accounting period ending on Mar. 31, 1953, amounting to £123,371 B 11s. The aggregate of this additional tax liability was £370,114 13s.

The question for decision is whether in valuing the assets of the company at the date of the deceased's death any deduction ought to be made in respect of a claim for additional income tax and profits tax which might arise on a sale of the ships for an amount in excess of the expenditure unallowed having regard to the manner in which this event afterwards happened.

C The following statutory provisions are material:

"Finance Act, 1894. Section 7 (5)

"The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased; . . ."

"Finance Act, 1940. Section 55:

D "(1) Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if—(a) the deceased had the control of the company at any time during the [five years (16)] ending with his death; . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance E Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection.

"(2) For the purposes of such ascertainment as aforesaid—(a) the net value of the assets of the company shall be taken to be the principal value thereof estimated in accordance with the said sub-s. (5), less the like allowance for F liabilities of the company as is provided by s. 50 (1) of this Act in relation to the assets of a company passing on a death by virtue of s. 46 of this Act, but subject to the modification that allowance shall be made for such a liability as is mentioned in para. (b) of that subsection unless it also falls within para. (a) thereof; (b) the aggregate value of all the shares and debentures of the company issued and outstanding at the death of the deceased shall G be taken to be the same as the net value of the assets of the company; . . . (d) the value of any share, or of any debenture, or of a share or debenture of any class, shall be a rateable proportion, ascertained by reference to nominal amount, of the net value of the assets of the company as determined under para. (a) of this subsection, or, in the case mentioned in para. (c) of this subsection . . . as the case may be."

H Section 50 (1):

"In determining the value of the estate for the purpose of estate duty the provisions of s. 7 (1) of the Finance Act, 1894, as to making allowance for debts and incumbrances shall not have effect as respects any debt or incumbrance to which assets of the company passing on the death by virtue I of s. 46 of this Act were liable, but the commissioners shall make an allowance from the principal value of those assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) other than—(a) liabilities in respect of shares

(16) The words "five years" were substituted by the Finance Act, 1946, s. 47 and Sch. 11, Part 1.

in or debentures of the company; and (b) liabilities incurred otherwise than for the purposes of the business of the company wholly and exclusively."

The appellants claim that they are entitled to make a deduction in respect of "balancing charges" as being "contingent liabilities" within s. 50 (1) of the Finance Act, 1940. Their claim does not relate to the balancing charges which were levied on the sale of the ships after the death of the deceased but to a sum of £270,000 which is an agreed figure representing the balancing charges which would have been paid if the ships had been sold at the time of the death.

The time of the death is the relevant moment and the appellants have contended that when the statute directs property to be valued at the price which it would fetch if sold in the open market, a sale at the moment of death should be assumed. On this hypothesis of a notional sale they argue that the liability to a balancing charge was contingent on the sale because at the date of the death the ships were worth much more than their written down value.

The answer to this argument is that to apply the statutory test of value it is necessary to ascertain what the property would fetch at the time of death on a sale not on a sale by a particular individual. Section 7 (5) of the Act of 1894 does not put the appellants in the same position as they would have been if the ships had been sold at the death. The ships were not sold and there is nothing in the section to introduce the artificial conception that they must be deemed to have been sold. I agree therefore with the judgments delivered in the Court of Appeal that the appellants' case fails in limine since the whole basis of the argument is a notional or hypothetical sale bringing in its train a contingent liability.

The appellants have, however, maintained in this House, as I understand their argument, that even if they cannot succeed in upholding their hypothesis of a sale they are entitled to make the deductions claimed as "contingent liabilities" having regard to the wide meaning which can be given to these words. It is true that, from the accountancy point of view, any provisions which the directors of a company as business men think it prudent to make for something which may not happen can be entered in a balance sheet as a liability. In ordinary speech no doubt one often uses the words "contingent liabilities" in this sense. I do not think in their context these words can have such an extended meaning nor indeed do the appellants contend that they should, for they expressly disclaimed that they would seek to take into account liabilities which may exist in the future but they have endeavoured to say that there is as it were "in gremio" a liability which was contingent since once the voluntary allowances have been accepted the acceptor runs the risk of attracting liability to refund the allowances.

This is no doubt true but in my judgment the risk of attracting liability is not enough and the argument involves a misconception of what is meant by "contingent liabilities" in their context. There may be no day of reckoning; the ships may never be sold; if there is a sale there may be a balancing allowance not a balancing charge. It is only when s. 292 of the Income Tax Act, 1952, which provides for balancing charges and balancing allowances comes into operation that any question can arise.

One must start with the word "liability" which prima facie connotes a legal liability. When one adds to it the adjective "contingent" one is not entitled to sail into an uncharted sea and to take into account not only contingent liabilities but all other kinds of liabilities which may be prospective or foreseeable as likely to be incurred.

There can be no true contingent liability unless there is an existing legal obligation under which a payment will become due on the happening of a future unascertained event or events. There must always be an underlying obligation. It does not matter whether one regards the obligation as suspended pending the arising of the contingency or whether one regards the performance of the obligation as suspended. The result to my mind is the same. In the ordinary case no

A doubt the contingent liability is imposed by contract. A common example is a contract of insurance when the insurance company promises to make a payment to the assured on the happening of a contingency. A car owner may have an accident and be liable to meet an award of damages. If he is insured the contingency is provided for. In some cases the contingent liability may be imposed by statute. An illustration is to be found in *Southern Railway of Peru, Ltd.* v. B *Owen* (*Inspector of Taxes*) (17). No doubt other examples can be found.

The distinction between a future liability which has not yet matured and a contingent liability is marked in s. 50 (1) itself. Those which have not matured are certain as to maturity whereas those which are contingent are uncertain as to maturity. The value of each is capable of estimation by the commissioners as the statute directs.

C *Re Duffy, Lakeman* v. *A.-G.* (18) is authority for the proposition that the words "contingent liabilities" in s. 50 mean legal liabilities actually existing in law at the relevant date and cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision but which in law does not become a liability until a subsequent date. That also was an estate duty case. It concerned the basis of valuation of the D shares of a company on the death of the deceased Joseph Duffy. The shares had to be valued for the purpose of calculating duty in the manner laid down in s. 55 of the Finance Act, 1940. The executors sought to deduct as a contingent liability a sum equivalent to income tax on the proportion of the profits of the company applicable to that part of the company's financial year which preceded the death of the deceased. Two points were taken by the Crown, first that the tax was E imposed annually, secondly that the trader is only liable if he carries on his trade into the next year. The tax not having been imposed, although admittedly there was a moral certainty that it would be, there was no liability and the Court of Appeal decided the case on this ground. ROXBURGH, J., in his judgment (19), which the Court of Appeal upheld, based himself on the second point taken by the Crown. He put the matter in this way:

F "Mr. Stamp gave a graphic illustration which really seems to me to illuminate the problem. It was this. The fact that you have got a live dog on Dec. 31, 1947, does not make you liable, contingently or otherwise, to pay for a dog licence in 1948. Of course, the probability is very great that you will not kill your dog overnight. Likewise, the probability was very great that this company would not go out of business immediately after the G testator's death. But the fact that you are unlikely to kill your dog before Jan. 1 cannot convert into a liability that which otherwise is not a liability, and it is quite plain that if you did kill your dog before Jan. 1, 1948, you would not be liable for a dog licence for the year 1948.

"It seems to me that that was just the position of this company with regard to the financial year beginning Apr. 6, 1943. It was unlikely that it H would not carry on business, but there was nothing to compel it to do so. It was unlikely that income tax would be abolished, but there was nothing to prevent Parliament from abolishing it. But, to my mind, it is impossible to believe that a state of affairs which you can terminate if you like by your own choice and without the intervention of anybody or anything, can properly be described as a liability. If you can go out of business and, thereby, I escape from any liability to tax then, in my judgment, you are not under a liability for the tax in question."

In my opinion the reasoning of these judgments is sound. True that to treat the passing of the next Income Tax Act as the crucial moment when liability attaches is to rest on rather an artificial basis since it is as certain as can be that year by year income tax will be imposed. This criticism cannot, however, be

(17) [1956] 2 All E.R. 728; [1957] A.C. 334.
(18) [1948] 2 All E.R. 756; [1949] Ch. 28. (19) Unreported.

levelled against the ground on which ROXBURGH, J., decided the case. There as here the liability could have been avoided at the volition of the company. Money for duty had to be raised but not necessarily by the sale of the ships though no doubt this was the convenient course to follow and a decision was taken to sell the ships rather than shares of the company. I agree with ROXBURGH, J., in regarding a state of affairs which can be terminated of one's own choice without outside intervention as being inconsistent with the imposition of a liability contingent or otherwise.

I see no room for an intermediate kind of liability between the contingent liability which I have tried to describe and the prospective liability which may or may not come into existence and which is admittedly outside the scope of a contingent liability for the purposes of the section and I find it impossible to define or limit the scope of a liability such as is contended for by the appellants. They have established vulnerability no doubt but not contingent liability.

I will not deal at length with the subsidiary arguments presented on behalf of the appellants. Accepting the distinction between liability and assessment drawn by LORD DUNEDIN in *Whitney* v. *Inland Revenue Comrs.* (20) I see no distinction between s. 1 and s. 292 of the Act of 1952 which enables the appellants to say that here there was a liability existing at the date of death. Further, I think that mutatis mutandis the same arguments apply to profits tax and there is no distinction to be drawn between profits tax and income tax. Annual imposition is necessary for both. Reliance was also placed on *British Transport Commission* v. *Gourley* (21), which shows that a prospective tax burden should be taken into account in assessing damages in an action of tort. No assistance can be gained from the speeches delivered in that case which had to do with prospective earnings and not with liabilities actual or contingent.

I would dismiss the appeal.

LORD GUEST: My Lords, on the death of Sir Arthur Sutherland on Mar. 29, 1953, the property passing for the purposes of estate duty included 98,700 shares of £1 each in B. J. Sutherland & Co., Ltd. The deceased had control of the company during the five years ending with his death and the principal value of the shares had therefore to be valued according to the provisions of s. 55 (1) of the Finance Act, 1940, by reference to the net value of the assets of the company. Section 55 (2) of the Act of 1940 provides that the value of the assets is to be taken to be the principal value estimated in accordance with s. 7 (5) of the Finance Act, 1894, less the allowance for liabilities provided for by s. 50 (1) of the Act of 1940.

Section 50 (1) is in the following terms:

> "In determining the value of the estate for the purpose of estate duty the provisions of s. 7 (1) of the Finance Act, 1894, as to making allowances for debts and incumbrances shall not have effect as respects any debt or incumbrance to which assets of the company passing on the death by virtue of s. 46 of this Act were liable, but the commissioners shall make an allowance from the principal value of those assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) other than—(a) liabilities in respect of shares in or debentures of the company; and (b) liabilities incurred otherwise than for the purposes of the business of the company wholly and exclusively."

At the date of Sir Arthur's death the assets of the company included five ships. At this date the company had received in respect of these ships which cost the company £847,907 capital allowances under ch. 2 of Part 10 of the Income Tax Act, 1952, to the amount of £557,158. The ships had at the deceased's death a

(20) [1926] A.C. 37. (21) [1955] 3 All E.R. 796; [1956] A.C. 185.

A greatly increased value and if they had been sold then, the company would have sustained a balancing charge under s. 292 of the Income Tax Act, 1952, giving rise to additional income tax and profits tax liability. The five ships were in fact sold during the year of assessment 1953-54 for £1,070,505 and a balancing charge arose on the sum of £548,318 giving rise to additional income tax liability and profits tax liability respectively of £246,743 and £123,371.

B The appellants claimed that in arriving at the value for estate duty purposes of the shares, they were entitled to receive an allowance under s. 50 (1) of the Finance Act, 1940, by taking into account the balancing charges attaching to the sale of the ships.

In the courts below the appellants' claim has been refused, but it is not unfair to say, at any rate so far as DANCKWERTS, J., (22) is concerned, that if they C had not considered themselves bound by authority to decide otherwise they might have decided in the appellants' favour.

The argument presented by the appellants was presented from two angles. First, it was argued that s. 7 (5) of the Finance Act, 1894, envisaged a notional sale of the ships as at the date of the deceased's death and that from the price in the open market as provided for in s. 7 (5) the balancing charges must be D deducted. The second aspect of the argument was that the liability for balancing charges was a " contingent liability " within the meaning of s. 50 (1) of the Finance Act, 1940, and that the commissioners must make an allowance for the balancing charges from the principal value of the assets.

The first argument was, in my opinion, rightly rejected by the Court of Appeal (23). The purpose of s. 7 (5) of the Finance Act, 1894, is to value the property. E As LORD EVERSHED, M.R., said (24) : " It does not require it to be assumed that the sale . . . has occurred . . .". It simply prescribes as the criterion for value price in the open market as between a willing seller and a willing buyer, which is a familiar basis of valuation. I therefore agree with all that fell from the Master of the Rolls and UPJOHN, L.J., on this aspect of the matter. But both these learned judges appeared to think that this concluded the case in favour of the F revenue and that if you did not assume a notional sale under s. 7 (5) of the Act of 1894, there was no room for the operation of s. 50 (1) of the Finance Act, 1940. With great respect to these learned judges this seems to me to fail to appreciate the second limb of the appellants' argument. By s. 55 (2) of the Act of 1940 you are directed to s. 7 (5) of the Act of 1894 for the method of valuation of the assets of the company, but in calculating the allowance for liabilities of the company G you are directed to s. 50 (1). And among the allowances which the commisssioners are directed to make are " contingent liabilities ". Contingent liabilities, therefore, remain as deductions from the open market value of the assets of the company.

If this be the correct interpretation of these sections, the only question is whether the liability to pay balancing charges was a " contingent liability " under s. 50 (1). If the question were untrammelled by authority I should have H little difficulty in holding that the liability for these balancing charges was a contingent liability. It is plain from the terms of s. 50 (1) that the liability contemplated is different from a debt or incumbrance, because the ordinary provisions of s. 7 (1) of the Act of 1894 regarding debts and incumbrances are not to apply. Section 50 (1) refers both to liabilities which have not matured at the date of death and to contingent liabilities. Contingent liabilities must therefore be something I different from future liabilities which are binding on the company, but are not payable until a future date. I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence on an event which may or may not happen. A contingent obligation has in Scots law a perfectly well-known meaning. I quote from ERSKINE'S INSTITUTE OF THE LAW OF SCOTLAND, Vol. 2, Book III, title 1, s. 6:

(22) [1959] 2 All E.R. 682; [1960] Ch. 134.
(23) [1960] 3 All E.R. 270; [1960] Ch. 611.
(24) [1960] 3 All E.R. at p. 274; [1960] Ch. at p. 624.

"A conditional obligation, or an obligation granted under a condition the existence of which is uncertain, has no obligatory force till the condition be purified; because it is in that event only that the party declares his intention to be bound, and consequently no proper debt arises against him till it actually exist; so that the condition of an uncertain event suspends not only the execution of the obligation, but the obligation itself . . ."

In GLOAG ON CONTRACT (2nd Edn.) pp. 271, 272 future obligations are contrasted with contingent obligations. An obligation is future when though not presently exigible it is dependent on no other condition than the arrival of the day of payment. An obligation is contingent "if its enforceability is dependent on an event which may or may not happen". I see no reason why these principles should not be applicable to a United Kingdom statute and no authority was quoted to show that English law differed in any way.

The Crown argued that *Re Duffy, Lakeman* v. *A.-G.* (25) was a barrier to the appellants' success and the learned judges of the Court of Appeal considered themselves bound by that decision. In particular, reliance was placed on the construction placed by LORD GREENE, M.R., on the words "contingent liabilities" when he said (26):

". . . but, taking the construction of these words, I find it impossible to give them a meaning extending beyond what is always ascertainable without any doubt whatsoever, namely, an existing legal liability—a liability actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision, but which in law does not become a liability until a subsequent date."

With great respect to LORD GREENE, if a liability must be an existing legal liability to comply with s. 50 (1), that would appear to give no content to the adjective "contingent". The liability is not a legal liability until the contingency has arrived and the section cannot therefore be restricted to "existing legal liabilities". *Re Duffy* (25) concerned the point whether income tax payable at the standard rate for the financial year 1943-44 assessed by reference to the profits of the year 1942-43 during which the deceased died on June 24, 1942, was a contingent liability of the company for the purposes of s. 50 and s. 55 of the Finance Act, 1940. The Court of Appeal decided that it was not a contingent liability on the view that there was no present liability for income tax and that it was not certain that income tax would be imposed in the Finance Act for the next year. ROXBURGH, J., whose judgment was affirmed by the Court of Appeal, approached the matter from a slightly different angle. He held that as the company was free not to carry on business in the relevant year and that as the company could terminate its liability to income tax by its own voluntary act by not trading, it could not be described as a liability. It is not necessary to come to a conclusion whether *Re Duffy* (25) was rightly decided. The facts of the present case are different and more favourable to the taxpayer than they were in *Re Duffy* (25). The claim for initial allowances for what has been described as depreciation is the voluntary choice of the taxpayer, but once he has obtained such allowances, he is automatically involved by the operation of law in the payment of balancing charges, if the assets are parted with at a price greater than the written-down value in the certain circumstances defined in s. 292 of the Income Tax Act, 1952. In the present case as at the date of the deceased's death the ships in question had a value on the open market considerably in excess of that written-down value. The liability for such a balancing charge was, in my view, a "contingent liability" within the meaning of s. 50 (1) of the Act of 1940, the liability being contingent on the ships being sold at a price in excess of their

(25) [1948] 2 All E.R. 756; [1949] Ch. 28.
(26) [1948] 2 All E.R. at p. 760; [1949] Ch. at p. 37.

A written-down value. The courts below have, in my opinion, put too narrow a construction on the words " contingent liabilities ".

The commissioners will, under s. 50 (1), require to make an estimation of the contingent liabilities as appears to them to be reasonable. The allowances to be made will not be the full extent of the balancing charges.

I therefore agree that the appeal should be allowed and the case dealt with in B the way in which my noble and learned friend on the Woolsack proposes.

Appeal allowed.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Keenlyside & Forster*, Newcastle-upon-Tyne (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

C [*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

Re MATTHEWS'S WILL TRUSTS.
D BRISTOW AND OTHERS *v.* MATTHEWS AND OTHERS.

[CHANCERY DIVISION (Pennycuick, J.), October 10, 11, 12, 1961.]

Administration of Estates—Marshalling—Devise of property in Australia—Sale and application of proceeds partly in paying Australian death duty not ultimately payable out of proceeds of sale—Remittance of moneys forming E *part of estate to England—Balance of proceeds of sale not set aside and separately invested nor appropriated—Devisee's right to compensation in a fixed sum (being amount of balance) notwithstanding depreciation of remitted assets—No notional appropriation for want of consents required by Land Transfer Act,* 1897 (60 *&* 61 *Vict. c.* 65), *s.* 4 (1).

Death Duty—Incidence—Real property—Contrary intention—Australian federal F *estate duty—New South Wales probate duty—" Expenses incident to the execution of the preceding trusts "—" Debts "—" Testamentary expenses "—Whether testamentary direction to pay these showed intention to exonerate realty from death duty.*

By his will a testator devised his " moiety of the freehold premises known as Roberts' Hotel in the city of Sydney, New South Wales, subject to the G lease thereof but with the benefit of my share of the rent thereof unto my said wife during her life " and after her death he devised the moiety to his son, the first defendant, in fee simple. The testator gave his residue to his trustees on trust for conversion and directed that out of the moneys arising from the conversion the trustees should pay " all the expenses incident to the execution of the preceding trusts and powers and my debts and funeral H and testamentary expenses " and declared further trusts. The testator died on Apr. 23, 1916. His estate included property in Australia which at the date of his death was valued at £40,650 10s. and property in England and Ceylon valued at the date of his death at £26,911 17s. 1d. The amount of the proceeds of sale of the moiety of the Roberts' Hotel, which was realised shortly after the testator's death, after deducting £3,098 14s. 8d. in respect I of Australian duty properly payable in respect thereof was £14,013 15s. 4d. Much of this had initially been used for paying Australian duty not chargeable in respect of the proceeds of sale of the moiety of the hotel. Ultimately £6,132 10s. 5d. of the £14,013 15s. 4d. was credited to a separate account and was separately invested, £1,218 fell to be charged against the moiety by virtue of a settlement made by the testator in 1910. The balance (£6,663 4s. 11d.) had not been so credited nor had it been separately invested, nor had appropriation been made in respect of it, though remittances from Australia of much more than enough to satisfy the latter sum had been

received. The assets in the hands of the trustees had depreciated since the widow's death on Feb. 17, 1958. A

The £3,098 14s. 8d. duty was made up of New South Wales probate duty and Commonwealth of Australia federal estate duty. By the relevant New South Wales statute the probate duty was deemed to be a debt of the testator, and by the relevant Commonwealth statute the federal estate duty was a charge on the estate; broadly, each duty was, under the relevant statutory provisions, to be borne by the properties in question in the absence of provision to the contrary by the testator in his will. B

Held: (i) no payment of or appropriation to the £6,663 4s. 11d. having been made, the first defendant remained entitled to that sum, his right being an equitable right to compensation of that amount (see p. 873, letter I, post); and, although it had been the duty of the trustees to set aside the sum of £6,663 14s. 11d. and invest it or to appropriate assets towards it, the trustees could not be regarded in equity as having made such an appropriation under s. 4 (1) of the Land Transfer Act, 1897*, since the consents required by that enactment had not been obtained (see p. 874, letter G, post). C

(ii) the testator's will did not show an intention that the Australian duties should be borne by his residuary estate, because (a) the duties were not " expenses incident to the execution of the preceding trusts ", (b) nor were they " debts " of the testator (viz., debts owed by him) and (c) nor were they " testamentary expenses ", within the words quoted previously from the trust of the proceeds of conversion of the testator's residuary estate; accordingly, the moiety of the Roberts' Hotel was not exonerated from the duties (see p. 876, letter H, and p. 877, letter E, post). D E

Shelley v. *New South Wales Institution for the Deaf and Dumb and the Blind* ([1919] A.C. 650), and *Re Brewster, Butler* v. *Southam* ([1908] 2 Ch. 365) followed.

[As to marshalling assets, see 16 HALSBURY'S LAWS (3rd Edn.) 346, para. 670, and 14 ibid., 614, para. 1132. F

As to United Kingdom estate duty on personalty being a testamentary expense, see 15 HALSBURY'S LAWS (3rd Edn.) 130, para. 267; and for cases on the subject, see 21 DIGEST 6, *11-20*; as to United Kingdom estate duty on realty being a first charge, see 15 HALSBURY'S LAWS (3rd Edn.) 131, para. 269.

As to testamentary directions altering the incidence of death duties, see 16 HALSBURY'S LAWS (3rd Edn.) 385-388, paras. 751, 752. G

For the Land Transfer Act, 1897, s. 4, see 9 HALSBURY'S STATUTES (2nd Edn.) 717, and compare the Administration of Estates Act, 1925, s. 41, ibid., 746.]

Cases referred to:

Brewster, Re, Butler v. *Southam*, [1908] 2 Ch. 365; 77 L.J.Ch. 605; 99 L.T. 517; 23 Digest (Repl.) 482, *5499*. H

Broadwood, Re, Lyall v. *Broadwood*, [1911] 1 Ch. 277; 80 L.J.Ch. 202; 104 L.T. 49; 23 Digest (Repl.) 535, *6004*.

Edinburgh Corpn. v. *Lord Advocate*, (1879), 4 App. Cas. 823; 8 Digest (Repl.) 404, *965*.

Shelley v. *New South Wales Institution for the Deaf and Dumb and the Blind*, [1919] A.C. 650; 21 Digest 40, *m*. I

Adjourned Summons.

This was an application by originating summons dated May 15, 1959, by the plaintiffs, Arnold Wilson Bristow, Sir Guy Nott-Bower and Michael John Ellison who were the trustees of the will dated Feb. 9, 1914, with two codicils of William Macdonald Matthews, deceased. The application (as amended in the course of the hearing) was for the determination of the following questions:—

* For the Land Transfer Act, 1897, s. 4, see p. 874, letter E, post.

A (1) Whether on the true construction of the will and codicils of the testator the investments and cash held by the plaintiffs as trustees thereof on the death of Frances Elizabeth Matthews (the widow of the testator and hereinafter called "Mrs. Matthews") should be apportioned between the first defendant Francis William Macdonald Matthews as the person who then became absolutely entitled to the "moiety of the freehold premises known as Roberts' Hotel" in the will B and the other defendants as being the persons entitled to the residuary estate of the testator as follows:

(a) the moiety should at the death of Mrs. Matthews be treated as consisting of first the investments and cash ("the appropriated fund") which were at the death of Mrs. Matthews held by the plaintiffs as trustees of the will as representing £6,132 10s. 5d. which sometime before June 30, 1921, had been set aside as C representing that amount out of the proceeds of sale of the moiety and which were at the death of Mrs. Matthews of the estimated value of £4,969 6s. 5d. and secondly the sum of £6,618 12s. 6d. to be raised and paid out of the other investments and cash at the death of Mrs. Matthews held by the plaintiffs, the last-mentioned sum being £17,112 10s. (that is the total net proceeds of sale of the moiety) less the sum of £6,132 10s. 5d. and also less £3,098 14s. 8d. (that is the D Australian federal probate and estate duty payable on the death of the testator in respect of the moiety) and also less £1,218 (being a proportion attributable to the moiety of the sum payable under a settlement dated July 13, 1910, and made on the marriage of the testator's daughter, Susan Cicely Fowke) and less special contribution of £44 12s. 5d.; or

E (b) the moiety should at the death of Mrs. Matthews be treated as consisting of first the appropriated fund and secondly the investments then representing the sum of £3,003 12s. 8d. received by the executors of the testator in October, 1920, from Australia in respect of the testator's interest in 249, George Street, Sydney, the investments then representing the sum of £2,249 4s. 9d. being a sum of £9,500 received by the executors of the testator in September, 1922, in F respect of his share of a mortgage of £30,000 (Grimley's mortgage) less the sum of £7,250 15s. 3d. then paid to the trustees of the settlement of July 13, 1910, and the investments then representing the sum of £910 7s. 6d. (which together with the sum of £3,003 12s. 8d. and the sum of £2,249 4s. 9d. amount to the sum of £6,163 4s. 11d.) being part of a sum of £9,499 2s. 6d. received by the executors of the testator in October, 1925, in respect of a mortgage for the sum of £9,500 secured on property in Australia (the Hordern mortgage) but subject to raising G thereout for the benefit of the testator's residuary estate £53 13s. 2d. (being the difference between the sum of £1,218 and £1,164 6s. 10d., the proceeds of sale of the Brighton 6% Corporation Stock) and the sum of £44 12s. 5d. special contribution; or

(c) the moiety should be apportioned in some other, and, if so, what way.

H (2) Whether on the true construction of the will and codicils (a) the New South Wales probate duty or (b) the Commonwealth of Australia federal estate duty, payable in respect of the death of the testator on the "moiety of the freehold premises known as Roberts' Hotel" was (i) payable out of the residuary estate of the testator in exoneration of the defendant Francis William Macdonald Matthews to whom the moiety was devised after the death of Mrs. Matthews; I or (ii) was payable out of the moiety in exoneration of the residuary estate of the testator; or (iii) was payable out of some other fund or in some other way.

The second and subsequent defendants were persons who were all beneficially interested under the will of the testator, and two codicils thereto dated Nov. 17, 1915, and Mar. 31, 1916.

A. A. B. Fuller for the plaintiffs.

Michael Albery, Q.C., and *M. Essayan* for the first defendant.

J. A. Brightman, Q.C., and *S. W. Templeman* for the remaining defendants.

Oct. 11. **PENNYCUICK, J.:** This summons raises certain questions under the trusts of the will of one William Macdonald Matthews. The first question is one of considerable general importance, and I am much indebted to the arguments which I have heard from counsel on behalf of all parties.

By his will which is dated Feb. 9, 1914, the testator, after appointing executors and trustees and making certain bequests not now material, gave and devised his

> " moiety of the freehold premises known as Roberts' Hotel in the city of Sydney, New South Wales, subject to the lease thereof but with the benefit of my share of the rent thereof unto my said wife [she had been previously mentioned as his wife, Frances Elizabeth Matthews] during her life "

and after her decease he gave and devised the said moiety of the said house and premises unto and to the use of his son, Francis William Macdonald Matthews, in fee simple. The son, Francis William Macdonald Matthews, is the first defendant on the present summons. The testator made certain other bequests not now in point, or directly in point. He then gave his residue on trust for conversion. He directed that as to the moneys to arise from the conversion his trustees should in the first place pay or retain all the expenses incident to the execution of the preceding trusts and powers and his debts and funeral and testamentary expenses and should in the next place pay the pecuniary legacies thereinbefore mentioned. Then he directed that the surplus should be invested, and that the trust fund thereby constituted should be held on trust to pay the income to his widow during her life and after her death on certain trusts for some of his children, which are not now in point. The only significance of those trusts is that the remaining defendants are the persons beneficially interested in residue.

The testator died on Apr. 23, 1916. His estate included property in Australia which at the date of his death was valued at £40,650 10s. and also property in England and Ceylon which at the date of his death was valued at £26,911 17s. 1d. The testator's moiety in the Roberts' Hotel, Sydney, was realised shortly after his death the net proceeds of sale amounting to £17,112 10s. Out of that sum, the solicitors acting in Australia for the executors paid the sum of £3,098 14s. 8d. representing Australian duty in respect of the Roberts' Hotel itself. For the purpose of this question, I shall treat that sum as being properly chargeable against the proceeds of the Roberts' Hotel itself and not against residue, though I understand there is a second question in this summons which relates to that point. That sum of £3,098 14s. 8d., when deducted from the sum of £17,112 10s., leaves the sum of £14,013 15s. 4d. Out of the net proceeds of sale, the solicitors in Australia paid two further sums which were clearly not chargeable against the proceeds of sale of the Roberts' Hotel by way of ultimate incidence. One of those was Australian duty on the rest of the estate, £7,881 4s. 11d. The other was Australian duty on certain premises known as Strand Arcade, amounting to £2,121 18s. 5d., those premises having formed the subject of another gift. In the result, the Australian solicitors remitted to the executors in England the sum of £4,010 12s., representing £17,112 10s., less the three deductions which I have mentioned. That sum of £4,010 12s. was separately invested by the executors in this country, and no further question arises with regard to it. Subsequently the executors made good to the Roberts' Hotel account the sum of £2,121 18s. 5d., representing the Australian duty on the Strand Arcade premises, and that sum of £2,121 18s. 5d. was separately invested, and again no further question arises with regard to it. A sum of £1,218 fell to be charged against the moiety by virtue of a settlement dated July 13, 1910, and made on the marriage of the testator's daughter Susan Cicely Fowke. So, in the result, out of the sum of £14,013 15s. 4d. representing the proceeds of sale of the moiety less Australian duty on the moiety, £1,218 was charged by virtue of the 1910 settlement, £6,132 10s. 5d. was credited to the Roberts' Hotel account

A and separately invested and the balance of £6,663 4s. 11d. was not so credited and no separate investment in respect of that balance has ever been made. Subsequently certain further remittances were received from Australia which would have been much more than sufficient to satisfy the balance of £6,663 4s. 11d., and there have been, throughout, English, and I suppose Ceylon, assets much in excess of that balance. However, no appropriation of assets to satisfy B the balance has ever been made. At some time after 1945 the trustees paid the sum of £44 12s. 5d. by way of special contribution, which is properly attributable to the Roberts' Hotel account.

The testator's widow, who had under the will a life interest in both the moiety of the Roberts' Hotel and residue, died on Feb. 17, 1958. The investments in the hands of the trustees have depreciated in value since the date of her death, C and that depreciation has given rise to the present question.

The question raised by the summons is in broad terms this: has the first defendant, on the one hand, a claim against the assets in the hands of the trustees for the sum of £6,663 4s. 11d., neither more nor less, apart from the special contribution of £44 12s. 5d. to which I shall not again refer, or has he a claim to some and, if so, what rateable share in the assets of the estate? The latter D would, of course, be less advantageous to him than his claim for the fixed sum.

Counsel for the first defendant started his argument by quoting some two or three text-book passages. I will quote two of those at this stage: JARMAN ON WILLS (8th Edn.) at p. 1956, under the head of "As to marshalling of assets in favour of creditors and legatees".

E "On this subject it may be stated, as a general rule, that, wherever a creditor, having more than one fund, resorts to that which, as between the debtor's own representatives, is not primarily liable, the person whose fund is so taken out of its proper order, is entitled to be placed in the same situation as if the assets had been applied in a due course of administration, in other words, to occupy the position of the creditor in respect of that fund, or those funds, which ought to have been applied, to the extent to which his own F has been exhausted."

In SNELL'S PRINCIPLES OF EQUITY (25th Edn.) at p. 337 it is stated:

"The general principle of marshalling is that if any beneficiary is disappointed of his benefit under the will through a creditor being paid out of the property intended for the beneficiary, then to the extent of the dis- G appointment the beneficiary may recoup or compensate himself by going against any property which ought to have been used to pay the debts before resorting to his property."

The argument of counsel for the first defendant was simplicity itself. He said that the amount to which the first defendant was entitled by way of compensation for part of the proceeds of the Roberts' Hotel moiety having been H applied in discharge of liabilities for which residue was primarily liable, was a fixed sum; the beneficiaries in respect of the settled legacy of the Roberts' Hotel moiety, that is the widow for life and now the first defendant, had throughout been entitled to that fixed sum; no payment or appropriation had ever been made in respect of the fixed sum, and so the right of the first defendant today was to receive the fixed sum, neither more nor less. It appears to me that that I contention is well-founded. In the course of his argument, counsel, following certain text-book passages and one reference in a reported case to which I need not refer further, treated the right of the legatee in such circumstances as being based on subrogation. I feel great doubt whether this is the correct view: see *Re Broadwood, Lyall* v. *Broadwood* (1). For the present purpose, I am content to treat the right of the legatee as being simply an equitable right to compensation.

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(1) [1911] 1 Ch. 277.

Counsel for the remaining defendants put his contention thus: he accepted that the primary right of the beneficiaries in respect of the specific devise of the Roberts' Hotel moiety was to a fixed sum, but he said that the duty of the trustees was to set aside this fixed sum and invest it, the date on which that duty arose being fairly treated as the date at which the administration of the estate was complete. Then he said that equity regards that as done which ought to be done; so that the trustees must be treated as having set aside the fixed sum and invested it on the completion of the administration of the estate, for which purpose the date June 30, 1921, might be taken, having regard to the accounts in evidence. Then he said that the entirety of the estate must be treated as representing in part the investments of the fixed sum and in part the investments of residue. Next, these investments having been blended from the start, the estate must be apportioned rateably between the fixed sum and residue by reference to (a) the fixed sum and (b) the value of the balance of the estate as at the completion of administration, say June 30, 1921, and, as to that method of apportioning blended funds, he referred to *Edinburgh Corpn.* v. *Lord Advocate* (2).

It is accepted on behalf of the first defendant that it was the duty of the trustees, on the completion of the administration, to set aside the fixed sum and invest it; but it seems to me that the contention of counsel for the remaining defendants fails at the next stage. The duty of the trustees was to raise the amount of the fixed sum in cash and invest that sum in authorised investments, or alternatively to appropriate existing assets of the estate towards the fixed sum with the consents of beneficiaries required at that time by s. 4 of the Land Transfer Act, 1897, now replaced with variations by s. 41 of the Administration of Estates Act, 1925. Section 4 (1) provides:

> "The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate . . . appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the court, and such valuation and appropriation shall be conclusive save as otherwise directed by the court."

It seems to me that the trustees had no right to appropriate existing assets of the estate towards the fixed sum of £6,663 4s. 11d. without the consents required under s. 4 of the Land Transfer Act, 1897, and that equity cannot treat the trustees as having done that which they had no right to do. It may be worth mentioning in this context that the estate accounts as at June 30, 1921, show only very small sums in cash, amounting to £453 4s. 9d.

If, contrary to my view, the trustees could be treated as having made this appropriation, then it seems to me the consequence as to apportionment of the blended fund would follow; but, as they cannot be treated as having done so, then the right of the devisees of the Roberts' Hotel moiety remains what it has been throughout, an unsatisfied money claim.

No authority has been cited in support of this contention which, if it were well-founded, would be of very considerable general significance. The same position, so far as I can tell, would arise in every case where there was an ordinary pecuniary legacy settled on trust for the same life tenant as the tenant of residue with reversion to a different person from the person entitled to residue.

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(2) (1879), 4 App. Cas. 823.

A Counsel for the remaining defendants at one stage in his argument contended that even if the first defendant were not restricted to a rateable share of the investments, his remedy would lie against the trustees for breach of trust; but I do not see how any conduct on the part of the trustees could have discharged the specific devisees' right to compensation out of the assets of the estate once that right had attached.

B It will be observed that an identical question, mutatis mutandis, would arise where the assets of an estate had appreciated instead of depreciated. This consideration does not of itself throw any further light on the problem now before me, but it does show that the view which I have indicated as being the correct one is by no means uniformly detrimental to residue.

The originating summons raises a somewhat different contention as being that C to be argued on behalf of the remaining defendants, namely, that the specific remittances from Australia received in 1920, 1922 and 1925 should be treated as appropriated to compensation and that thereafter a tracing operation should be pursued in respect of those remittances. Counsel for the remaining defendants has contented himself with enunciating this contention without seeking to support it further. It is sufficient for me to say that I do not myself see any ground on D which these remittances could be treated as so appropriated.

I propose therefore to answer the first question in the summons in accordance with alternative (a) [see p. 871, letter B, ante], subject to one or two modifications in detail which are not in dispute.

[HIS LORDSHIP then heard argument on the second question.]

E Oct. 12. **PENNYCUICK, J.:** The second question in the summons, which has been added by amendment, relates to the New South Wales probate duty and Commonwealth of Australia federal duty, amounting together to £3,098 14s. 8d., which were chargeable in respect of the testator's moiety of the Roberts' Hotel and were in fact paid out of the proceeds of sale of that moiety. The question raised is:

F "Whether upon the true construction of the said will and codicils (a) the New South Wales probate duty or (b) the Commonwealth of Australia federal estate duty, payable in respect of the death of the testator on the said 'moiety of the freehold premises known as Roberts' Hotel' is (i) payable out of the residuary estate of the testator in exoneration of the defendant Francis William Macdonald Matthews to whom such moiety is devised after G the death of Mrs. Matthews; or (ii) is payable out of such moiety in exoneration of the residuary estate of the testator; or (iii) is payable out of some other fund or in some other way."

I have already referred to the passages in the will which relate to this point. It will be sufficient merely to state that the testator made a specific devise on H settlement trusts of his moiety of the freehold premises Roberts' Hotel in Australia. Then, after making certain other specific and pecuniary gifts, he gave his residue on trust for conversion. I will not read the whole clause again. It starts with a gift to the executors of the residue of his real and personal estate on trust to sell and convert into money; and then come the important words:

I "And as to the moneys to arise from the sale conversion and getting in of my said estates and any moneys of which I may be possessed I direct my said trustees thereout in the first place to pay or retain all the expenses incident to the execution of the preceding trusts and powers and my debts and funeral and testamentary expenses."

The nature of the two duties in question is set out in an affidavit sworn by Mr. George Mercer, who is a barrister practising in the Supreme Court of New South Wales and in the High Court of the Commonwealth of Australia. I quote these passages from his affidavit:

"At the date of the death of the testator there were only two such duties namely (i) State probate or stamp duty (now called death duty) payable under the Stamp Duties Act, 1898, (New South Wales) as amended by the Stamp Duties (Amendment) Act, 1914, (being acts of the legislature of New South Wales since replaced by the Stamp Duties Act, 1920, as amended) and (ii) Federal estate duty payable under the Estate Duty Act, 1914, and the Estate Duty Assessment Act, 1914, (being acts of the legislature of the Commonwealth of Australia)."

He then went on to set out at length the nature of these two duties. As regards state stamp duty, he said that this

"was payable to the Commissioner of Stamp Duties in New South Wales in respect of all real and personal estate of which any person dying after the coming into operation of the Wills Probate and Administration Act, 1898, was seised or possessed or entitled to in the said state."

Under the relevant Act, that duty was deemed to be a debt of the testator.

"Federal estate duty was payable under the law in force when the testator died, and under the law at present in force, in the said state and commonwealth in respect of the estate of a deceased person, where the estate comprises real property in Australia . . . The federal estate duty was, and is, under such law a first charge upon the estate in priority to other incumbrances whatever."

Each of the statutes contains provisions the broad effect of which is that the property in question is to bear its own duty, in the absence of provisions to the contrary. The affidavit goes on to deal at length with the manner in which the courts in Australia have construed those statutes; but the present question seems to me to depend—and this is common ground between all counsel concerned—not on the way in which the courts in Australia would deal with the matter, but on the proper construction of the will of this testator, the question being: has the testator, or has he not, indicated an intention that these two duties should fall not on his moiety of the Roberts' Hotel itself, but should be discharged out of residue?

Counsel for the first defendant, who is the specific devisee now in possession of the proceeds of sale of the moiety in Roberts' Hotel, contended that there were three phrases in the direction in regard to residue which might operate to throw these duties on residue; first, there was the direction to pay all the expenses incident to the execution of the preceding trusts; second, the direction to pay debts; and, third, the direction to pay testamentary expenses. I shall deal with those three phrases in that order.

First it is said that the Australian duties represent "expenses incident to the execution of the preceding trusts and powers." I feel great doubt whether those words, "the preceding trusts and powers", do indeed refer to the trusts declared of the specific devises and bequests. Such a construction would introduce great difficulty into the administration of the estate; and, if it were necessary to do so, I should answer that question in the negative. However, it is unnecessary, because, be that as it may, it is clear that the Australian duties do not represent expenses incident to the execution of the trusts of the moiety of Roberts' Hotel. They represent something quite different, namely, the expense of clearing the moiety of the Roberts' Hotel so as to make it available by way of assent in favour of the life tenant for the operation of the trusts declared concerning it. Some assistance on that point is to be derived from the case in the Privy Council of *Shelley* v. *New South Wales Institution for the Deaf and Dumb and the Blind* (3). In that case, the Privy Council held that the words "all the expenses incident to the execution of the preceding trusts", in an Australian will, did not include the payment of duty. That decision turned on the trusts of a particular will and I accept, of course, that the terms of each particular will must be construed

(3) [1919] A.C. 650.

A separately and that a decision on a will in one case is not conclusive authority on the construction of a different will. It is sufficient to say that in the case of the present will those words are not properly applicable to these Australian duties.

The next word referred to in the will is "debts". There again, it seems to me that the direction to pay debts is not of its nature appropriate to cover a liability for foreign duty which is not a debt owing by the testator himself but is merely B to be deemed to be a debt under the local statute. So here, the stamp duty is, under the local statute, to be deemed to be a debt of the testator but in fact it was not a debt of the testator, and it would not be right to construe the direction to pay debts as covering that which was not, in truth, a debt at all.

On this point some, though not conclusive, assistance, is to be derived from *Re Brewster, Butler* v. *Southam* (4) where the testatrix directed her trustees to C pay her debts, and it was held on the construction of that particular will that the direction to pay debts referred to actual debts and did not include local death duty on the Melbourne property, though deemed to be a debt at that date by the local law. In his judgment, SWINFEN EADY, J., said (5):

> "By the expression 'debts' she meant actual debts or moneys she owed, and did not intend to include something not really a debt, but only 'deemed D to be a debt' under the [Victoria Administration and Probate Act, 1890]."

I accept, of course, that the construction of a direction to pay debts must depend on all the terms contained in the particular will; but it seems to me that here, too, there is nothing in the context of the will which would make it proper to construe the word "debts" as including these dominion duties, which are not in fact debts at all but merely deemed to be debts.

E Finally, there is the expression "testamentary expenses"; but it is well established that the expression "testamentary expenses" in a will does not, in the absence of some supporting context, extend to duties in respect of foreign property specifically devised or bequeathed. For a text-book statement on that point, see DYMOND'S DEATH DUTIES (13th Edn.) at pp. 683-685. There is nothing in the context of the present will which would extend that expression.

F Counsel for the first defendant has relied on two matters as affording a context which would support a wide construction of the various phrases, "expenses incident to the execution of the preceding trusts and powers", "debts" and "testamentary expenses". The first point is that in the devise of the moiety of Roberts' Hotel itself, the testator, after giving the devise on settlement trusts for the benefit of his wife and the first defendant, goes on to provide:

> G "And if I shall have sold the said moiety during my life then I give to my trustees a sum equal to the purchase money received by me for the same upon trust to invest the same in some or one of the securities hereby authorised and to pay the income of such investments to my wife during her life and on her decease the said sum as well capital as income shall be in trust for my said son."

H Counsel for the first defendant pointed out, truly, that if the alternative gift had taken effect, estate duty on the proceeds of sale of the Roberts' Hotel would have fallen on residue; but, so he said, it would be an odd thing if the testator intended that the incidence of duty should be different according to whether the property was retained at his death or had previously been sold. It seems to me that that possible alteration in the incidence of duty if the property should be sold I affords no ground for implying in the primary devise of the property in specie, a direction as to the incidence of duty.

The second point, as I understood it, is this, that under a settlement made on July 13, 1910, the testator entered into a covenant on the marriage of his daughter with a Mr. Fowke that his executors would on his death convey to the trustees of the settlement one equal twelfth part of certain real estate in Sydney, subject to the proper proportion of all death duties affecting the same, and that settlement is referred to in the will itself. I am not at all clear that the terms of the

(4) [1908] 2 Ch. 365. (5) [1908] 2 Ch. at p. 369.

settlement are indeed admissible on the construction of the will, even as a surrounding circumstance; but, assuming that they are, they appear to me to throw none but the dimmest light on the intentions of the testator with regard to the incidence of duty as between devisee and residue, and it is quite impossible to infer from the express direction as to duty in the case of the Fowke settlement an intention that the duty on the Roberts' Hotel moiety should not fall on that property itself. It seems to me, therefore, that there is nothing in the will which exonerates the moiety from the two Australian duties and that those must fall on the property itself; in other words, on the first defendant.

I propose, therefore, to answer the second question in the summons in accordance with alternative (ii) [see p. 871, letter I, ante].

Order accordingly.

Solicitors: *Bristows, Cooke & Carpmael* (for the plaintiffs); *E. P. Rugg & Co.*, agents for *F. W. A. Cushman & Son*, Hove (for the first defendant); *Francis & Crookenden* (for the remaining defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

EAST BARNET URBAN DISTRICT COUNCIL *v.* BRITISH TRANSPORT COMMISSION AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Veale, JJ.), October 11, 12, 13, 1961.]

Town and Country Planning—Enforcement notice—Notice founded on breach of condition of grant of planning permission—Comprehensive condition applying to land other than that to which permission truly related—Land used by railway company for emergency coal stacking ground and by coal merchants as coal depot—User of land as transit depot for handling and storage of crated motor vehicles carried by rail—Whether "development"—Development permitted by General Development Orders—Permission not needed—Town and Country Planning Act, 1932 (22 *&* 23 *Geo.* 5 *c.* 48), *s.* 53—*Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 12 (2)—*Town and Country Planning General Development Order*, 1948 (*S.I.* 1948 *No.* 958), *art.* 3 (1), *Sch.* 1, *Class* XVIII A—*Town and Country Planning General Development Order*, 1950 (*S.I.* 1950 *No.* 728), *art.* 3 (1), *Sch.* 1, *Class* XVIII A.

The first respondents, and their predecessor in title, owned seven parcels of land, coloured pink (area 7,575 square yards), light green (10,450 square yards), blue (90 square yards), brown (175 square yards), dark green (1,845 square yards), yellow (10,720 square yards) and purple on an agreed map. The pink and light green land had been used as an emergency coal stacking ground for railway coal up to August, 1946. The blue land had been used as an office, warehouse or engineering shop up to July, 1947. The brown land had been used as an office, storage and, possibly, an engineering shop up to Dec. 8, 1948. The dark green land had been used as a coal depot by coal merchants up to Dec. 16, 1951. The yellow land, which was bounded on the side away from the railway by an embankment constructed between 1904 and 1914, had been unoccupied since 1936. The purple land was a siding built on the light green land. Under various tenancy agreements (later embodied into one), between the first and second respondents, the second respondents entered into occupation of the pink land on Aug. 1, 1946, the light green and blue on Sept. 1, 1947, the brown on Mar. 15, 1950, the dark green and yellow on Jan. 1, 1952, and the purple in May, 1952.

As from the date on which the second respondents entered into occupation of each area of land, they used it as a transit depot for the handling and

A storage of crated motor vehicles. Ninety-nine per cent. of the crates were received and despatched by rail. There were sidings on the land, which were used for loading and unloading and for the movement of mobile cranes. The boxes were carried by rail by the first respondents from the second respondents' factories to the land where they were unloaded, sorted and marshalled and were there for a period varying between four and fourteen B days. The buildings coloured blue and brown were used by the second respondents for purposes ancillary to the depot. On Apr. 4, 1951, the second respondents applied to the appellants as the local planning authority under Part 3 of the Town and Country Planning Act, 1947, for permission to develop and use for the above purposes. On the true construction and analysis of this application the court found that it was an application in C respect only of the dark green and yellow land. On May 24, 1951, the appellants granted permission for such development of the dark green and yellow land subject to a condition, whose effect was that the permission would cease in respect of all the land (coloured pink or green or yellow or blue or brown) on May 31, 1958. Under the Town and Country Planning General Development Orders, 1948 and 1950, art. 3 (1), Sch. 1, Class XVIII A* D development required in connexion with the movement of traffic by rail and carried out by railway undertakers or their lessees in, on, over or under the operational land of the undertaking was permitted without planning permission. The second respondents having continued to use all the land after May 31, 1958, as a transit depot for crated vehicles, the appellants, on Nov. 5, 1959, served seven enforcement notices under s. 23 E of the Town and Country Planning Act, 1947†, on the first respondents as owners, and seven enforcement notices on the second respondents as occupiers, to discontinue such use within three months from Nov. 5, 1959. On application by the respondents the justices ordered that the notices should be quashed, finding as a fact that the use of the land as a transit depot did not constitute development within the meaning of the Town and Country F Planning Acts, 1932 and 1947.

Held: (i) the question whether there had been such a change of use as would constitute development was one of fact and degree; on the facts it had not been established that the justices could not reasonably have come to the conclusion that there had not been development of the land (for which purpose the yellow land was to be regarded merely as an unused part of G the unit, the transit depot, in question) within either s. 53‡ of the Town and Country Planning Act, 1932, or s. 12 (2)§ of the Town and Country Planning Act, 1947, and the Divisional Court would not interfere with the findings of the justices (see p. 885, letter G, and p. 886, letters C and G, post).

Dictum of GLYN-JONES, J., in *Marshall* v. *Nottingham City Corpn.* ([1960] 1 All E.R. at p. 665) applied.

H (ii) moreover, if the use of the land did amount to development, in law no planning permission had been needed for such development of the dark green and yellow land, because permission had already been given by art. 3 (1) Sch. 1 Class XVIII A and the fact that further permission had been asked and given subject to a condition did not prejudice the respondents (see p. 889, letter I, to p. 890, letter A, post).

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* The relevant portions of art. 3 (1) and Sch. 1, Class XVIII A are in the same wording; see p. 889, letter A, post.

† Section 23 (1), so far as material, reads: "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, . . . the local planning authority may . . . serve on the owner and occupier of the land a notice under this section."

‡ The relevant portion of s. 53 is set out at p. 884, letter D, post.

§ The relevant part of s. 12 (2) is set out at p. 884, letter E, post.

Mounsdon v. *Weymouth and Melcombe Regis Corpn.* ([1960] 1 All E.R. 538) applied. A

(iii) accordingly there had been no basis for the imposition of the comprehensive condition, which thus was ineffective in relation to the pink, light green, blue and brown land, as it was also in relation to the dark green and yellow land (see p. 890, letter A, post).

Appeal dismissed. B

[For the Town and Country Planning Act, 1947, s. 12, see 25 HALSBURY'S STATUTES (2nd Edn.) 506.

For the Town and Country Planning General Development Order, 1950, art. 3 and Sch. 1, Class XVIII A, see 21 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 88, 106.] C

Cases referred to:

Guildford R.D.C. v. *Penny*, [1959] 2 All E.R. 111; [1959] 2 Q.B. 112; 123 J.P. 286; [1959] 2 W.L.R. 643: 3rd Digest Supp.

Marshall v. *Nottingham City Corpn.*, [1960] 1 All E.R. 659; 124 J.P. 222; [1960] 1 W.L.R. 707; 3rd Digest Supp.

Mounsdon v. *Weymouth and Melcombe Regis Corpn.*, [1960] 1 All E.R. 538; [1960] 1 Q.B. 645; 124 J.P. 231; [1960] 2 W.L.R. 484; 3rd Digest Supp. D

Pyx Granite Co., Ltd. v. *Ministry of Housing and Local Government*, [1959] 3 All E.R. 1; [1960] A.C. 260; 123 J.P. 429; [1959] 3 W.L.R. 346; 3rd Digest Supp.

Case Stated. E

This was an appeal by way of Case Stated by the appellants, East Barnet Urban District Council, against a decision given on Feb. 5, 1960, by the justices for the county of Hertford sitting at Barnet. On Jan. 8, 1960, seven complaints were preferred by the first respondents, the British Transport Commission, and seven complaints were preferred by the second respondents, Vauxhall Motors, Ltd., against the appellants appealing against fourteen enforcement F notices dated Nov. 5, 1959, and served on the respondents under the Town and Country Planning Act, 1947, s. 23, requiring the use of seven parcels of land near Oakleigh Park Station for the handling and storage of crated vehicles to be discontinued within three months from Nov. 5, 1959.

The following facts were agreed by the parties and accepted by the justices. The seven parcels of land were coloured pink (enforcement notice 1), light green G (enforcement notice 2), blue (enforcement notice 3), brown (enforcement notice 4), dark green (enforcement notice 5), yellow (enforcement notice 6) and purple (enforcement notice 7) on an agreed map. The land had been acquired by the Great Northern Railway Co. (the predecessors of the first respondents) under various Acts of Parliament from 1846 to 1898, and in each case it appeared from the conveyance of the land that it was acquired pursuant to statutory H authority and that the acquisition was expressed to be for the purpose of the railway. The land had always been in railway occupation and any use to which it had been put had been railway use, except for parts of the land which had been let off from time to time mainly to retail coal merchants as depots for the storage and distribution of coal arriving by rail. On Dec. 19, 1921, the appellants' predecessors passed a resolution to prepare a planning scheme in respect of the I whole of their district (which included the land referred to in the enforcement notices) under s. 42 of the Housing, Town Planning, etc., Act, 1919, and this resolution was approved by the Minister of Health on Apr. 27, 1922. The local planning authority for the land referred to in the enforcement notices had at all times been Hertfordshire County Council (hereinafter called "the council"). By agreements dated July 22, 1948, Feb. 18, 1952, and Oct. 19, 1959, the council duly delegated to the appellants certain powers of the council under Part 3 of the Town and Country Planning Act, 1947, including the enforcement of planning

A control in respect of all land within the area of the appellants, which included the land referred to in the enforcement notices. The facts relating to the land to which the enforcement notices referred were as follows.

No. 1 (pink). The approximate area was 7,575 square yards. From 1919 to 1946, this land was used first by the Great Northern Railway Co. (hereinafter referred to as "the G.N.R.") and later by the London and North Eastern Railway Co. B (hereinafter referred to as "the L.N.E.R.") as an emergency coal stacking ground for their own railway coal. There was normally twenty-one thousand tons of coal stacked on the land divided into fourteen stacks about ten feet six inches high. Those stacks also extended to parcel No. 2 (light green). The second respondents entered into occupation on Aug. 1, 1946, their tenancy agreement being dated Jan. 30, 1947. This tenancy agreement was superseded by a further agreement C dated Dec. 3, 1952, which included the tenancy of the pink, light green, blue, brown, yellow and dark green land including the purple siding.

No. 2 (light green). The approximate area was 10,450 square yards similarly occupied from 1919 to 1946 by the G.N.R., and later by the L.N.E.R. as an emergency stacking ground for railway coal. This land was left vacant from August, 1946, to Sept. 1, 1947, when the second respondents entered into occu- D pation, their tenancy agreement being dated Dec. 31, 1947. This agreement was subsequently embodied in the agreement of Dec. 3, 1952.

No. 3 (blue). An area of approximately ninety square yards, which consisted of a building which had been occupied as an office and warehouse by tenants from 1933 to 1939, and (except for one room) as an engineering workshop from 1941 to July, 1947, the second respondents occupying the building from Sept. 1, E 1947. Their original tenancy agreement was dated Dec. 31, 1947, and was embodied in the agreement of Dec. 3, 1952.

No. 4 (brown) was a building of approximately 175 square yards and had been used by tenants, as an office from 1931 to 1948, with a user clause permitting storage and repairing of printing machinery, and it was believed that it was used as an engineering workshop until Dec. 8, 1948. It then remained vacant until it F was occupied by the second respondents on Mar. 15, 1950. Their original tenancy agreement was dated Sept. 12, 1950, and was embodied in the agreement of Dec. 3, 1952.

No. 5 (dark green) was an area of 1,845 square yards and had been used from March, 1935, to Dec. 16, 1951, as a coal depot, by various coal merchants, the last being Messrs. Charringtons. It was occupied by the second respondents G from Jan. 1, 1952. The tenancy agreement of Dec. 3, 1952, covered this land.

No. 6 (yellow) covered an area of approximately 10,720 square yards. The second respondents entered into occupation on Jan. 1, 1952 (the justices finding that the land was vacant from 1936 until that date), and their tenancy was covered by the agreement of Dec. 3, 1952. This land was bounded on the side away from the railway by an embankment which was constructed between the years 1904 H and 1914.

No. 7 (purple). This was a siding constructed on the land coloured light green (No. 2) in May, 1952. It was laid by General Industrial Sidings, Ltd. for the second respondents and was an extension of the track running to the northern end of the dark green land (No. 5), which track was in existence before Aug. 1, 1946, and at least since November, 1938.

I As from the date on which the second respondents entered into occupation of each area of land they used it and continued to use it as a transit depot for the handling and storage of motor vehicles in boxes. Ninety-nine per cent. of the boxes were received and despatched by rail, the remainder by road transport. There were on the land a number of sidings used for loading and unloading and for the movement of mobile cranes. The work done on the land was concerned entirely with what were known as the second respondents "C.K.D. shipments". At their factories at Luton and Dunstable, unassembled vehicles were packed in boxes, loaded at specially constructed railway sidings and carried by rail by the

first respondents to Oakleigh Park. At Oakleigh Park the crates were unloaded, sorted and marshalled. They were normally at Oakleigh Park for periods ranging from four to fourteen days, but there were exceptional cases in which they were there for a longer period, due to shortage of shipping space. They were then re-consigned from Oakleigh Park to the docks, being reloaded and transported by the first respondents. The crates varied in size, and the maximum number of crates ever stacked at Oakleigh Park was 4,759. Normally the maximum number stacked was about two thousand and the minimum number about eight hundred. Crates were never stacked higher than twenty feet, nor within thirty feet of the easterly boundary of the yellow land (No. 6). The staff normally employed at this depot was fifteen. Their working hours were from 7.45 a.m. to 5.15 p.m., Mondays to Fridays, inclusive. Crates were stacked on the pink (No. 1), light green (No. 2), dark green (No. 5) and yellow (No. 6) land. The buildings coloured blue (No. 3) and brown (No. 4) had been, since the second respondents first occupied them, used for purposes ancillary to the depot, the former as offices, canteen, drying room and toilet, and the latter as stores and a repair shop.

On Apr. 4, 1951, the second respondents applied under Part 3 of the Town and Country Planning Act, 1947, to the appellants for permission to develop and use the land coloured pink, light green, blue, dark green, brown and yellow for the purposes of export vehicle storing and sorting, the transfer of Messrs. Charrington's coal depot and the making of a new access and on May 24, 1951, the appellants granted permission for such development subject to the condition, inter alia, that such use should expire on May 31, 1958. On Jan. 12, 1952, the second respondents made an application to the appellants for permission for installation of an additional siding spur (the land coloured purple) to be used for the handling and storage of export cases situated at Oakleigh Park Station, East Barnet. Permission was granted by the appellants on Feb. 7, 1952, subject to the condition (inter alia) that such use should expire on May 31, 1958. The justices found the following further facts: (a) that the respective commencements of the use of the various parts of the land in question as a transit depot for the handling and storage of crated motor vehicles carried by rail did not constitute development within the meaning of the Town and Country Planning Act, 1932 or the Town and Country Planning Act, 1947; (b) that all the land in question was at all material times comprised in the undertaking of the L.N.E.R. or of the first respondents within the meaning of the Town and Country Planning (General Interim Development) Order, 1946; (c) that all the land in question was at all material times operational land of the undertaking of the first respondents within the meaning of the Act of 1947, and the Town and Country Planning General Development Orders, 1948 and 1950.

It was contended by the appellants that the second respondents had applied for permission under Part 3 of the Act of 1947 to use the seven parcels of land for the purposes of handling and storage of crated vehicles and that the second respondents had been granted permission for a period expiring on May 31, 1958, that the use had continued since then and that, accordingly, the enforcement notices requiring the discontinuance of such use were valid. The respondents admitted that the use had continued since May 31, 1958, and still continued, but they contended that the use was lawful and that the enforcement notices were invalid and should be quashed because (i) the commencement of the use did not constitute development either under the Act of 1932 or the Act of 1947; (ii) if the commencement of the use constituted development under either the Act of 1932 or the Act of 1947 the development was authorised by one or more of the Provisional Town and Country Planning (General Interim Development) Order, 1946, the Town and Country Planning (General Interim Development Order), 1946, and the Town and Country Planning General Development Orders, 1948 and 1950; (iii) notwithstanding the applications for and grant of the permissions the respondents were not precluded from asserting that no such permission was required;

A (iv) the permissions did not, on their true construction, impose a condition requiring the use to be discontinued on May 31, 1958; (v) if such permissions or either of them purported to impose a condition requiring the use to be discontinued on May 31, 1958, the condition was bad in law and of no legal effect; (vi) the enforcement notices were bad in law and of no legal effect in that they sought to enforce a condition which was of no legal effect; (vii) the third recital of all the enforcement notices was erroneous and the notices were, accordingly, void.

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The justices ordered that all the enforcement notices be quashed and further ordered the appellants to pay each of the respondents the sum of £500 for costs. The appellants now appealed.

R. E. Megarry, Q.C., and *Paul V. Baker* for the appellants, East Barnet Urban District Council.

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E. S. Fay, Q.C., and *P. R. E. Browne, Q.C.*, for the first respondents, the British Transport Commission.

H. I. Willis, Q.C., and *H. P. Stirling* for the second respondents, Vauxhall Motors, Ltd.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by the appellants, East Barnet Urban District Council, against a decision of justices for the county of Hertford, sitting at Barnet who, on complaint being made, quashed, pursuant to their powers under s. 23 (4) of the Town and Country Planning Act, 1947, fourteen enforcement notices, being seven notices served on the first respondents, as owners, and seven notices served on the second respondents, as occupiers. These enforcement notices relate to an area of land near Oakleigh Park Station, now being used by the second respondents as a transit depot for the storage and handling of motor vehicles in crates, including the unloading from and loading on to the railway line of the first respondents. The first respondents are served as owners and the second respondents as occupiers of that land, and the seven notices served on each of them respectively relate to different parcels of land, that having been done because each parcel has a somewhat different planning history and, accordingly, may involve different considerations. Stated quite generally, the appellants' case is that permission was given by them under delegated powers from Hertfordshire County Council, the local planning authority, for a change of use of the land to that of a transit depot, but that that permission was subject to a condition for the cessation of such use on May 31, 1958. Admittedly such use continued thereafter and, indeed, still continues, and it is to a breach of that condition that all the enforcement notices relate.

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This appeal raises a great number of points, many of them of considerable difficulty, but logically, as it seems to me, the first question is whether, when each parcel of land was first used as part of this transit depot, a development took place within the meaning of the Town and Country Planning Acts for which permission was required. If no such permission was required then, although an application for permission was made and permission granted, that cannot estop the respondents from taking the point later that no permission was required. Such, indeed, was decided by this court in *Mounsdon* v. *Weymouth and Melcombe Regis Corpn.* (1). In fact, that point had already been adumbrated in *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (2), where counsel had either abandoned the point or refused to take it, and it is quite clear that that course met with the favour of their Lordships, particularly VISCOUNT SIMONDS (3) and LORD JENKINS (4). The respondents start, so far as this point is concerned, with a finding by the justices in their favour because para. 5 (a) of the Case Stated reads as follows:

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"In so far as the following questions are questions of fact, we further

(1) [1960] 1 All E.R. 538; [1960] 1 Q.B. 645.
(2) [1959] 3 All E.R. 1; [1960] A.C. 260.
(3) [1959] 3 All E.R. at pp. 5, 7; [1960] A.C. at pp. 285, 288.
(4) [1959] 3 All E.R. at p. 14; [1960] A.C. at pp. 299, 300.

found:—(a) that the respective commencements of the use of the various parts of the land in question in this case as a transit depot for the handling and storage of crated motor vehicles carried by rail did not constitute development within the meaning of the Town and Country Planning Act, 1932, or the Town and Country Planning Act, 1947."

Accordingly, the appellants must satisfy this court that there was no evidence on which the justices could so find or, to put it I think more accurately, that no reasonable bench of justices properly directing themselves as to the law could, on the facts agreed or found by the Case, come to that conclusion. It is not, as has been emphasised so many times, a question of what this court might have decided if the point was open for their decision. This court can only deal with the matter on the grounds I have already stated.

[His Lordship then stated the facts relating to the various parcels of land (as to which see p. 881, ante), and continued:] It will be seen from the dates to which I have referred that, so far as concerns the pink, the light green and the blue, the relevant Act was the Town and Country Planning Act, 1932, s. 53 of which provides the definition of " development ". So far as it is relevant, it is in these terms:

" ' Development ', in relation to any land, includes . . . any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used."

So far as the rest of the land is concerned, the relevant Act is the Town and Country Planning Act, 1947, in which, by s. 12 (2), " development " means, so far as it is relevant here, ". . . the making of any material change in the use of any buildings or other land ". Though the wording, as I have pointed out, is different, I do not feel that such difference in language necessitates different considerations, at any rate for the purposes of this case. The word " material " comes in for the first time in the definition in the Act of 1947, but that must be referring to material as material for planning purposes, and, although the word does not appear in s. 53 of the Act of 1932, I think that it is clear and, indeed, it is conceded that, in considering what is a different purpose in that connexion, one must have regard again to planning considerations.

I will, however, deal with these somewhat separately, and take first the pink and the yellow/green land. The question there is whether, when the second respondents went into occupation of those two parcels, there was a use of the land for a purpose which was different from the purpose for which the land was last used. The question immediately arises as to what meaning one attaches to a " purpose different ". Does one consider the general purpose or does one have to descend to the particular and say: Was the particular purpose different? To take an example, is one considering a purpose for which a shop is occupied for the purpose of a retail shop quite generally, or does one consider the narrower purpose of it being used as a retail shop for the sale of a particular commodity? If the former is correct, then a change in the nature of the article sold would not be development; if the latter, it would. Many other illustrations of that sort could be given, and similar questions arise whether an increase in turnover would itself amount to a use of land for a different purpose or whether a different method of working would mean a use for a different purpose. The same considerations arise when one is considering in relation to the words of s. 12 (2) of the Act of 1947 whether there has been a change of use. It is, however, clear that, under both Acts, what one is really considering is the character of the use of the land and not the particular purpose of a particular occupier. Some support for that is to be found in *Guildford R.D.C.* v. *Penny* (5). In that case the justices had found that there had been no material change, albeit there had been an intensification of user by caravans, an increase from eight to twenty-seven caravans. The court,

(5) [1959] 2 All E.R. 111; [1959] 2 Q.B. 112.

A while recognising that the intensification might be of such a nature as to amount to a change of use, felt unable to interfere with the finding of the justices. So far as the point I am considering is concerned, it is to be noted that it is put in this way by LORD EVERSHED, M.R. (6):

> "Mere intensity of user may (as it seems to me; but I must not be taken as deciding this point) affect a definable character of the land and of its use— or one of them."

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I quote that merely to show that he is treating the matter from the point of view of the character of the use of the land. Again, in *Marshall* v. *Nottingham City Corpn.* (7), GLYN-JONES, J., had to consider the question, not as a Case Stated, but on a trial, whether there had been a change of use. He deals with the sort of considerations which may arise as follows (8):

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> "The mere fact that a dealer in the course of his business begins to deal in goods in which he had not dealt before does not necessarily involve a change, still less a material change in his use of the land or premises where the business is carried on. A dealer in musical instruments might fifty years ago have begun to deal in gramophones or phonographs, as I suppose they would then have been called; and then in the course of time in radio sets and later in television sets. A dealer in electrical appliances as demand changed and fresh appliances were invented may have successively added vacuum cleaners, refrigerators, washing machines and the like to his stock in trade and he too might have begun to deal in radio and television sets. Each of them may have ceased to sell goods formerly sold for which there is no longer an adequate demand. Yet neither, in my view, has thereby altered the use he is making of his premises. Moreover, if the business of a retail dealer is being carried on in any building, it may be that there is a change of use if, for example, the business of a baker is substituted for a different business, for example, that of a grocer; but I am unable to see why or how such a change can be material from any point of view which could legitimately be taken by a planning authority . . . This question, as I understand it, is one of fact and degree to be answered on the evidence in this case: and my answer is that the plaintiff's company has not made a material change in the use of the land."

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It is to be observed that GLYN-JONES, J., thought that the matter was one of fact and degree. For my part, I entirely accept that. It is a question of fact and degree in every case and, when the matter comes before this court by way of Case Stated, the court is unable to interfere with a finding of the justices on such a matter unless, as I have said, it must be said that they could not properly have reached that conclusion.

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So far as the pink and light green area is concerned, one starts with this, that it is land alongside a busy main line railway with sidings and had been used for storing coal which had presumably been brought there by rail and in due course would be taken away by rail. Assuming for a moment that any change in use, if it be a change, had been effected by the first respondents themselves and not by the second respondents, it could not, I should have thought, be said that, merely by changing the storage from coal to, for instance, oil if they were converting locomotives to diesel oil, there was a change of use or, more accurately, a use for a different purpose. The mere fact that the commodity changes does not necessarily mean that the land is being used for a different purpose nor, as it seems to me, is there any relevance in the fact that the purpose for which the land is used is effected by other hands, in this case by the second respondents and their employees. Again, it seems to me that it can make no difference that the new commodity is not owned by the first respondents. As I have said, these are all considerations,

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(6) [1959] 2 All E.R. at p. 113; [1959] 2 Q.B. at p. 125.
(7) [1960] 1 All E.R. 659.
(8) [1960] 1 All E.R. at p. 665.

but none of them, it seems to me, make it necessary for one to say that the land is being used for a different purpose. It has been urged on us that the coal stacks that were originally there were static. How far that is true, I do not know. We have no evidence how often they were moved and replaced, but, undoubtedly, I should have thought, the handling, storing and marshalling of crates must involve far greater movement, including the use of cranes and the like and, accordingly, it is said that this must be one of the cases where the increase in movement or the increase in turnover is so great as to make the user of the land for a different purpose or, in the case of the Act of 1947, to amount to a material change of use. That an intensification of use, as in the *Guildford* case (9), may amount to a change of use is conceded, but that, again, is entirely a matter of fact and degree and, prima facie, one for the justices. Whatever conclusion I might have come to myself on the evidence in deciding it on a complaint made, I am quite satisfied sitting here that it is impossible for me to say that no reasonable bench of justices, properly directing themselves as to the law, could have come to the conclusion which they did. Indeed, to do so would be to substitute my opinion for that of the justices who, with their knowledge of the site and of local conditions, were clearly the best qualified tribunal.

I have referred specifically to the pink and the light green area. Slightly different considerations may affect the land in other colours. So far as the blue is concerned, the relevant Act, as I have said, is the Act of 1932. I find no possible way of distinguishing the blue which was used and is now used as incidental to whatever the user was and is; it falls or stands according to the argument in regard to the pink and the light green. So far as the dark green is concerned, that was the site used as a depot by Charrington's for coal, and there again, in my opinion, one cannot say that the justices must have erred. So far as the yellow is concerned, counsel for the appellants has urged that it would be quite wrong, quite impossible in law, for the justices to say that there had not been a material change of user because of the finding that theretofore it had been unoccupied. For myself, I cannot accede to that argument in the circumstances of this case. As I have said, the land has been artificially divided because of the previous planning history of the various parcels, but, as I understand, this yellow land has at all times been a part of whatever one can say was there before, a coal storage depot, a siding, a yard or whatever one calls it. That yellow has always been there as part and parcel of that depot, albeit no coal has at any time been on it. Supposing the first respondents, without letting the land to the second respondents, had extended the siting of their stacks of coal on to the yellow part of the depot, one asks oneself whether it could really be said that that amounted to a change of use. Whatever unit one considers in these cases is always a matter of difficulty, but, looked at as a matter of common sense in the present case, it seems to me that this was merely an unused part of the unit in question. So far as the purple is concerned, as I have said, that was part of the light green, and the position there depends on the correctness of the justices' decision in regard to the pink and the light green. Accordingly, I am satisfied that there is no ground on which this court should interfere with the findings.

That, of course, is enough to decide this case, but there is at least one other fundamental point on which, in my judgment, the appellants fail. That concerns the interpretation of the application for planning permission and the permission granted containing conditions, the breach of which has given rise to these enforcement notices. The application, which concerns all the land except the purple, was dated Apr. 4, 1951. Observe that that was at a time when the second respondents were, and had for quite a period been, using the pink, the light green and the blue as part of their transit depot. One begins to read the application with that in mind. It no doubt takes the form of filling up a printed form, and para. (2) of that form invites answers to the questions:

(9) [1959] 2 All E.R. 111; [1959] 2 Q.B. 112.

A "(a) Particulars of the applicant's interest in the land . . . (b) If the applicant is a prospective purchaser or lessee of the land, state whether the vendor or lessor has consented to the proposed development. (c) When was the land acquired?"

The answer to that is:

B "The work involved is the transfer of Messrs. Charrington Warren's (Coal Merchants) coal depot from the 'up' to the 'down' side of the main line as shown on plan. When this is completed [the second respondents] take over the land vacated of which they will be yearly tenants, and the tenancy will be effective as soon as the transfer is complete."

C There has been a considerable confusion with the plans, and it is convenient to read the application with plan A attached to the Case, albeit the colours are different. This transfer of Messrs. Charrington's coal depot is clearly removing it from the dark green and putting it on the west side of the railway line next to the down line. The fourth question in the form is:

"Describe the proposed development, including the use for which the land
D is to be used. If it is to be used for more than one purpose, give details."

The answer is a reference to "Sheet 1 attached". It is next to be observed that question (5) says: "State the purpose for which the land is now used. If it is to be used for more than one purpose, give details", and the answer to that is: "(1) On the 'down' side land is either allotments or open undeveloped land." That refers to the site to which Charrington's were going, next to the down line.
E "(2) On the 'up' side land is a coal depot." That refers to the dark green land. Pausing there, it seems to me abundantly clear that, so far, this application is dealing merely with the dark green on plan A, arranging for Charrington's to be moved from there to the west side of the railway and for the second respondents to take over and use the dark green as part of the transit depot which they were at that time, and had been for some time, operating. But then
F a slight confusion comes because sheet 1 which is in answer to the fourth question is answered in these terms: a separate heading is put in: "Use of land and development proposed", and it goes on in paras. (2), (3) and (4) to deal with an occupation of the dark green from which Charrington's were going; the removal of Charrington's to the west side, and a new access. In para. (2), reference is also
G made to the occupation of what is the yellow on plan A for the purposes of this transit depot. Pausing there, this is dealing really with the dark green and the yellow, but in para. (1) of that sheet these words occur: "The use of land at Oakleigh Park Station for export vehicle storing and sorting (land coloured pink on plan attached hereto)". To that was attached a plan and a legend, and that pink land is the pink and light green which we are considering in the present
H case, and the legend to the plan attached says that the pink on the plan which is the pink and light green on our plan, amounting to sixteen thousand square yards, is at present "occupied" by the second respondents. The green is the additional area to be occupied by the second respondents when Charrington's are moved, and that is the yellow and dark green on plan A. The dark green is where Charrington's are going and the blue is a coal depot area of the Co-operative
I Society.

I have listened to the arguments and the manner in which this application has been dissected and analysed word by word, and, although it is in many ways unfortunately worded, I am abundantly satisfied that this is an application merely in regard to the dark green and the yellow. In particular, if this were intended to be an application to cover, for instance, the pink and the light green which had been used for years as a transit depot, it seems to me that quite a different wording would be used, something which made it perfectly clear that what were

being invoked were the powers under s. 18 (1) of the Town and Country Planning Act, 1947 (10). That, in my judgment, is all that was being asked for in this case, and the permission, which again has been analysed word by word, is, in my judgment, dealing with that application in regard to the dark green and the yellow. There is no doubt that the permission almost more than the application is thoroughly badly worded. It is in these terms:

> "In pursuance of their powers . . . the council on behalf of the local planning authority hereby permit the development proposed by you in your application dated Apr. 4, 1951, and received with sufficient particulars on Apr. 4, 1951, of the land for the purpose of re-siting coal yard and provision of new access at Oakleigh Park Station, East Barnet, and use of land for the handling and storage of crated vehicles and shown on the plan(s) accompanying such application subject to the following conditions."

Before proceeding further, I think it is quite clear on the construction which I have put on the application that the only development proposed, for which permission was being given, was in regard to the dark green—I am leaving out the access—and the yellow. That being so, the use of land for the handling and storage of crated vehicles referred to is that additional part of the dark green and yellow and does not in any way refer to the pink and the light green. That permission was subject to the following conditions:

> "(a) To the use of the whole of the extended site indicated on the plan by pink, green and yellow colour for occupation as storage and handling of crated vehicles on the east side of the railway subject to the following conditions:—(1) The consent hereby granted to be limited to a period expiring on May 31, 1958 . . ."

As I have said, that is not at all happily worded but, to my mind, it is clear that they are making the change of use, what was said to be a change of use in regard to the dark green and the yellow, conditional on that land and the rest of the site only being used for the purposes of a transit depot until May 31, 1958. It was intended, I think, as a comprehensive condition which it would be within their powers to make, to limit the user not only of the land in respect of which permission had been sought but in regard to the whole of the adjoining land, in other words, the whole site. That, as I think, is the intention of this permission. I should add that it has been argued by the respondents that, in any event, the condition: "The consent hereby granted to be limited to a period expiring on May 31, 1958", is bad in that what was intended was that the permitted use was only to continue to the date when there should be a cessation of that user, and that, as worded, the consent "hereby granted" meant that they had until May 31, 1958, to change the use. I find it unnecessary to deal with that point. I will assume in the appellants' favour that it is sufficiently clear that the intention was that the new user was to cease on May 31, 1958.

On my interpretation of those two documents, the application and permission, the next point is to consider whether any permission was necessary in regard to the dark green and the yellow. I have already dealt with the point that, in my judgment, no permission was needed because there was no development, but, on this second way of looking at it, it is to be observed that both the dark green and the yellow were subsequent to the coming into force of, first, the Town and Country Planning General Development Order, 1948 (S.I. 1948 No. 958), and, secondly, the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728). For the purposes for which I want to consider the order, the wording is the same, and I am, therefore, referring to the General Development Order, 1948. Article

(10) The relevant portion of s. 18 (1) reads: "The power to grant permission to develop land under this Part of this Act shall include power to grant permission for the retention on land of any buildings or works . . . carried out thereon before the date of the application, or for the continuance of any use of land instituted before that date (. . . in accordance with permission so granted for a limited period only) . . ."

A 3 (1) of that provides as follows:

> "Subject to the subsequent provisions of this order, development of any class specified in Sch. 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or the minister."

B Schedule 1, Class XVIII, A. Railway or Light Railway Undertakings, provides:

> "Development required in connexion with the movement of traffic by rail and carried out by the undertakers or their lessees in, on, over, or under the operational land of the undertaking . . .",

subject to certain exceptions which are irrelevant to this case. The respondents maintain that, if development did take place, it was permitted by that provision C in the General Development Orders. For my part, I am satisfied that that is right. It is quite clear that the change of use was in connexion with the movement of traffic by rail. It is quite clear that it was by the undertakers' lessees, and it is also, in my judgment, quite clear that it was over operational land of the undertaking. There is, indeed, a finding by the justices in the Case that all the land in question was at all material times operational land. Counsel for the appellants, D without conceding the point, I think feels the difficulty that he is in with regard to that provision of the General Development Order, 1948, and the similar one in 1950, which clearly apply to the dark green land and to the yellow land. That being so, the position seems to me to be this: An application is made and permission is given for development in regard to the dark green and the yellow land. That application and permission were quite unnecessary having regard to the fact E that, if there had been development on those two parcels of land, permission had already been given under the respective General Development Orders. That being so, one looks at the powers of the justices under s. 23 (4) of the Town and Country Planning Act, 1947, and one finds that the court of summary jurisdiction

> "(a) if satisfied that permission was granted under this Part of this Act F for the development to which the notice relates [took place] . . . shall quash the notice."

Accordingly, as in my judgment the permission had been granted under this Part of this Act, to wit, by these two General Development Orders, the justices were right in quashing the notices.

Reference has been made, however, to art. 3 (2) of the respective General G Development Orders, which provides:

> "Nothing in this article or in Sch. 1 to this order shall operate so as to permit any development contrary to a condition imposed in any permission granted or deemed to be granted under Part 3 of the Act otherwise than by this order."

H It was faintly suggested by counsel for the appellants that a specific condition, such as was imposed in this case on the grant of an application, overrode any unlimited permission in a General Development Order. I find myself quite unable to accede to that argument. It seems to me that that provision is covering a case where a specific permission has been given subject to a condition, and that is followed by a General Development Order in unqualified terms. It has been I suggested by counsel for the appellants that the position is really the other way round, and that the justices are not entitled to quash unless it can be shown that the specific permission was a nullity. Again, I cannot accede to that argument. It seems to me that the position is that, there having been a permission granted under this Part of this Act within s. 23 (4), it is for the appellants to satisfy this court that something happened which has prevented the General Development Order from operating. I can find nothing to that effect. Accordingly, in those circumstances, and again invoking *Mounsdon* v. *Weymouth and Melcombe Regis*

Corpn. (11), no permission was required in respect of the dark green and the yellow because permission had already been granted. The fact that permission was asked for and granted does not in any way prejudice the respondents and, that being so, it follows necessarily that there is no basis for the comprehensive condition dealing with the pink, the light green, the blue and the brown and that, there being no basis for that condition, there is in turn no basis for the enforcement notices in regard to that land. Accordingly, on that second ground, which is alternative, and on the basis that what did occur when the second respondents went into occupation amounted to development, I think that the appellants fail.

I should add that a number of other points were taken with which I find it unnecessary to deal, at any rate in detail, but I ought, perhaps, just to refer to them. It was said in the alternative by the respondents in regard to the pink and the light green that, if there had been development, at any rate permission was given by the earlier General Interim Development Order, 1946 (S.R. & O. 1946 No. 1621). Reliance was placed on the schedule, classes I and V, and again in regard to the pink and light green it was said that, even if that was wrong, class XVIII A, to which I have already referred in the schedule to the Order of 1948 had, as it were, a retrospective effect, and made it unnecessary for permission to be obtained. Without coming to any decision on those arguments, it is only right for me to say that, as at present advised, I would be against the respondents on those points.

Then, as I have said, it was said that, in any event, the condition was invalid in saying that the consent was limited to a period expiring on May 31, and finally it was said that the enforcement notices on their face were bad by reason of what was stated (12) in recital (3). Again, I find it unnecessary to deal with those points. Finally, I cannot leave this case without myself paying tribute to the justices, who found themselves faced with a long case bristling with difficulties, no doubt every point being urged by eminent counsel on both sides. I think that they are to be congratulated on the way in which they dealt with the case. Accordingly, in my judgment, this appeal fails and must be dismissed.

ASHWORTH, J.: I agree, and cannot usefully add anything.

VEALE, J.: I also agree.

Appeal dismissed. Leave to appeal granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Robert A. Winch*, Barnet (for the appellants); *Solicitor, British Transport Commission* (for the first respondents); *Machin & Co.* (for the second respondents).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(11) [1960] 1 All E.R. 538; [1960] 1 Q.B. 645.

(12) In twelve of the enforcement notices, recital (3) read "By a notice dated May 24, 1951, the council granted permission under Part 3 of the . . . Act of 1947 for the use of the land (with other land and buildings) for the handling and storage of crated vehicles subject (inter alia) to the condition that the use thereby permitted should be limited to a period expiring on May 31, 1958." In two of the enforcement notices, recital (3) read: "By notice dated Feb. 7, 1952, the council granted permission under Part 3 of the . . . Act of 1947 for the installation of the siding and for the use of the siding for the handling and storage of export cases subject (inter alia) to the condition that the use thereby permitted should be limited to a period expiring on May 31, 1958".

A

HEDLEY BYRNE & CO., LTD. v. HELLER & PARTNERS, LTD.

[COURT OF APPEAL (Ormerod, Harman and Pearson, L.JJ.), October 17, 18, 1961.]

Negligence—Duty to take care—Statements—References given by bank honestly but without due care—No special relationship between inquirer and bank giving rise to duty of care—Whether bank liable for negligent reference—Whether duty owed by bank to take reasonable care.

B

Bank—Statement in answer to inquiry—Financial references given honestly but without due care—Bank giving reference to other bank—Use by second bank's customer expected—First bank financing customer whose reference given—Whether first bank liable to second bank's customer.

C

Advertising agents for a manufacturing company making domestic electrical appliances placed forward orders for advertising time with television companies and for advertising space in newspapers and periodicals. They themselves as "recognised" advertising agents assumed responsibility to the television companies, newspapers and periodicals for payments becoming due under the orders. At that time the manufacturing company was heavily indebted and the defendant merchant bankers had taken over its overdraft and were affording it finance, and it was, as was assumed for the purposes of the appeal in the present case, dependent for its survival on the continuance of financial facilities by the defendants. The advertising agents, through their own bank, made inquiry of the defendants as to the ability of the manufacturing company to meet a debt of £8,000 or £9,000, and (as was assumed) in reliance on a satisfactory oral reference given in reply refrained from cancelling the orders. In the event the advertising agents suffered loss. In an action brought by the advertising agents for damages against the defendants, they conceded that the reference was given honestly; it was found at the trial, and it was assumed on appeal, that the reference was given negligently in that it was not justified on facts known to the defendants.

D

E

F

Held: the defendant bankers, having acted honestly in giving the reference, were not liable even if the reference were negligently given because—

(i) in the absence of a special relationship between an inquirer and a person giving a reference, the latter did not owe a duty towards the former to exercise reasonable care in making statements in answer to the inquiry; and the facts that the defendants were giving the reference to another bank and that bank or its customers were likely to act in reliance on that reference did not bring about sufficient proximity of relation to create such a duty (see p. 902, letter H, p. 893, letter I, and p. 900, letter F, post).

G

Candler v. *Crane, Christmas & Co.* ([1951] 1 All E.R. 426); *Le Lievre* v. *Gould*, ([1893] 1 Q.B. 491) applied.

H

Dicta of COZENS-HARDY, M.R., in *Parsons* v. *Barclay & Co., Ltd.* ((1910), 26 T.L.R. at p. 629) and of EARL LOREBURN in *Robinson* v. *National Bank of Scotland* (1916 S.C. (H.L.) at pp. 155, 157) followed.

Woods v. *Martins Bank, Ltd.* ([1958] 3 All E.R. 166) and *Clayton* v. *Woodman & Son (Builders), Ltd.* (ante, p. 249) distinguished.

Batts Combe Quarry Co. v. *Barclays Bank, Ltd.* ((1931), 48 T.L.R. 4) considered.

I

(ii) the fact (as was assumed) that the defendant bankers were financing the manufacturing company did not create a special relation imposing such a duty of care because the duty to be established was a duty towards the plaintiffs, the advertising agents, and the special relation must be one which existed between the defendants and them (see p. 901, letter A, post).

Nocton v. *Lord Ashburton* ([1914] A.C. 932) considered.

Dictum of ASQUITH, L.J., in *Candler* v. *Crane, Christmas & Co.* ([1951] 1 All E.R. at p. 440) applied.

Per CURIAM: the relationship between the person giving the reference and the subject of the reference is, at any rate normally, relevant not to the creation of the supposed duty but to the performance or breach of it, whether it be a duty of exercising due care or only of giving an honest answer (see p. 902, letter B, post).

Appeal dismissed.

[As to the arising of a duty to take reasonable care, see 28 HALSBURY'S LAWS (3rd Edn.) 7, para. 4, p. 20, para. 17; and for cases on the subject, see 36 DIGEST (Repl.) 12-18, *34-79*.

As to bankers answering inquiries as to a customer's financial position, see 2 HALSBURY'S LAWS (3rd Edn.) 241, para. 455; and for cases on the subject, see 3 DIGEST (Repl.) 344, *1115-1117*.]

Cases referred to:

Batts Combe Quarry Co. v. *Barclays Bank, Ltd.*, (1931), 48 T.L.R. 4; 3 Digest (Repl.) 343, *1109*.

Bourne v. *Swan & Edgar, Ltd., Re Bourne's Trade Marks*, [1903] 1 Ch. 211; 72 L.J.Ch. 168; 20 R.P.C. 105; 43 Digest 177, *311*.

Candler v. *Crane, Christmas & Co.*, [1951] 1 All E.R. 426; [1951] 2 K.B. 164; 36 Digest (Repl.) 17, *75*.

Clayton v. *Woodman & Son (Builders), Ltd.*, ante, p. 249; [1961] 3 W.L.R. 987.

Derry v. *Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 9 Digest (Repl.) 127, *685*.

Edelsten v. *Edelsten*, (1863), 1 De G.J. & Sm. 185; 7 L.T. 768; 46 E.R. 72; 43 Digest 217, *614*.

Heaven v. *Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest (Repl.) 7, *10*.

Le Lievre v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 36 Digest (Repl.) 9, *27*.

Low v. *Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 43 Digest 852, *3002*.

M'Alister (or Donoghue) v. *Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562: 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

Nocton v. *Ashburton (Lord)*, [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 42 Digest 107, *1017*.

Parsons v. *Barclay & Co., Ltd.*, (1910), 103 L.T. 196; 26 T.L.R. 628; 3 Digest (Repl.) 344, *1115*.

Pasley v. *Freeman*, (1789), 3 Term Rep. 51; 2 Smith, L.C. 12th Edn. 71; 100 E.R. 450; 1 Digest (Repl.) 27, *205*.

Robinson v. *National Bank of Scotland*, 1916 S.C. 46; *affd.* H.L., 1916 S.C. (H.L.) 154; 26 Digest (Repl.) 33, *63*.

Woods v. *Martins Bank, Ltd.*, [1958] 3 All E.R. 166; [1959] 1 Q.B. 55; [1958] 1 W.L.R. 1018; 3 Digest (Repl.) 182, *324*.

Appeal.

The plaintiffs appealed against an order of MCNAIR, J., made on Dec. 20, 1960, dismissing an action for damages for negligence against the defendant merchant bankers, in and about answering inquiries by and giving references to the plaintiffs' bankers on their behalf. The grounds of appeal were: (i) that the judge was wrong in law in holding that the defendants were not guilty of negligence or breach of duty as alleged by the plaintiffs; (ii) that he was wrong in law in holding that no duty rested on a bank which was asked by another bank (either on its own account or on behalf of one of its customers) for a reference as to the credit or credit-worthiness of the customer of the former bank except to answer honestly and that he ought to have held that there was a duty to exercise reasonable care; (iii) that the judge ought to have held that there was a special relationship in the particular circumstances in which the reference was sought by the

A plaintiffs from the defendants whereby a duty or special duty was cast on the defendants to exercise reasonable care in the giving of such references; and (iv) that, having found as facts that, if a duty existed to exercise reasonable care in giving the references, the defendants had been guilty of negligence in the references and had failed to exercise reasonable care, and that the plaintiffs had thereby suffered damage, the judge misdirected himself in holding that the B defendants were not guilty of any breach of duty or under any liability to the plaintiffs.

The defendants filed a cross-notice, the grounds of which were: (i) that the judge's finding that the defendants, if under a duty of care, had been guilty of negligence in giving the references was against the weight of the evidence; (ii) that he was wrong in holding that the references given meant that a company, C Easipower, Ltd., could safely be granted credit for £8,000 to £9,000; (iii) alternatively that he ought to have held that the plaintiffs did not understand the references as bearing that meaning and did not refrain from cancelling orders in reliance on the references bearing that meaning; (iv) that the judge was wrong in holding that the damages claimed were recoverable, or alternatively that they exceeded the £9,000, the maximum sum for which the references were asked and D given; (v) that there was no evidence that any part of the damages claimed flowed from the references; and (vi) that, if the defendants were under the duty of care alleged, the plaintiffs' claim was barred in law by the Statute of Frauds Amendment Act, 1828.

S. B. R. Cooke, Q.C., and *D. G. A. Lowe* for the plaintiffs.
Maurice Lyell, Q.C., and *J. M. Shaw* for the defendants.

E

PEARSON, L.J., delivered the first judgment at the request of ORMEROD, L.J.: This is an appeal from a judgment of MCNAIR, J., given on Dec. 20, 1960, in favour of the defendants, Heller & Partners, Ltd., who are merchant bankers, against the plaintiffs, Hedley Byrne & Co., Ltd., who are advertising agents. It will be convenient to adopt the learned judge's very concise summary of the F plaintiffs' case and the question of law which arises. He said:

> "In outline the plaintiffs' case against the defendants is that, having placed on behalf of a client, Easipower, Ltd., on credit terms substantial orders for advertising time on television programmes and for advertising space in certain newspapers on terms under which they, the plaintiffs, became personally liable to the television and newspaper companies, they G caused inquiries to be made through their own bank of the defendants as to the credit-worthiness of Easipower, Ltd., who were customers of the defendants, and were given by the defendants satisfactory references. These references turned out not to be justified, and the plaintiffs claim that in reliance on the references, which they had no reason to question, they refrained from cancelling the orders so as to relieve themselves of their H current liabilities. In these circumstances, though the plaintiffs in their statement of claim alleged that the references were not honestly given (which claim was abandoned before me), they seek to recover the damages which they have suffered on the allegation that the references were given negligently and without any or any reasonable care in that the expressions of opinion contained in the references were not justified by the facts as I known to the defendants. The claim as so put raises in a neat form the question whether, in circumstances such as these, a person who has acted on a banker's reference so given can succeed short of proving fraud."

As to the facts, the learned judge, on making the assumption that there was a duty of care, found that there was negligence on the part of the defendants in giving the references. In law, however, he held that no duty of care was owing by the defendants to the plaintiffs in respect of the references, and therefore that the claim failed.

The plaintiffs in their notice of appeal challenge his decision that in law there was no duty of care. The defendants in their cross-notice seek to uphold that decision, and in addition they dispute the finding of negligence, and raise points as to the occurrence, causation and amount of the alleged damage, and as to the effect of the Statute of Frauds Amendment Act, 1828, commonly known as Lord Tenterden's Act.

Accordingly, the first question is whether there was in law any duty of care, and, if the decision is that there was none, that will dispose of the appeal, and it will not be necessary to consider any of the additional matters referred to in the defendants' cross-notice. It is right to point out that counsel for the defendants has in substance not been called on to argue in this appeal, and therefore has not had an opportunity of presenting to this court his clients' view of the facts. Some of the facts are clear and free from doubt. Others are controversial and it will have to be made clear what facts are assumed in favour of the plaintiffs as the basis of the decision on the question of law.

Easipower, Ltd., was incorporated by a Mr. F. R. Williams some years ago, and developed a business in the manufacture of domestic electrical appliances, especially electric blankets. Its trade was largely seasonal, the sales being mainly concentrated into the autumn period of the year. At some time before 1958 the whole of its share capital was taken over by Pena Industries, Ltd., the parent company of a group of companies. In this group there was a company known as Comcor, Ltd. who acted as bankers for the group. By 1958 the parent company (Pena Industries, Ltd.) was in financial difficulties, and on June 1, 1958, a winding-up order was made on its own petition. Also in the early part of 1958 Easipower, Ltd., was heavily indebted, owing £45,730 to Comcor, Ltd., £15,164 to Martins Bank, Ltd. (who held a debenture as security), and substantial sums to trade creditors. The defendants took over the financing of Easipower, Ltd. On May 9, 1958, Comcor, Ltd. assigned to the defendants the debt of £45,730 owing by Easipower, Ltd. Martins Bank, Ltd., who were unwilling to continue the overdraft amounting to £15,164, transferred that overdraft and the debenture to the defendants, and the defendants on May 23, 1958, agreed to grant to Easipower, Ltd., an overdraft up to £50,000. With the concurrence of the defendants, Easipower, Ltd., borrowed money, apparently on the security of its stocks of electric blankets, from another company called City Merchants, Ltd., who had substantially the same directorate as the defendants, and Easipower, Ltd., used the money for the purpose of paying off the debt of £45,730. There were still substantial sums owing to trade creditors. It is assumed for the purposes of the argument that Easipower, Ltd., was at the material times in 1958 dependent for its survival on the continuance of the financial facilities provided by the defendants.

In July and August, 1958, the plaintiffs, as advertising agents for Easipower, Ltd., placed forward orders for advertising time with television companies and for advertising space in newspapers and periodicals. The plaintiffs, having the status of "recognised" advertising agents, assumed responsibility to the television companies and the newspapers and periodicals for the payments that would become due in respect of the advertising. The total amount involved was somewhere in the region of £22,000, but the plaintiffs estimated that the amount likely to be on risk at any one time would be about £8,000 or £9,000. On Aug. 18, 1958, the plaintiffs telephoned to their bank (the Piccadilly branch of National Provincial Bank, Ltd.) asking them to obtain a reference as to the ability of Easipower, Ltd., to meet a debt of £8,000 to £9,000. The Piccadilly branch of the bank referred to the City office, and then there was a telephone conversation between a representative of National Provincial Bank, Ltd., and Mr. L. Heller, representing the defendants. Mr. Heller's note of the conversation is accepted as correct. It is as follows:

> "Heller & Partners, Ltd. Minute of telephone conversation. Call from National Provincial Bank, Ltd., 15 Bishopsgate, E.C.2. 18.8.58

A Person called: L. Heller. re Easipower, Ltd. They wanted to know in confidence, and without responsibility on our part, the respectability and standing of Easipower, Ltd., and whether they would be good for an advertising contract for £8,000 to £9,000. I replied the company recently opened an account with us. Believed to be respectably constituted and considered good for its normal business engagements. The company is a subsidiary B of Pena Industries, Ltd., which is in liquidation, but we understand that the managing director, Mr. Williams, is endeavouring to buy the shares of Easipower, Ltd., from the liquidator. We believe that the company would not undertake any commitments they are unable to fulfil."

The substance of that reference given in the telephone conversation was passed to the plaintiffs. It is assumed for the purposes of the argument that the C reference given by the defendants as to Easipower, Ltd., was too favourable, not being justified by the facts known to the defendants; and that it was (if there was a duty of care) given negligently; and that the defendants, in reliance on it, refrained from cancelling the advertising orders, and thereby suffered loss (1). However, it was conceded by the plaintiffs at the trial, and on the hearing of this appeal, that the reference was given honestly. I should mention for the sake D of completeness that there was a later reference given on Nov. 11, 1958, but, as no separate point is raised with regard to it, there is no need to set it out.

On the facts as stated and assumed, was there a duty of care, and are the plaintiffs entitled to recover damages for negligence? The leading case is *Derry* v. *Peek* (2) and, as it is very familiar and was discussed in later cases to which reference will be made, I will read only the first two paragraphs from the E headnote:

"In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement, made through carelessness and without F reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit."

A passage in the headnote in *Low* v. *Bouverie* (3) which is directly material for the present purpose states:

G "If the trustee takes upon himself to answer the inquiries of a stranger about to deal with the cestui que trust, he is not under any legal obligation to do more than to give honest answers to the best of his actual knowledge and belief; he is not bound to make inquiries himself. Provided he answers honestly, he incurs no liability to the inquirer, unless he binds himself by a statement amounting to a warranty, or so expresses himself as to be estopped H from afterwards denying the truth of what he has said."

LINDLEY, L.J., in his judgment said (4):

"I will next take the case of a trustee who answers the inquiry. What in this case is the extent of his obligation? Is he bound to find out the facts —bound to make inquiries of his co-trustees, or of the solicitor to the trust? I Or is his obligation limited to giving such information as he himself can give without inquiry or research? I am not aware of any principle or authority which imposes upon him any obligation to do more than give an honest answer to the inquiry—that is to say, to do more than answer to the

(1) The loss pleaded in the points of claim was the incurring of liabilities and loss of profit amounting in the aggregate to £17,661 18s. 6d. The relief claimed, so far as remained relevant on the appeal, was damages for breach of duty or negligence in and about answering the inquiries, and giving the references, in question.

(2) (1889), 14 App. Cas. 337. (3) [1891] 3 Ch. 82. (4) [1891] 3 Ch. at p. 100.

best of his actual knowledge and belief. He may, no doubt, undertake a greater responsibility; he may bind himself by a warranty, or he may so express himself as to be estopped from afterwards denying the truth of what he said; but unless he does one or the other, I do not know on what principle consistent with *Derry* v. *Peek* (5) he can, if he answer honestly, expose himself to liability."

Then there is a passage in the judgment of BOWEN, L.J., where he said (6):

"But *Derry* v. *Peek* (5) decides, secondly, that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry."

In *Le Lievre* v. *Gould* (7) the headnote reads:

"Mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part:—*Held*, that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and they could not maintain an action against him by reason of negligence."

There is a passage which is of considerable interest in relation to the argument which was presented in this case. In his judgment in *Le Lievre* v. *Gould*, LORD ESHER, M.R., said (8):

"Then it is said that, even if there was no contract between the plaintiff Dennes and the defendant, nevertheless the defendant is liable to the plaintiffs for having given certificates which contained untrue statements; for, it is said, the defendant owed a duty to the plaintiffs to exercise care in giving the certificates, because he knew that the plaintiffs would or might act upon them by advancing money to Lovering. No doubt the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven* v. *Pender* (9) has no bearing upon the present question. That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

LORD ESHER goes on to expound that further. Then he says (10):

"That is the effect of the decision in *Heaven* v. *Pender* (9), but it has no application to the present case."

It will be sufficient to read a short extract from the judgment of COZENS-HARDY, M.R., in *Parsons* v. *Barclay & Co.* (11), which was a case in this court (12):

(5) (1889), 14 App. Cas. 337. (6) [1891] 3 Ch. at p. 105. (7) [1893] 1 Q.B. 491.
(8) [1893] 1 Q.B. at p. 496. (9) (1883), 11 Q.B.D. 503.
(10) [1893] 1 Q.B. at p. 497. (11) (1910), 26 T.L.R. 628.
(12) (1910), 26 T.L.R. at p. 629.

A "His Lordship said he wished emphatically to repudiate the suggestion that, when a banker was asked for a reference of this kind, it was any part of his duty to make inquiries outside as to the solvency or otherwise of the person asked about, or to do anything more than answer the question put to him honestly from what he knew from the books and accounts before him. To hold otherwise would be a very dangerous thing to do and would put B an end to a very wholesome and useful practice and long established custom which was now largely followed by bankers."

Next in order of date is *Nocton* v. *Lord Ashburton* (13) from which I will read certain passages later. Then there is a case of importance, *Robinson* v. *National Bank of Scotland* (14), on appeal to the House of Lords from the Court of Session, C in which the headnote reads (14):

"A cautioner who had been compelled to pay the whole of a loan, which he had guaranteed along with two co-cautioners who had become bankrupt, brought an action against the bank of which the co-cautioners were customers to recover the amount of his loss. He averred that he had been induced to become a cautioner for the loan by reason of representations as to the D financial position of his co-cautioners contained in a letter written by the agent of their bank to another bank in reply to inquiries as to their credit, which representations he averred were false and fraudulent and concealed material facts which ought to have been disclosed."

The passage which is probably most material in the present case is not contained in the speeches delivered, but in an earlier passage in the report, where it E says (14) that, after the conclusion of the argument for the appellant, and after counsel for the respondents had been heard for a short time, EARL LOREBURN informed him that their Lordships, as at present advised, thought that there was no special duty on M'Arthur toward the pursuer; that the respondents were not liable unless M'Arthur's representations were dishonest; and that their F Lordships had not been satisfied as yet that the representations were dishonest. The speeches were mainly concerned with the pursuer's claim in respect of alleged false and fraudulent representations. However, there are certain passages which have a bearing on the present question. EARL LOREBURN said (15):

"This is an action for false and fraudulent representation. In such an action the pursuer cannot succeed, unless he proves dishonesty. There is G another kind of action known to the law, namely, for some breach of duty arising out of the relations between the parties, as, for instance, where a solicitor is sued for failure to exercise diligence. That class of case was referred to in *Nocton* v. *Lord Ashburton* (13)."

VISCOUNT HALDANE said (16):

H "There is only one other point about which I wish to say anything, and that is the question which was argued by the appellant, as to there being a special duty of care under the circumstances here. I think the case of *Derry* v. *Peek* (17) in this House has finally settled in Scotland, as well as in England and Ireland, the conclusion that in a case like this no duty to be careful is established. There is the general duty of common I honesty, and that duty of course applies to the circumstances of this case as it applies to all other circumstances. But when a mere inquiry is made by one banker of another, who stands in no special relation to him, then, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred.

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(13) [1914] A.C. 932. (14) 1916 S.C. (H.L.) 154. (15) 1916 S.C. (H.L.) at p. 155.
(16) 1916 S.C. (H.L.) at p. 157. (17) (1889), 14 App. Cas. 337.

"In saying that I wish emphatically to repeat what I said in advising this House in the case of *Nocton* v. *Lord Ashburton* (18), that it is a great mistake to suppose that, because the principle in *Derry* v. *Peek* (19) clearly covers all cases of the class to which I have referred, therefore the freedom of action of the courts in recognising special duties arising out of other kinds of relationship which they find established by the evidence is in any way affected. I think, as I said in *Nocton's* case (18) that an exaggerated view was taken by a good many people of the scope of the decision in *Derry* v. *Peek* (19). The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur."

In LORD ATKINSON's speech there is this passage (20):

"I do not discuss the question whether there may not be established between two men relations by which a duty is imposed upon one to see that the information which he conveys to the other is accurate; but it appears to me to be perfectly clear that the facts of this case did not impose upon Mr. M'Arthur any such duty towards the inquirer who inquired of him, and therefore the case comes back and rests upon the doctrine of *Derry* v. *Peek* (19)."

I should then mention shortly *Batts Combe Quarry Co.* v. *Barclays Bank, Ltd.* (21), in which for business purposes an inquiry was made of a bank as to the stability of a customer of the bank. It was argued by Mr. Goddard (22):

"Mr. Goddard submitted that there was no case to go to the jury. The action did not lie in the absence of fraud, which was not alleged. No duty was owed to the plaintiffs by the defendant bank. Their only duty to Lloyds Bank was to answer honestly, and it was not suggested that their answer was not honest. There was no duty when there was no relation by contract. Negligence lay against a person only if he had a duty not to be negligent. He submitted that Barclays Bank owed no duty to a customer of Lloyds Bank and that there was no evidence of negligence."

I think that it can be inferred from that last sentence that his primary submission was that Barclays Bank owed no duty, and then there was an alternative submission that in any case, even if a duty was owing, there was no evidence of negligence on the facts (22):

"Mr. Trapnell [on the other side] contended that there was evidence of negligence on the part of the defendants' branch manager in the scope of his employment."

The brief report of the judgment of AVORY, J., is in these terms (23):

"AVORY, J., said that in his opinion there was no evidence establishing any duty on the part of the defendant bank towards the plaintiffs. He thought that the authorities showed that in such a case the only duty, if any, was a duty not to be negligent. He was further of opinion that there was no evidence of negligence on the part of the defendant bank through their manager. He must therefore direct the jury to find a verdict for the defendants."

The most important words in that summary of the judge's judgment are the words "if any", because they show quite clearly that he was not giving a decision

(18) [1914] A.C. 932.
(19) (1889), 14 App. Cas. 337.
(20) 1916 S.C. (H.L.) at p. 157.
(21) (1931), 48 T.L.R. 4.
(22) (1931), 48 T.L.R. at p. 5.
(23) (1931), 48 T.L.R. at p. 6.

A that there was such a duty of care as alleged; he was proceeding on the assumption that there might be such a duty of care, and decided that there was no evidence of any breach of it.

I have mentioned that because our attention has been called to a passage in 2 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) at p. 241 in which the statement in the text, referring to answers given by bankers with regard to the position and B character of the banker's customers, is: "Action can be brought on the ground of negligence in making such a representation". Reference is made to footnote (q), and footnote (q) says:

> "See *Batts Combe Quarry Co.* v. *Barclays Bank, Ltd.* (24) (in answering a financial inquiry the only duty, if any, to the inquirer is not to be negligent)."

C The authority cited in that footnote is, as I have said, not adequate to prove the existence of any such duty, because the words "if any" show clearly that no such decision was being given; it was merely an assumption, and not a decision.

Candler v. *Crane, Christmas & Co.* (25) was a decision of this court by a majority, the majority being ASQUITH, L.J., and COHEN, L.J., and in the minority D was DENNING, L.J. The whole subject was very carefully explored in that case, and large portions of the judgments have been read to this court in the course of the present appeal. It will be sufficient for present purposes to read certain passages in the headnote where, I think, the effect of the majority decision is accurately expressed. The facts were that the plaintiff was considering the possibility of investing £2,000 in a limited liability company, but before deciding E to do so desired to see the accounts of the company. The managing director of the company accordingly instructed the defendants, the accountants of the company, who were getting out the accounts, to press on and complete them, informing a clerk of the accountants, who had been requested by them to prepare the accounts, that they were required to be shown to the plaintiff who to his knowledge was a potential investor in the company. The clerk accordingly F prepared the accounts and at the request of the managing director showed them to, and discussed them with, the plaintiff who took a copy of them and submitted them to his own accountant for advice. As a result the plaintiff invested his money in the company. The accounts were carelessly prepared, contained numerous false statements and gave a wholly misleading picture of the state of the company, which was wound up within a year, the plaintiff losing the whole G of his investment. It had been held in the court below that the clerk had been extremely careless in the preparation of the accounts, and that the resulting damage to the plaintiff was plain. But the action was dismissed on the ground that the defendants owed no duty of care to the plaintiff. On appeal that decision was upheld.

These passages in the headnote, I think, set out very conveniently and succinctly the main point decided (26): H

> "*Held*, by COHEN, L.J., and ASQUITH, L.J., following *Derry* v. *Peek* (27) and *Le Lievre* v. *Gould* (28) (DENNING, L.J., dissenting) that a false statement, carelessly, as contrasted with fraudulently, made by one person to another, though acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the I parties, and that this principle had in no way been qualified by the decision of the majority in *M'Alister* (*or Donoghue*) v. *Stevenson* (29). Accordingly the plaintiff's action failed. Per ASQUITH, L.J.: the principle laid down by LORD ATKIN in *M'Alister* (*or Donoghue*) v. *Stevenson* (29) in answer to the question: 'Who then, in law, is my neighbour?' has never yet been

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(24) (1931), 48 T.L.R. 4.
(25) [1951] 1 All E.R. 426; [1951] 2 K.B. 164.
(26) [1951] 2 K.B. at p. 165.
(27) (1889), 14 App. Cas. 337.
(28) [1893] 1 Q.B. 491.
(29) [1932] All E.R. Rep. 1; [1932] A.C. 562.

applied where the damage complained of was not physical in its incidence to either person or property."

Then there are two recent decisions of SALMON, J., which were called to our attention. The first was *Woods* v. *Martins Bank, Ltd.* (30), in which it was held that a banker did owe a duty of care to a customer or prospective customer who asked his advice as to investments and who received from him bad advice. But in my view that does not really advance the case for the plaintiffs here, because the decision was based on the finding of fact that there was a fiduciary relationship existing between the plaintiff and the defendants. That finding will be found in the report (31). In *Clayton* v. *Woodman & Son (Builders), Ltd.* (32) there was a building contract between the builders and the hospital board and the contract provided that the works were to be carried out in accordance with the architect's directions. A stone gable was to be incorporated into the wall of a room and, for that purpose, a chase or groove had to be cut into the side of the gable. The architect gave instructions to the bricklayer that he was to cut the chase in the gable. The architect knew that the bricklayer would carry out his instructions without shoring or strutting the gable, because the architect considered it was unnecessary to do that, but in fact the operation was dangerous. The bricklayer carried out the instructions of the architect and suffered injury in consequence. It was held that a duty of care was owing by the architect to the bricklayer and there was a breach of it.

However, there are two distinctions between that case and the present one. First of all, that was not a case merely of information being given or a statement being made; it was a case of instructions being given by a person in authority to a person whose duty it was to comply with them, and the intended and natural effect of the instructions was that the person instructed did what he was told to do, and what he was told to do was, on the facts, something which it was not safe for him to do. The second distinction is that the accident in that case involved physical injury and not financial loss. It is sufficient, in my view, to point out that there are those two distinctions, and it is not necessary to express any opinion as to the correctness of the decision or the reasoning in that case.

Counsel for the plaintiffs in the present case advanced an argument based on *M'Alister (or Donoghue)* v. *Stevenson* (33). He said that because the defendants were giving a reference to another bank and that bank or its customers, who were in fact the plaintiffs, were likely to act in reliance on that reference, there was therefore sufficient proximity to impose on the defendants in relation to the plaintiffs a duty to exercise reasonable care. That argument is in effect the argument which was rejected by this court in *Candler* v. *Crane, Christmas & Co.* (34) and at least very similar to the argument which had been rejected many years earlier by this court in *Le Lievre* v. *Gould* (35). In my view that argument is plainly not maintainable in this court.

Counsel for the plaintiffs also founded an argument on the passage in the speech of VISCOUNT HALDANE in *Robinson* v. *National Bank of Scotland* (36) where he said:

> "The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains . . ."

Counsel for the plaintiffs was unable to show any fiduciary relationship or any express or implied contract, but he suggested that there was, in this case, a relevant special relationship inasmuch as the defendants were financing Easipower,

(30) [1958] 3 All E.R. 166; [1959] 1 Q.B. 55. (31) [1959] 1 Q.B. at p. 72.
(32) Ante, p. 249. (33) [1932] All E.R. Rep. 1; [1932] A.C. 562.
(34) [1951] 1 All E.R. 426; [1951] 2 K.B. 164.
(35) [1893] 1 Q.B. 491; cf. p. 896, ante. (36) 1916 S.C. (H.L.) at p. 157.

A Ltd., and that company depended for its survival on such financing by the defendants being continued. In my opinion, however, those facts, which I assume for the purposes of the argument to be correct, do not constitute a relevant special relationship for the present purpose. The special relationship required to establish the duty of care as between A and B must be a special relationship existing between A and B, i.e., in cases such as this, between the B person who by himself or his agent makes the inquiry and the person who gives the reference in response to the inquiry. There may be a fiduciary or contractual or some other special relationship existing between those parties and creating the duty of care as between them. Examples of such special relationships were given by ASQUITH, L.J., in *Candler* v. *Crane, Christmas & Co.* (37); and then, bearing on the present matter, there is also a passage later. The lord justice had C been referring to the passage in LORD HERSCHELL's speech in *Derry* v. *Peek* (38). He said (39):

> "LORD HERSCHELL's dictum was, however, later interpreted both by the Court of Appeal in *Low* v. *Bouverie* (40) and later by the House of Lords in *Nocton* v. *Lord Ashburton* (41). It seems clear from the latter case (in which D the former was also considered and affirmed) that LORD HERSCHELL's proposition has been held only to hold good where (to use its terms) the '. . . person within whose special province it lay to know a particular fact . . .' occupies a contractual or fiduciary position vis-à-vis the '. . . person desirous of ascertaining the fact . . .' ."

E In my opinion that shows that the special relationship must be one of the person who knows the fact vis-à-vis the person desirous of ascertaining it.

In *Nocton* v. *Lord Ashburton* (41) there is a passage bearing on this question. The passage, in the speech of VISCOUNT HALDANE, L.C., is this (42):

> "Even the action on the case for deceit was itself evolved by the judges, as is shown by the dissenting judgment of GROSE, J., in *Pasley* v. *Freeman* (43) F so comparatively recently as 1789. Up to that date it was at least doubtful whether the action lay in the absence of a special duty. The doctrines of obligation to exercise care by persons in particular situations, who are doing acts which may injure the property or persons of others; of implied contract, as shown in the evolution of the action of assumpsit and its development from case; of the liability of the agent, who came at last to be treated G as warranting the authority which he asserted; of the right to an injunction and an account in equity in cases of passing off goods, as explained and contrasted with claims based on deceit in LORD WESTBURY's judgment in *Edelsten* v. *Edelsten* (44), and in such later authorities as the judgment of FARWELL, J., in *Bourne* v. *Swan & Edgar, Ltd.* (45); these doctrines and the like illustrate the freedom which has been exercised by the judges in H making new applications of recognised principles. Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases I in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that

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(37) [1951] 1 All E.R. at p. 438; [1951] 2 K.B. at p. 188.
(38) (1889), 14 App. Cas. at p. 360.
(39) [1951] 1 All E.R. at p. 440; [1951] 2 K.B. at p. 191. (40) [1891] 3 Ch. 82.
(41) [1914] A.C. 932. (42) [1914] A.C. at p. 947. (43) (1789), 3 Term Rep. 51.
(44) (1863), 1 De G. J. & Sm. 185. (45) [1903] 1 Ch. 211.

relationship may be properly treated as giving rise to a special duty of care in statement."

In my opinion, having regard to those cases, the relationship which may create a special duty must be a relationship between two relevant parties. I think also one can add that the relationship between the person giving the reference and the subject of the reference is, at any rate normally, relevant not to the creation of the supposed duty but to the performance or breach of it, whether it be a duty of exercising due care or only of giving an honest answer. It is interesting to observe that in the statement of claim in the present case the dependence of Easipower, Ltd. on the defendants' financing is relied on not in or under para. 4, where the duty is alleged, but under para. 6, where breach of duty is alleged. I think that is right. The allegation of dependence belongs to the subject of breach of duty, the failure to perform the alleged obligation.

The reference complained of contained the words, "without responsibility on our part". Those words, in themselves, might be relied on as excluding any liability for negligence. However, counsel for the plaintiffs contends that they should be understood only as excluding a warranty of the accuracy of the reference given. He says they should not be understood as excluding liability for negligence, because for that purpose express and unambiguous words would be necessary. I do not find it necessary to express any opinion on that point.

Apart from authority, I am not satisfied that it would be reasonable to impose on a banker the obligation suggested, if that obligation really adds anything to the duty of giving an honest answer. It is conceded by counsel for the plaintiffs that the banker is not expected to make outside inquiries to supplement the information which he already has. Is he then expected, in business hours in the bank's time, to expend time and trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report? That seems wholly unreasonable. Then, if he is not expected to do any of those things, and if he is permitted to give an impromptu answer in the words that immediately come to his mind on the basis of the facts which he happens to remember or is able to ascertain from a quick glance at the file or one of the files, the duty of care seems to add little, if anything, to the duty of honesty. If the answer given is seriously wrong, that is some evidence—of course, only some evidence—of dishonesty. Therefore, apart from authority, it is to my mind far from clear that the banker, in answering such an inquiry, could reasonably be supposed to be assuming any duty higher than that of giving an honest answer.

However that may be, for the reasons which have been given, I am of opinion that we are clearly bound by previous decisions of this court, fortified by at least statements of principle if not actual decisions in the House of Lords, to uphold the decision of the learned judge (46) and dismiss the appeal.

ORMEROD, L.J.: I am in full agreement with the views expressed by PEARSON, L.J., and there is nothing that I wish to add. I also would dismiss the appeal.

HARMAN, L.J.: I agree. The matter has been so fully covered by PEARSON, L.J., that I desire to add nothing except, perhaps by way of supplement, on this aspect of law as it occurs to a Chancery practitioner. It has always been a fundamental proposition that innocent misrepresentation does not sound in damages; and that turns out to be the same doctrine, I think, as my common law brethren

(46) See p. 893, letter I, ante.

A enunciate. It has always been, of course, a good defence to an action of specific performance to prove that he who seeks it has innocently misrepresented the facts. It may also be used as a sword as well as a shield to obtain rescission of an executory contract; but once a contract is executed it is no use trying to obtain damages which may have been suffered through misrepresentations which your vendor has made if they prove to be made without dishonesty. It is true B that there may be relationships of a contractual or fiduciary kind which are exceptions to that rule, but apart from that, and in the ordinary case, damages are out of the picture, and the two sides of the law, therefore, hold the same doctrine in that respect. In my opinion once the plaintiffs here decided to abandon their charge of fraud they had no hope of success.

C *Appeal dismissed. Cross-notice to remain. Leave to appeal to the House of Lords granted.*

Solicitors: *Evill & Coleman* (for the plaintiffs); *Franks, Charlesly & Co.* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D

E

Re LATHAM (*deceased*).
INLAND REVENUE COMMISSIONERS *v.* BARCLAYS BANK, LTD. AND ANOTHER.

F [CHANCERY DIVISION (Wilberforce, J.), July 19, 20, 21, 1961.]

Estate Duty—Accountability—Beneficiary absolutely entitled to settled funds subject to two successive life interests—Canadian settlement—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 8 (4).

G *Estate Duty—Deduction of debt—Reimbursement—Duty leviable on death of life tenant of trust funds settled by Canadian settlement—Succeeding life tenant domiciled in England accountable but did not pay duty—Whether amount of duty a debt allowable against second life tenant's free estate—Whether there was a right to reimbursement—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (1) (*b*), *s.* 9 (6), *s.* 20 (2).

H In 1931 a settlor made a settlement in Canadian form of movable property situated in Canada. The sole trustee was a Canadian corporation. The fund was settled on certain trusts as to income during the life of the settlor, and after his death one fourth part of the trust fund was to be set aside and the income paid to the settlor's widow during her life. On the death of the widow the one fourth share was held on trusts under which H. was entitled I to a protective life interest in one-third of it, and R. became absolutely entitled to the one-third of the one fourth share on H.'s death. On Oct. 26, 1931, the settlor died, but under the law then applicable no claim for estate duty arose in respect of the trust fund. On Dec. 12, 1950, the settlor's widow died, and estate duty became payable on the one fourth share in which she had had a life interest. H. became accountable for one-third of the duty so payable, but he died on July 24, 1955, domiciled and resident in England without having paid that duty. His executors claimed a deduction against

H.'s free estate for the amount of that duty, and interest. The Inland Revenue Commissioners admitted the right to deduct the interest, but disputed the right to deduct the principal amount of the duty, on the footing that the executors of H. had the right to reimbursement, either by R. personally, or by the effect of the Finance Act, 1894, s. 9, out of the property representing the share of H. in the trust fund.

Held: (i) deduction from H.'s free estate for the debt for the principal amount of the estate duty leviable on the widow's death, in respect of the one-twelfth of the settled funds passing on her death to H., was not permissible because on general equitable principles, assuming that Canadian law in respect of such principles was the same as English law, there would be a right of reimbursement out of the capital of the trust funds subject to the Canadian settlement in respect of estate duty paid by H. (a tenant for life) or his executors, as the principal amount of that duty would be proper to be borne by capital; and this equitable right was a right of reimbursement within s. 7 (1) (b) of the Finance Act, 1894, which accordingly excluded allowance being made for the debt of the principal amount of the estate duty (see p. 913, letter I, post).

(ii) R. was not an accountable person within s. 8 (4) of the Act of 1894 for the duty because—

(a) he took an interest in the fund subject to two successive life interests and the duty was chargeable on the death of the first of the life tenants to die (see p. 909, letter C, post).

Re McNeill ([1957] 3 All E.R. 508) applied.

(b) R. was not within the second category of accountable persons described in s. 8 (4) in the words—" to the extent of the property actually received . . . by him, every trustee, guardian, committee, or other person in whom any interest in the property . . . is at any time vested "—because the latter description " or other person " must be construed ejusdem generis with the immediately preceding words, and R. was not entitled in a fiduciary capacity but beneficially (see p. 909, letter I, and p. 910, letter E, post).

Tillmanns & Co. v. *S.S. Knutsford, Ltd.* ([1908] 2 K.B. 385) applied.

(iii) although, if the estate duty had been paid, the right of H., or of his executors (for s. 9 (6) of the Finance Act, 1894, applied to executors of a limited owner as well as to the limited owner, see p. 913, letter A, post), to enforce against the Canadian trust funds the indemnity charge created by s. 9 (6) of the Finance Act, 1894, would not have been excluded by s. 20 (2) of that Act, since that charge was not a charge for the purpose of enabling revenue to be collected by the Crown (see p. 912, letter A, post; *Re Bullock-Webster*, [1936] Ch. 1, distinguished), yet, as the settlement was a Canadian settlement, the Canadian courts would not allow a charge created by an English statute to interfere with beneficial rights under the settlement (see p. 912, letter F, post; *Spiller* v. *Turner*, [1897] 1 Ch. 911, applied), so that neither H. nor his executors would have an effective right of reimbursement by virtue of s. 9 (6).

[As to accountability for estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 118-120, paras. 246-248; and for cases on the subject, see 21 DIGEST 27, 28, *155-166*.

For the Finance Act, 1894, s. 7 (1) (b), s. 8 (4) and s. 9 (6), see 9 HALSBURY'S STATUTES (2nd Edn.) 360, 366, 371.]

Cases referred to:

Bullock-Webster, Re, Royal Exchange Assurance v. *Royal Trust of Canada*, [1936] Ch. 1; 105 L.J.Ch. 291; 153 L.T. 448; Digest Supp.

London and South American Investment Trust, Ltd. v. *British Tobacco Co. (Australia), Ltd.*, [1927] 1 Ch. 107; 96 L.J.Ch. 58; 136 L.T. 436; 9 Digest (Repl.) 627, *4192*.

A *McNeill, Re, Royal Bank of Scotland* v. *MacPherson*, [1957] 3 All E.R. 508; [1958] Ch. 259; [1957] 3 W.L.R. 1007; 3rd Digest Supp.

Spiller v. *Turner*, [1897] 1 Ch. 911; 66 L.J.Ch. 435; 76 L.T. 622; 9 Digest (Repl.) 639, *4256*.

Tillmanns & Co. v. *S.S. Knutsford, Ltd.*, [1908] 2 K.B. 385; 77 L.J.K.B. 778; sub nom. *S.S. Knutsford, Ltd.* v. *Tillmanns & Co.*, 99 L.T. 399; *on appeal*, sub nom. *S.S. Knutsford, Ltd.* v. *Tillmanns & Co.*, [1908] A.C. 406; 17 Digest (Repl.) 283, *907*.

B

Action.

In this action, the Inland Revenue Commissioners claimed (among other things) against the defendant bank as executor of the will of Sir Herbert Paul Latham, deceased, a declaration that the bank was accountable for estate duty (and also interest thereon) which became payable on the death of Lady Florence Clara Latham on the principal value of such part of the fund settled by Sir Richard Thomas Paul Latham by a settlement in Canadian form dated June 29, 1931, as Sir Herbert Paul Latham had become entitled to on the death of Lady Latham. The commissioners also claimed, against the defendant, Sir Richard Thomas Paul Latham, a declaration that on the death of the said Sir Herbert Paul Latham the said defendant became accountable for the said estate duty and interest. The commissioners claimed further against both defendants, a declaration that the amount of the said estate duty was a debt of the said Sir Herbert Paul Latham in respect of which there was a right of reimbursement within the meaning of the Finance Act, 1894, s. 7 (1) (b), and that the said amount was not allowable as a deduction in determining the value of the estate of the said Sir Herbert Latham for the purposes of estate duty payable thereon at his death. The facts appear in the judgment.

C

D

E

Sir Milner Holland, Q.C., and *E. Blanshard Stamp* for the plaintiffs, the Inland Revenue Commissioners.

H. E. Francis, Q.C., and *R. Cozens-Hardy Horne* for the defendants.

F

WILBERFORCE, J.: This is a difficult case, but, having reached a view on it, I think that it is better that I give my judgment now, even with some sacrifice of precision, in view, particularly, of the state of the term. The question is briefly: whether in the estate of Sir Herbert Paul Latham it is proper to deduct, in the accounts of that estate which are submitted for the calculation of estate duty, a certain debt, and the question involves consideration of s. 7, s. 8 and s. 9 of the Finance Act, 1894.

G

The facts are quite simple: a settlement was made on June 29, 1931, which is stated in the statement of claim to have been made in Canadian form. Looking at the settlement it does appear, indeed, that the settlement is in fact made in what either could be called Canadian form or a form used in the Province of Quebec. The parties to it were Sir Thomas Paul Latham, who was the settlor, and Barclays Trust Company of Canada, in other words a Canadian corporation, as the trustee, of the other part. The property settled consisted of movable property situated in Canada, which at that time consisted of—and I think at all material times has consisted of—certain Canadian securities.

H

The trusts of the settlement were, so far as relevant, as follows. There were provisions which were to apply during the lifetime of the settlor as to the income of the trust fund. I need not go into that in detail. After the death of the settlor one fourth part of the trust fund was to be set aside and the income paid to the widow of the settlor for the rest of her life. On her death that one fourth part was to devolve in accordance with the trusts declared in relation to the other three fourths. The other three fourths were to be divided in equal shares, i.e., one fourth was to be held for the benefit of each of the three children of the settlor, namely, Herbert Latham—who was the same person as Sir Herbert Paul Latham whose estate is in question in this case—Mrs. Hamilton and Lady Hay.

I

The shares of each of those three children were settled on protective trusts for the child during his or her life and there were ultimate trusts in favour of the children of each of those children on their attaining the age of twenty-one or marrying. I am concerned only with the one third of the widow's quarter share which was settled on Sir Herbert Paul Latham for his life, on protective trusts, and that one third became, on his death, absolutely vested in the defendant, Sir Richard Latham.

The settlor died on Oct. 26, 1931, but under the law as it stood at that time no estate duty became chargeable under the settlement on his death. He was survived by his widow, Lady Latham, and she died, domiciled in England, on Dec. 12, 1950. Accordingly estate duty became payable on her quarter share. One-third of that duty was chargeable to Sir Herbert Paul Latham, or, I should say, perhaps more accurately, that he became accountable for the duty, but he never paid it, and it is the liability for that duty which gives rise to the debt in question in this case. Sir Herbert died, domiciled in England, on July 24, 1955, and the first defendants, Barclays Bank, Ltd., are his executors.

In a supplementary Inland Revenue affidavit, which was filed in connexion with Sir Herbert Paul Latham's estate on Dec. 18, 1957, a reference was made to this liability for duty, and among the debts or liabilities of the estate, which were shown in a schedule to that affidavit, was an item expressed in this way:

> "Estate Duty on Funds of the Canadian Settlement of Sir T. P. Latham passing on the death of Lady F. C. Latham, £71,609 0s. 9d. Interest for period 13.12.50 [the day after the death of the widow] to 24.7.55 [the date of the death of Sir Herbert] £6,607 12s. 10d."

which made, together, £78,216 13s. 7d. and a deduction was claimed from the assets of the estate in the aggregate of that sum.

The Commissioners of Inland Revenue concede that the estate is entitled to a deduction in respect of the interest represented in that aggregate sum, but they dispute the right of the estate to claim a deduction for the principal amount of duty, £71,609, and the question whether they are correct in disputing the rights to deduct depends, in the first instance, on s. 7 (1) (b) of the Finance Act, 1894. Section 7 (1) provides:

> "In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—. . . (b) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained . . ."

The question, therefore, which has to be determined here is whether there is a right to reimbursement from any other estate or person in respect of this debt.

What is claimed in the statement of claim, as amended at the hearing before me, is that the debt was a debt in respect of which the defendant bank had the right to reimbursement, either by the defendant, Sir Richard Latham, personally, or, by the effect of s. 9 of the Finance Act, 1894, out of property representing the deceased's (Sir Herbert's) share. The claim is put in various ways. In the first place it is said that Sir Richard Latham, the present remainderman, having an absolute interest in the deceased's estate, is, himself, accountable for duty on Lady Latham's death, and then it is said that where there is a situation in which two or more persons are liable for the stated amount of duty, those persons should contribute according to their respective interests.

The first step, then, is to determine whether Sir Richard is, himself, accountable for this duty, the position being, it will be seen, that the duty was payable on the death not of the tenant for life, whom he immediately succeeded, but of the preceding tenant for life. For that purpose reference is made to s. 8 (4) of the Finance Act, 1894, and I must read the greater part of that subsection:

> "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property [I pause

A there to say this is such a case] every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title B shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the commissioners allow, deliver to the commissioners and verify an account, to the best of his knowledge and belief, of the property: . . ."

It is clear, starting at the beginning of that subsection, that the first class of person who is made accountable for duty is a person to whom property passing C on a death passes for a beneficial interest in possession, and, of course, it was by reason of that provision that the deceased became an accountable person. Had this been a normal English settlement there would have been no difficulty whatever in dealing with the position of other persons because it would be clear that the deceased, or for that matter his estate—I will deal with that later—would have had a right to recover any debt which he so paid against the capital D of the estate, or possibly, also, against the remainderman himself. But the special character of this case arises from the fact that the property chargeable is out of the United Kingdom, and that the settlement is a Canadian settlement and not an English settlement.

Returning to s. 8 (4), there are two other classes of persons who are rendered E accountable. The second class is contained in the words

> " to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested."

It is said that although, admittedly, Sir Richard cannot come within the first class because he was not a person to whom the property, on Lady Latham's F death, passed for any beneficial interest in possession, he is nevertheless brought within the second class, because he is an " other person in whom any interest in the property ", i.e., an absolute interest, is now vested. Although it might not have been vested during the deceased's lifetime, at any rate it is now vested and the provision says " is at any time vested ", so that the requirements of this disposition are, it is stated, satisfied.

G I shall have to examine those words on their merits, but I must first refer to an authority, *Re McNeill, Royal Bank of Scotland* v. *MacPherson* (1), which has been cited on the subsection in which this question, or something very similar to it, has been considered by the Court of Appeal. The first point which I have to decide is whether the principle of that case governs this case. That was a case where a testator gave his residuary estate on trusts under which there were H successive life interest, as here. The income of one-half was to be paid to the testator's brother, Alexander, for life, and thereafter to the testator's sister, Eila, during her life. Subject to those interests certain pecuniary legacies were to be paid free of duty, and subject to the legacies the residue was to be distributed to certain named persons. Certain duty became payable on the death of Eila who had survived Alexander. The question which was raised in those proceedings was I whether any part of the duty which had become chargeable on the first death, i.e., the death of Alexander, could be charged against the legatees. There were two points which had to be considered. The first was whether the expression in the will " free of duty " exempted the legatees from liability to pay estate duty, and both UPJOHN, J., and the Court of Appeal decided that they did not, and that the words only related to legacy duty. Before UPJOHN, J., the question whether the estate duty on the first death, or any part of it, could be charged against the

(1) [1957] 3 All E.R. 508; [1958] Ch. 259.

legatees was not apparently decided, nor, indeed, argued; nor was it the subject-matter of the notice of appeal to the Court of Appeal, as originally presented. However, during the hearing in the Court of Appeal leave was given to amend the notice in order to raise the point, and it was raised in this way, by suggesting that the duty payable in respect of Alexander's death was not chargeable against the pecuniary legacies, but payable out of the residue on the death of Eila.

The problem before the Court of Appeal was stated by ROMER, L.J., who delivered the judgment of the court. He said (2) that he had to consider three points, of which the first was whether there was any statutory provision which would require the duty to be so charged. He said that there were only three possible statutory provisions which might apply, and those were s. 8 (4), s. 9 (1) and s. 14 (1) of the Finance Act, 1894. He proceeded to consider those sections and reached the conclusion that no part of the duty chargeable on the first death ought, as a matter of statutory provision, to be charged against the legatees.

That being, on the face of it, a decision of s. 8 (4) of the Act, and being a decision as to the incidence of duty arising in circumstances very similar to the present, it is obviously, at first sight, a decision which I should follow here, but it is said that *Re McNeill* (3) on its facts, and perhaps also on the arguments accepted by the court, is distinguishable in material respects from the present case. Two main grounds are given why the decision is distinguishable. In the first place it is said that reasons existed and were apparent in that case why the second category of persons in s. 8 (4), to which I have referred, could not include legatees. It was suggested that they were not persons who had actually received any property, and also that they were not persons in whom any interest in the property so passing was at any time vested.

As regards the first point, whether they were persons who may have received any property, I do not find in the report, nor is Mr. Cozens-Hardy Horne—who was in the case and who has appeared before me—able to find, that there was any evidence as to receipt or non-receipt by the legatees of any part of their legacies, and certainly it is right, I think, to say that the decision did not, on the face of it, turn on whether they had received, or had not received, any part of the legacies. As regards the second point, whether they had any interest, it seems to me that the Court of Appeal, at any rate, did treat the legatees as having an interest in the settled property, although not an interest in possession. I refer to a passage where ROMER, L.J., says (4):

> "It is true that on Alexander's death without issue the legacies became indefeasible, whereas they had previously been contingent, but a vested legacy payable in future is not a beneficial interest in possession."

There again whether or not the Court of Appeal treated the legatees as persons in whom an interest in the property was vested—and I think that they did—there is no indication in the judgment that they based their decision on the absence, in the case of the legatees, of any such interest.

Then it is said by counsel for the Crown that there are certain other passages which were referred to by the court in their judgment which distinguished the position of legatees from that of a person absolutely entitled to a residue or a share in residue. He refers to the interlocutory observations of LORD EVERSHED, M.R. (5), and also to a passage to a similar effect in the judgment where ROMER, L.J., says (6):

> "In the first place, the argument involves a pecuniary legacy being relegated in those circumstances to the status of an aliquot fraction of the whole estate, which it is not."

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(2) [1957] 3 All E.R. at p. 514; [1958] Ch. at p. 270.
(3) [1957] 3 All E.R. 508; [1958] Ch. 259.
(4) [1957] 3 All E.R. at p. 514; [1958] Ch. at p. 271.
(5) [1958] Ch. at p. 263. (6) [1957] 3 All E.R. at p. 515; [1958] Ch. at p. 272.

A Those passages, in which it is indeed clear that the Court of Appeal is drawing a distinction between a pecuniary legacy and a portion of residue, both, in my view, are related to the third argument which the Court of Appeal had to consider, viz., whether any part of the duty should be charged against the legatees on equitable principles. It does not seem to me that they relate to the first question that they set for themselves, which was whether there was any statutory provision B calling for duty to be debited to the legatees.

Looking at the judgment as a whole and seeing that s. 8 (4) was read by the court—although of course it is true that ROMER, L.J., mentions (7) what has been called the first category in the subsection—I think that I would be wrong to treat that judgment as limited to a consideration of the first category, or as based on, or justified by, any distinction in the position between legatees on the one C hand and persons entitled to a fund, or a part of a fund, on the other. To do so would be an unjustifiable distinction for me to make, and I think that I should treat the judgment as a judgment on s. 8 (4), and as being a decision that under that subsection a person who takes an interest in a fund, subject to two successive life interests, is not accountable for duty chargeable on the death of the first of such life interests. I therefore decide that *Re McNeill* (8) is applicable here and D binds me to decide that Sir Richard is not an accountable person within s. 8 (4).

That conclusion would be sufficient to dispose of this particular ground of claim, but as I have had the benefit of a very complete and, if I may say so, interesting argument on the construction of the subsection, it may perhaps be of assistance that I should express my views on the subsection as a matter of construction in order to enable any other court which may have to consider this question to E evaluate the strength of the reasoning.

The scheme of s. 8 (4) seems to me to be related to the requirement which is imposed by s. 6 (4) of the Act, which requires that estate duty, if not paid by an executor, shall be collected on an account delivered to the commissioners within six months after the death, by the person accountable. There are various provisions about the extension of time, but what is contemplated there is that F there shall be accountable persons other than an executor who can, within six months from the death, deliver the necessary account, and s. 8 (4) is the section which says who those persons are.

Looking again at the subsection, the first category of persons rendered accountable, those to whom any property passes in a beneficial interest in possession, are, it is to be observed, rendered accountable for the duty without any limit G as to amount. They are simply accountable for the duty, whether their interest is a life interest, or whatever else it may be. Then we come to the second category and there a different scheme is introduced. That starts off with the words: "to the extent of the property actually received or disposed of by him" which, at first sight, seems to suggest that one is dealing with a different class of person from those who succeed to beneficial interests, and there would not seem to me H to be any reason why (if the Crown is right and if persons taking a beneficial interest are to be included in the second category) this limitation should be introduced here when it is not found in the first category. Then one finds a list of persons, "trustee, guardian, committee, or other person", the first three being evidently persons in a fiduciary capacity, and one finds a later reference to persons in whom the management of the property is vested. That brings me I fairly and squarely up against the question: whether the words "or other person" are to be construed in accordance with the ejusdem generis rule.

Naturally, I feel some hesitation in being called on to decide this point which, curiously enough, has not arisen before in the seventy years of this statute's history, but I must confess that at first sight, on the argument which I have heard, I am very much inclined to treat those words as ejusdem generis with the

(7) [1957] 3 All E.R. at p. 514; [1958] Ch. at p. 271.
(8) [1957] 3 All E.R. 508; [1958] Ch. 259.

preceding words. The law on this subject is reasonably clear, though not always easy to apply. It has been perhaps most clearly stated in its present form in *Tillmanns & Co.* v. *S.S. Knutsford, Ltd.* (9), an opinion which was afterwards upheld in the House of Lords (10). It seems to me that this is one of the cases where one has a group of words which, evidently, as between themselves, have a generic character—" trustee, guardian, committee ". They have a common character which would be applied to those persons who have an interest in managing property. Then one gets the following words, " or other person " and, again, the requirement seems to be satisfied that unless one construes those words ejusdem generis with the preceding words, the preceding words would be rendered otiose. The only answer which has been suggested to that is that there may be some utility in making express reference to those persons in order to make it clear that they, amongst others, are included among accountable persons.

Then one has this circumstance, that the words " or other person " clearly, on the face of it, mean other than trustee, guardian, committee, and so on, and unless those words " or other person " are construed ejusdem generis, they could include a person who could fall within the first category. If it did include such a person, one would be faced with an inconsistency inasmuch as persons in the first category are accountable without limit, whereas persons in the second category are only accountable to the extent of the property actually received. One has the circumstance, to which I have already referred, that the whole of this class is only liable to the extent of the property actually received or disposed of, which, to my mind, of itself somewhat suggests that one is dealing with people in a fiduciary capacity such as personal representatives or trustees. Finally, one has the point that the words " trustee, guardian, committee " do not, one would think, exhaust the whole class of persons in a similar position, and that, therefore, there is some need to add on to them the words " or other person ", ejusdem generis, in order to sweep in other persons in any comparable positions such as receivers. So that for these reasons I accept the argument.

I will just add one other point, and this refers to the words " at any time ". There again that seems to me to suggest that one is dealing with a special situation, not merely with a case of persons taking beneficial interests, because the scheme which has been laid down by s. 6 does involve the account being delivered, in ordinary circumstances, within six months of the death. It would seem to me that the words " at any time ", which contemplate the rendering of accounts at a later date, were introduced in order to deal with such situations as changes in trusteeship or in guardianship, or in the person of the committee, so that taking s. 8 (4) as a whole it seems to me extremely intelligible that the first category should consist of persons having a material beneficial interest in possession, the second category should include all those persons, such as trustees, in a fiduciary or management position, and the third class any persons having a derivative title.

An argument has been addressed to me in relation to the latter category. It is said on behalf of the Crown that it is very odd if an alienee of a person in the position of Sir Richard should be accountable and that he should not himself be accountable. But this argument can be turned against the Crown by saying that if the Crown is right in its contention that Sir Richard is within the second category, then the position is that Sir Richard is liable only to the extent of property actually received or disposed of by him, but the alienee apparently is accountable without any such limitation. It seems to me that the phrase " every person in whom the same is vested in possession by alienation or other derivative title " may well have been inserted to deal with cases where the alienors would be accountable and not otherwise. That is all I need say on that part of the case. As I have said, the result is that under that subsection I do not come to the conclusion that Sir Richard is himself at the present time an accountable person.

The next argument is founded on s. 9 (6) of the Act, and that provides that:

(9) [1908] 2 K.B. 385. (10) [1908] A.C. 406.

A "A person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him."

That is a familiar section which creates what is generally known as a limited owner's charge, and which would, of course, if it were a normal case, have solved B this particular problem. But I have to consider whether it is sufficient to solve what I have to decide in view of the fact that the property is in Canada.

The first point which is raised is whether the operation of s. 9 (6) is excluded in this particular case by s. 20 (2) of the Act, which says:

"Nothing in this Act shall be held to create a charge for estate duty on C any property situate in a British possession, while so situate, or to authorise the commissioners to take any proceedings in a British possession for the recovery of any estate duty."

That subsection has been considered by the Court of Appeal in *Re Bullock-Webster, Royal Exchange Assurance* v. *Royal Trust of Canada* (11), and I must refer to that more fully. The decision in that case was that the right conferred D by s. 9 (4) on executors, who have paid estate duty on property not passing to them as such, to be repaid by the trustees or owners of the property the rateable part of the estate duty on the estate in proportion to the value of the property not passing to them as such, applies to personal property in British possessions to which s. 20 of the Act applies, and is not excluded by s. 20 (2). There the Court of Appeal were dealing with quite a different position from what I have here, E s. 9 (4), not being, on the face of it, a provision which gives rise to a charge at all; so it seems to me that the decision does not bind me in this case. However, I have been referred to a passage in the judgment of MAUGHAM, L.J., in which he, in analysing this section, states the reasons on which apparently it is based. He says (12):

"It may be asked, and I think it was asked in argument, why there is a F provision against the creation of a charge for estate duty upon property situate in a British possession? I think the answer may well be that a charge created by an Imperial Act on personal property situate in a British possession might lead to great difficulties; and if it is asked why there is nothing prohibiting a charge on property situate in a foreign country, the answer may well be that the draftsman did not think it necessary to say anything G about a charge which could not be enforced in that country so long as the property was there situate, because it is well known that foreign countries do not go out of their way to assist in the enforcement of British revenue laws."

So that, although he refers to two difficulties, one of enforcing a charge on personal property situate in a British possession, and the other of the enforcing of revenue H laws outside this country, what he has in mind is the enforcement of a charge for revenue purposes, by the revenue, or in order to collect revenue, and that he is not deciding that any other charge which may be created by s. 9 is excluded by s. 20.

Looking, therefore, again at s. 9 (6), it seems to me that all that that is doing is to say that the limited owner gets a charge similar to the charge he would get I if a mortgage had been created in his favour, and I ask this question: whether, if a mortgage were created in his favour, there would be any bar, any obstacle, to the enforcement of the mortgage created under s. 20 (2). I think not. I think that it could not be said that that subsection is dealing with a right of a limited owner to recover a sum of money which has been paid. It is not a charge for estate duty, because the estate duty had, so I think, ex hypothesi been paid before. It is a case of a person seeking to enforce what is the equivalent to a right

(11) [1936] Ch. 1. (12) [1936] Ch. at p. 14.

of indemnity, he having discharged an obligation. Therefore, I do not think that on this ground the right of the executors of the deceased, or of the deceased himself during his lifetime, to enforce his claim in respect of the duty against the Canadian property was, or would have been, excluded. However, it does seem to me that s. 9 (6) does not apply and cannot be invoked here on more general grounds.

What I have here is a Canadian settlement, or a settlement whose proper law is that of one of the provinces of Canada, and if that is so the rights of the beneficiaries under that settlement and the rights in respect of the trust property must be governed by the proper law of the settlement, which would be the law of Canada or of the appropriate province. It seems to me that if they have rights of that character it would not be possible for a piece of English statutory legislation such as this to interfere with those rights and to confer on one of the beneficiaries under the settlement a charge over a trust property inconsistent with the rights which the beneficiaries have under their own law.

It seems to me that that approach is very much confirmed by two cases to which I have been referred by counsel for the defendants. *Spiller* v. *Turner* (13), and *London and South American Investment Trust, Ltd.* v. *British Tobacco Co. (Australia), Ltd.* (14). If I may just refer to the first case in order to illustrate the point which I am endeavouring to make, that was a case where an English company which carried on business in Queensland had preference shareholders who were entitled to preferential payments of interest at six per cent. per annum. Then, by an Act of the colonial legislature, income tax was assessed on all dividends or interest paid out of the assets, and the question was whether the preference shareholders were bound, or affected, by that Act, or whether they were entitled to six per cent. free from deduction. It was held by KEKEWICH, J. (15), that the contract they had entered into being an English contract by an English company, the rights of the parties must be governed by English law, and he said, following that, that although the colonial legislature had power over the property of the company, it was not open to the colonial legislature to affect the contractual rights of the preference shareholders under the English contract to receive their six per cent. So here it seems to me that Sir Richard Latham having a right under Canadian law to receive the proceeds from the trust fund, it is not admissible, if I assume the Canadian courts apply the same principles as we would apply, to hold that such a charge as that created by s. 9 (6) should be recognised or enforced or allowed to interfere with a beneficiary's rights.

There was one other point which was raised on s. 9 (6) by the defendants, and that was an argument based on the particular wording of s. 7 (1) (b) and of s. 9 (6). It was said, first, that s. 7 (1) (b) refers to duty in respect of which there is the right of reimbursement, and what I have to consider is whether, after the death of the deceased, when the debt is claimed as a deduction, and at no other time, there is a right to reimbursement. Then it was said, looking at s. 9 (6) that the only charge is one conferred on a person having a limited interest in any property, who pays the estate duty in respect of that property. The deceased, it is said, did not pay estate duty and there is now no longer any person having any limited interest in the property; therefore, it is not possible to say that the present requirement as to s. 7 (1) (b) is satisfied. I am not inclined to accept that argument, because it seems to me that I should construe s. 9 (6) as conferring a right to a limited owner's charge not only on the limited owner himself, but on his personal representatives. I confess that I am rather disinclined to accept an argument that would suggest that if the claim for duty were enforced against the deceased or the deceased paid the duty, he would have the charge, but that, on the contrary, if the Crown succeeded in collecting the duty from the executors, Barclays Bank, Ltd., after the death of the deceased, it would not be possible under s. 9 (6) for them to exercise their rights under that subsection. It seems to

(13) [1897] 1 Ch. 911. (14) [1927] 1 Ch. 107. (15) [1897] 1 Ch. at p. 919.

A me that I am required, although the language is not very clear or very satisfactory for the purpose, to interpret s. 9 (6) as applying as well to the executors of a limited owner as to a limited owner himself, so that I would not be prepared to accept that particular argument of the defendants. I do, however, hold, for the reasons which I have stated, that the bank, as the personal representatives of the deceased, have not, by virtue of s. 9 (6), the right to reimbursement within B the meaning of s. 7 (1) (b).

Now I come to the third point which is raised by the Crown, which is this. It is said that on general equitable principles the estate of the deceased must be treated as having a right of reimbursement against the inheritance or capital of the estate in respect of the capital amount, which it is liable to pay. The principle was put by counsel for the Crown in this way:—where property was settled on trust C on persons entitled in succession, then any outgoing which was properly attributable to the whole fund must be provided for so as to give an equitable balance as between income and capital. Various cases were referred to which amply support that proposition. The proposition is not, itself, disputed by the defendants, and it also seems to me that the defendants do not dispute, or at any rate are not in a position to dispute, that similar principles must be treated as applicable in D Canada, or in the Province of Quebec. I have no evidence what the local law is, but it seems to me that on the basis of the case as pleaded I must assume that the relevant law, the applicable law, to this settlement is the same as English law, though perhaps I may, parenthetically, draw attention to the (in some ways unsatisfactory) consequences which may arise from proceeding in that way. It may be that this presumption or rule that English law is to be treated as the same E as Canadian law is satisfactory in many cases, such as where the law cannot be ascertained with certainty or where one is dealing with a matter of a common legal principle, but I must confess that I should find it more satisfactory in a somewhat technical subject-matter such as this, where one is dealing with rights under settlements which fall purely within the terms of English equity, if there had been some positive evidence alleged by pleading and properly proved, to F show that the relevant law was of the same character. However, in this particular case the difficulty is perhaps not very great because all that I am asked to do is to say that the Canadian courts would apply the same sort of broad principles based on plain common sense, which require that, where an obligation manifestly affecting the inheritance related to the capital of a trust fund falls on the shoulders of a person with a limited interest, that person should be entitled to come against G the capital or the person entitled to it and ask to be reimbursed. That is all that is being sought here. On that assumption which I, in the circumstances, am not reluctant to draw, it seems to me that if this debt had been paid in his lifetime by the deceased there could hardly have been any doubt that he would be entitled to come and seek for reimbursement of the amount which I have mentioned. For it is clear to my mind that the principles which have been cited H cover this sort of case, and that there is an equitable obligation here under the general law applying to the settlement of property in succession which would entitle, and which should entitle, the deceased and the bank to claim that such portion of this aggregate sum of estate duty as represents the charge in respect of the capital of the trust fund should be paid to them out of the capital. That right of reimbursement or recoupment seems to me to fall directly within the I wording of s. 7 (1) (b) and I therefore hold on this ground that there is a right to reimbursement from the capital of the estate, not from the person of Sir Richard, and consequently that the debt is not a permissible deduction from the capital of the estate. *Judgment for the plaintiffs.*

Solicitors: *Solicitor of Inland Revenue* (for the plaintiffs); *Charles Russell & Co.* (for the defendants). [*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

ANNISON AND OTHERS *v.* DISTRICT AUDITOR FOR THE METROPOLITAN BOROUGH OF ST. PANCRAS AND ANOTHER.

TAYLOR AND OTHERS *v.* SAME.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Veale, JJ.), October 17, 18, 1961.]

Local Government—Audit—Surcharge—Application for relief—Circumstances to be considered by the court—Discretion of court to grant—Local Government Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 51), *s.* 230.

The granting of a declaration under s. 230 (1) of the Local Government Act, 1933*, that a person surcharged has acted reasonably or in the belief that his action was authorised by law, and the granting of relief from personal liability under s. 230 (2) are two separate steps involving different considerations (see p. 918, letter E, post).

A metropolitan borough council, acting under the Requisitioned Houses and Housing (Amendment) Act, 1955, had de-requisitioned premises from time to time in respect of which the council had subsequently made payments to the landlords pursuant to s. 4 (4)† of the Act. Under s. 4 (4) on de-requisition of premises and on the licensee's becoming statutory tenant the recoverable rent of the premises must not exceed that last payable by the ex-licensee to the local authority " except so far as the local authority may from time to time determine ", and any deficiency from the rent otherwise recoverable must be paid by the local authority to the landlord. The council originally made no determination under s. 4 (4). Rents of de-requisitioned premises increased in consequence of the Rent Act, 1957. By resolutions of October, 1957, and March, 1958, the council resolved, in effect, that the whole of valid increases in rent of de-requisitioned premises consequent on the Rent Act, 1957, should be borne by the council, that is to say, should be paid out of the general rate fund. Payments were made accordingly. The district auditor surcharged certain borough councillors with a sum of £200, as being unlawfully paid, on the ground (among others) that the council had not properly exercised their discretion under s. 4 (4). On appeal under the Local Government Act, 1933, s. 228, by six of the councillors surcharged, the court found that the council's decisions were arbitrary, and that the real reasons were that they would not adopt any test of means of the tenants concerned and that they disliked Parliament's action in passing the Rent Act, 1957, and, accordingly, upheld the surcharge‡. Meanwhile, further sums amounting to some £1,400 had been paid out of the general rate fund in respect of such increases for the year ending Mar. 31, 1959. In January, 1961, the district auditor disallowed the sum of £1,400 and surcharged twenty-three of the borough councillors with that sum as being a loss to the funds of the council negligently incurred by them. On applications by certain of those councillors for declarations under s. 230 (1) of the Local Government Act, 1933, that they had acted reasonably or in the belief that their actions were authorised by law, and for relief from personal liability from the surcharge under s. 230 (2),

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* Section 230 is set out at p. 916, letter I, post.

† Section 4 (4) provides: " Except so far as the local authority may from time to time determine, the rent recoverable by the landlord of any such dwelling [i.e., any de-requisitioned dwelling the licensee of which has become a statutory tenant of the landlord under s. 4] in respect of any period before Apr. 1, 1965, from the licensee or any statutory successor of his shall not exceed the rent last payable by the licensee to the local authority under the licence; and where the rent so recoverable in respect of any such period falls short of the rent which would be recoverable apart from this subsection, the local authority shall pay to the landlord an amount equal to the difference."

‡ In *Taylor* v. *Munrow*, [1960] 1 All E.R. 455.

A **Held:** (i) there was proper ground in the cases of all applicants for making the declaration envisaged by s. 230 (1) of the Local Government Act, 1933, as the court had come to the conclusion that all applicants had honestly believed that what they did was authorised by law and had not, by their actions, shown that they were completely unfit to take part in local government.

B (ii) the applicants had not, however, satisfied the court under s. 230 (2) that they ought fairly to be excused, for they had acted contrary to advice tendered to them by their town clerk and had had their attention drawn to ministry circulars suggesting what the right course of action was; therefore the court would not relieve them wholly or in part from personal liability.

C [As to applications for relief from surcharge by a district auditor, see 24 HALSBURY'S LAWS (3rd Edn.) 589, 590, para. 1083.

For the Local Government Act, 1933, s. 230, see 14 HALSBURY'S STATUTES (2nd Edn.) 475.]

Cases referred to:

Lee v. *McGrath*, [1934] All E.R. Rep. 440; 151 L.T. 553; sub nom. *Re Magrath*, [1934] 2 K.B. 415; 103 L.J.K.B. 660; Digest Supp.

D *Taylor* v. *Munrow*, [1960] 1 All E.R. 455; 124 J.P. 207; [1960] 1 W.L.R. 151; 3rd Digest Supp.

Applications.

These were two applications by, respectively, thirteen and seven members of St. Pancras Borough Council under the Local Government Act, 1933, s. 230. E The district auditor of the borough William Davis Munrow, had disallowed £1,400, part of an item debited to the Requisitioned Properties Revenue Account for the year ending Mar. 31, 1959, and had surcharged that sum jointly and severally on twenty-three members of the council. The applications were for declarations that the applicants had acted reasonably and in the belief that their actions were authorised by law, and for relief from personal liability in respect F of the surcharge. The facts are set out in the judgment of LORD PARKER, C.J.

N. R. King for the first applicants, Annison and others.

D. J. Turner-Samuels for the second applicants, Taylor and others.

R. J. Parker, Q.C., for the respondent district auditor.

J. Ryman for the respondent borough council.

G **LORD PARKER, C.J.:** These are two applications by members of the Metropolitan Borough of St. Pancras under s. 230 of the Local Government Act, 1933, to be relieved from personal liability in respect of the sum of £1,400 disallowed by the respondent district auditor for the borough in the accounts of the borough council for the year ending Mar. 31, 1959. The matter in respect of which this surcharge was made first came to light at the audit for the year ending Mar. 31, 1958, when the district auditor disallowed the sum of £200 H debited to the requisitioned properties revenue account and surcharged that sum jointly and severally on twenty-three councillors. Six of such councillors appealed against that decision to this court which, on Jan. 28, 1960, gave judgment upholding the district auditor's decision: see *Taylor* v. *Munrow* (1), in the report of which the relevant legislation and the facts giving rise to the surcharge were fully set out. It is sufficient to say that, notwithstanding the coming I into force of the Rent Act, 1957, the respondent council by a majority decided not to make any determination under s. 4 (4) of the Requisitioned Houses and Housing (Amendment) Act, 1955; and that as the result of this the provisions of s. 4 applied (2) and the tenants, regardless of their ability to pay, were relieved of any increases resulting from the Rent Act, 1957, the council at the expense of the general body of ratepayers paying the increase to the landlord.

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(1) [1960] 1 All E.R. 455.

(2) Section 4 (4) is set out in footnote † at p. 914, ante.

On Jan. 20, 1959, the district auditor decided that this action of the council was unreasonable and negligent and he surcharged the said sum of £200 on the twenty-three councillors who had voted on Oct. 9, 1957, and Mar. 19, 1958, to adopt the recommendation of the housing management committee that this action be taken. Meanwhile, for the year ending Mar. 31, 1959, further such sums were debited to the account and, by his decision dated Jan. 9, 1961, and his reasons dated Jan. 13, 1961, the district auditor disallowed the sum of £1,400 in the accounts of that year, and again surcharged the said sum on the twenty-three councillors. In his reasons he states thus:

> "I have surcharged the said sum of £1,400 jointly and severally upon the persons named in my certificate of surcharge dated Jan. 20, 1959, because by voting at the council meeting of Oct. 9, 1957, for the adoption of the recommendation of the housing management committee 'That the council bears the full cost of any increases in rent between the operative date of any valid notices received and the date on which the council is able to make a formal decision'. And, by voting at the council meeting of Mar. 19, 1958, for the adoption of the recommendation of the housing management committee that 'the whole of the valid rent increases under the Rent Act, 1957, in regard to all tenancies of formerly requisitioned properties released to owners under s. 4 of the Requisitioned Houses and Housing (Amendment) Act, 1955, be borne by the council, subject to the amount payable being limited to an amount applicable to a rent calculated on twice the gross value' those persons were responsible for authorising the expenditure of £1,400 which I have disallowed. And because by voting at the said council meetings of Oct. 9, 1957, and Mar. 19, 1958, for the adoption of the said recommendations—(i) the said persons perversely and unreasonably disregarded the changed conditions created by the introduction of the new rent levels for controlled tenancies which were authorised by the Act of 1957, the repeated recommendations of the Ministry of Housing and Local Government, and the advice proffered to them by their own officers; (ii) the said persons were responsible for the failure of the council to make such determinations under s. 4 (4) of the Act of 1955 as it was their duty in the circumstances to make; and (iii) the said persons failed to pay due and proper regard to the obligation upon them to exercise over the funds within their control such reasonable care, skill and caution as is required from trustees or managers of the property of others; and they thereby negligently incurred a loss to the funds of the council amounting to not less than the said sum of £1,400."

Of the twenty-three councillors originally surcharged in the sum of £200, four took no steps in the matter at all. Six, as I have said, appealed to this court, and thirteen, as they were entitled to do, applied to the minister to be relieved from personal liability, which relief was granted by the minister on Nov. 2, 1960. It is these same thirteen, the first applicants, who apply to this court to be relieved from personal liability in respect of the surcharge of £1,400. They cannot apply again to the minister since this surcharge is in excess of £500 (see the effect of s. 229 (1) and s. 230 (1) of the Act of 1933). The six councillors who appealed to this court against the surcharge of £200 together with two of the four who had up to then taken no steps, also apply to this court to be relieved from personal liability. One such applicant has died, and the remaining seven are the second applicants.

Section 230 of the Act of 1933 provides as follows:

> "(1) In the case of a surcharge, the person surcharged may, whether or not he appeals under the preceding section, apply to the tribunal (whether the High Court or the minister) to whom he appeals or, if he does not appeal, to the tribunal (whether the High Court or the minister) to whom

A he might have appealed, for a declaration that in relation to the subject-matter of the surcharge he acted reasonably or in the belief that his action was authorised by law, and the court or minister, if satisfied that there is proper ground for doing so, may make a declaration to that effect.

"(2) Where such a declaration is made the person surcharged, if by reason of the surcharge he is subject to the disqualification imposed by B Part 2 of this Act, or by the corresponding provision of any enactment relating to London, shall not be subject to that disqualification, and the court or minister may, if satisfied that the person surcharged ought fairly to be excused, relieve him either wholly or in part from personal liability in respect of the surcharge, and the decision of the court or minister under this section shall be final."

C It will be seen, therefore, that, once a declaration is made under sub-s. (1) two things follow: First, any disqualification imposed by Part 2 of this Act as the result of the surcharge is automatically avoided. The section in question in Part 2 is s. 59, the relevant part of which, sub-s. (1), reads as follows:

"Subject to the provisions of this section, a person shall be disqualified D for being elected or being a member of a local authority if he . . . . (d) has within five years before the day of election or since his election been surcharged to an amount exceeding £500 by a district auditor . . ."

Secondly, the court, or the minister if the surcharge is under £500, can then consider whether the applicant ought fairly to be excused in whole or in part from personal liability for the surcharge. In other words, the minister and the E court are given a wide discretion in considering relief from personal liability. As I read it, in deciding whether an applicant who has been surcharged ought fairly to be excused, the court can and should take into consideration all the circumstances, including the means of the applicant and the fact that, if relieved, the amount will fall on the general body of ratepayers (see in that connexion *Lee* v. *McGrath* (3)). The court can and should also consider the conduct of the F applicant, for example, whether, though he believed that what he did was authorised by law, he had acted unreasonably or had acted negligently and, indeed, all the circumstances of the case.

The question of relief from personal liability only arises if a declaration is made under s. 230 (1), and that subsection also introduces a discretion, because it provides that the court or the minister "if satisfied that there is proper ground G for doing so" may make a declaration to that effect. I pay no regard to the word "may", which probably ought to be construed as "must", but it seems to me that a discretion is clearly introduced by the provision that the court may make the declaration if satisfied that there is proper ground for doing so. It is said that those words only mean if one or other of the matters that have gone before have been proved, namely, that the applicant has acted reasonably H or in the belief that his action was authorised by law. In my judgment, however, if that was all that was intended, quite different words would have been used. It seems to me that, having regard to the automatic avoidance of disqualification which is provided in sub-s. (2), the words "proper ground" in sub-s. (1) are introducing a discretion as to the granting of the declaration. In other words the court has three possible alternatives open to it: to make no declaration I at all; to make a declaration but not to excuse the applicant from personal liability—in other words, to say that the applicant can continue to take his part in local government, but ought to bear the surcharge—or, lastly, to make a declaration and relieve the applicant from personal liability.

Turning to the two cases now before the court, all the applicants claim that they believed that what they did was authorised by law. They do not claim that they had acted reasonably. Indeed, having regard to the findings which I have

(3) [1934] All E.R. Rep. at pp. 446, 450; [1934] 2 K.B. at pp. 427, 435.

read of the district auditor, from which there is no appeal, it would really be impossible for them to do so. I do not propose to go through the various affidavits of the applicants or to refer to a long letter of Feb. 27, 1959, written on behalf of the first applicants to the minister setting out the reasons for the action they took and on which the minister granted relief. It is enough for me to say that I have come to the conclusion (though in the cases of the seven applicants with some doubt) that all the applicants honestly believed that what they did was authorised by law. Further, in my judgment there is "proper ground" in all their cases for making the declaration, for I have no reason to think that they have, by their actions, shown themselves completely unfit to take part in local government and should for that reason be disqualified.

When, however, I turn to the question whether they should be fairly excused from personal liability, the matter is more difficult. While taking into consideration the means of the applicants, and while not questioning the honesty of their intentions, I feel that their conduct cannot be lightly excused. In particular, they were being advised by the town clerk against the action proposed by them, and they had their attention drawn to circulars from the ministry suggesting what was the right course for them to take. Further, I cannot ignore the strong findings of the district auditor to which I have referred. Taking into consideration all the circumstances, I am not satisfied that any of the applicants have shown that they ought fairly to be excused and, accordingly, while making the declarations asked for under s. 230 (1), I would not grant relief from personal liability under sub-s. (2).

I would only add this, since I am differing from the minister who granted relief in respect of the £200, that it seems to me that, in his letter (4) of Nov. 2, 1960, he is really treating the relief from personal liability as following automatically from the declaration; at any rate, he does not deal specifically with the question whether the applicants ought fairly to be excused. In my judgment, however, the granting of the declaration and the granting of relief from personal liability are two separate steps involving somewhat different considerations.

ASHWORTH, J.: I agree.

VEALE, J.: I also agree.

Declarations on both applications that the applicants acted in the belief that their actions were authorised by law. Applications for relief from personal liability refused.

Solicitors: *H. C. L. Hanne & Co.* (for the first applicants, Annison and others); *Gaster & Turner* (for the second applicants, Taylor and others); *Sharpe, Pritchard & Co.* (for the respondent district auditor); *Town clerk*, St. Pancras (for the respondent borough council).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

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(4) The minister granted relief to the first applicants, the last paragraph of the letter reading: "The minister accordingly, in exercise of his powers under s. 230 of the Local Government Act, 1933, hereby declares that in the matter to which the surcharge of £200 relates each one of you acted in the belief that his or her action was authorised by law, and in the circumstances he further wholly relieves each one of you from personal liability in respect of the surcharge."

A

GARDANO & GIAMPARI v. GREEK PETROLEUM GEORGE MAMIDAKIS & CO.

[QUEEN'S BENCH DIVISION (McNair, J.), October 3, 4, 1961.]

Shipping—Bill of lading—Transfer of rights—Consignee's right to sue—Contract for sale of goods by charterers—Charterparty for carriage of goods within contract of sale—Charterers claiming for alleged shortage and contamination of goods after voyage—Whether right to sue vested in consignee (purchaser from charterers) to the exclusion of charterers—Bills of Lading Act, 1855 (18 *&* 19 *Vict. c.* 111), *s.* 1.

B

By a contract of sale dated Nov. 29, 1957, and incorporating certain provisions of an earlier contract, the charterers agreed to supply to the Greek government a quantity of kerosene. Delivery of the kerosene was stated to be " Ex the Eleussinia Installation " at Piraeus, and the method of delivery to be either into barrels or tins to be filled at the installation or in bulk into tankers, either road or sea, provided by the Greek government. Loss between the shipping and delivery was to be wholly at the risk of the charterers. Freight was payable at $3.92 per metric ton delivered at Eleussinia. There was a provision as to shortage which placed on the Greek government the risk of ocean shortage only up to 0.50 per cent., and imposed the risk of any shortage over that figure on the charterers. With a view to partial performance of the contract of sale, the charterers, on Mar. 12, 1958, entered into a charterparty with the shipowners. The charterparty was in the form of a tanker voyage charterparty and provided that a cargo of kerosene should be loaded and proceed as ordered on signing bills of lading direct to Piraeus and " there deliver the same on being paid freight at and after the rate of $3.90 per ton of 20 cwts. of oil intake quantity ". Any dispute arising during the execution of the charterparty was to be settled in London. A bill of lading was issued, reciting that a quantity of kerosene had been shipped by Russian suppliers in good order and condition to be delivered " in the like good order and condition " to a department of the Greek government. After arrival of the kerosene at Piraeus, the charterers alleged shortage, discoloration and contamination and withheld part of the freight. The foreign laws applicable to the contract of sale, the charterparty and the bill of lading were in no material respect different from the law of England. In an arbitration the owners contended that the charterers had no right of suit on the charterparty, all rights of suit having passed to the Greek government by virtue of the Bills of Lading Act, 1855, s. 1.

C

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Held: the shipowners had not established that the Greek government was entitled to the exclusion of the charterers to claim for shortage, contamination, poor quality etc. of the kerosene for the following reasons—

(i) on the true construction of the contract between the charterers and the Greek government it was not one to which the normal incidents of a c. & f. contract attached, and the property in the kerosene was not proved to have passed to the Greek government on shipment by reason of the consignment made by the bill of lading; accordingly the rights of suit had not been transferred to the Greek government by virtue of s. 1 of the Bills of Lading Act, 1855 (see p. 924, letter I, and p. 925, letter H, post).

H

Den of Airlie S.S. Co., Ltd. v. *Mitsui & Co., Ltd. and British Oil & Cake Mills, Ltd.* ((1912), 17 Com. Cas. 116) applied.

I

(ii) the Soviet authorities (in whose name the bill of lading was taken) having shipped as agents for the charterers to whom the property in the kerosene had passed, the charterers were entitled to sue the shipowners for substantial damages whether the property in the kerosene did or did not remain in them (see p. 925, letter B, post).

Davis v. *James* ((1771), 5 Burr. 2680), *Joseph* v. *Knox* ((1813), 3 Camp. 320) and *Dunlop* v. *Lambert* ((1839), 6 Cl. & Fin. 600) applied.

[As to the effect of the delivery of a bill of lading to the consignee, see 35 HALSBURY'S LAWS (3rd Edn.) 349, para. 499; and as to the liability of the shipowner to the consignee, see ibid., p. 350, para. 500; for cases on the subject, see 41 DIGEST 397, *2411-2425*, and 394-396, *2365-2399*.

As to the passing of property under a c.i.f. contract, and as to the incidence of risk, see 34 HALSBURY'S LAWS (3rd Edn.) 173, 174, paras. 295, 296; and as to the elements of such a contract, see ibid., pp. 164, 165, para. 278; and for cases on the incidence of risk, see 39 DIGEST 527-529, *1412-1424*.

For the Bills of Lading Act, 1855, s. 1, see 23 HALSBURY'S STATUTES (2nd Edn.) 383.]

Cases referred to:

Davis v. *James*, (1770), 5 Burr. 2680; 98 E.R. 407; 8 Digest (Repl.) 167, *1080*.

Den of Airlie S.S. Co., Ltd. v. *Mitsui & Co., Ltd. and British Oil & Cake Mills Ltd.*, (1912), 105 L.T. 823; 12 Asp. M.L.C. 97; *affd.* C.A., (1912), 106 L.T. 451; 12 Asp. M.L.C. 169; 17 Com. Cas. 116; 2 Digest (Repl.) 499, *472*.

Dunlop v. *Lambert*, (1839), 6 Cl. & Fin. 600; 7 E.R. 824; 8 Digest (Repl.) 166, *1074*.

Joseph v. *Knox*, (1813), 3 Camp. 320; 170 E.R. 1397; 41 Digest 554, *3808*.

Special Case.

This was an interim award in the form of a Special Case Stated in an arbitration between claimant shipowners and respondent charterers. The dispute referred to arbitration arose by reason of the charterers withholding and refusing to pay $3,514.35 in respect of freight under the charterparty, subsequently mentioned, of the tanker Stamura for a voyage from Constanza to Piraeus (Eleussis) with a cargo of kerosene, which was acquired by the charterers in part fulfilment of their obligation to supply kerosene under the contract of Nov. 29, 1957, mentioned below. The consignee named in the bill of lading issued in respect of the cargo of kerosene was a department of the Greek government. The charterers counterclaimed in the arbitration for breach of charter, alleging that the kerosene discharged was discoloured and contaminated. As a preliminary point the shipowners contended that the charterers were not the owners of the cargo and were not entitled to counterclaim.

By a contract dated Nov. 29, 1957, made between the charterers, Greek Petroleum George Mamidakis & Co., and the Greek Ministry of Commerce, the charterers agreed to supply the Greek government with 31,540 tons of kerosene. After setting out the statutory authorisation of the Ministry of Commerce, the contract provided:

"(1) Products—Quantity: The [charterers] hereinafter called the 'supplying company' sells to the Ministry of Commerce hereinafter called the 'ministry' 31,540 M.T. kerosene under the following specific terms. (2) Time of Delivery: The above quantity of kerosene will be placed at the disposal of the reception services mentioned below in partial deliveries during the quarter January-March, 1958, in monthly proportions which may be amended at the request of the reception services and after a previous understanding between the ministry and the supplying company. (3) Reception services—Places of Delivery: The quantities in M.T. for each receiving service at the places where the kerosene must be delivered are as follows: (a) For the State Monopoly: Ex the Eleussinia Installation of the supplying company M.T. 31,500. (b) For the Admiralty: Ex the Eleussinia Installation of the supplying company M.T. 40. (4) Fixing of Price: The kerosene purchased by the ministry by virtue of this contract is sold by the supplying company at a price, a part of which covers the value in foreign exchange c. & f. and a part fixed firm in drachmas per M.T. to cover the inland servicing expenses of the supplying company and their profit. These prices in detail are as follows: (a) Value f.o.b.: As price basis f.o.b.

A (Constanza) will be considered the lowest price of Platts oilgram in effect for shipments of Gulf Coast Domestic and Export All Ports . . . less 6 per cent. of the f.o.b. price . . . (b) Freight: The freight payable is fixed at $3.92 per M.T. with delivery of the product at Eleussinia. (c) Servicing expenses and profit of the supplying company: The part of the price offered, which covers the various expenses of the supplying company for storage, movement, B leakage and any eventual loss of weight within their installation is fixed to Drs. 88 (eighty-eight) per M.T. for all methods of deliveries."

The contract then incorporated the following provisions of an earlier contract between the parties dated July 9, 1957:

"II. Country of Origin—Quality. The above quantity of kerosene C will be of U.S.S.R. or Roumanian origin and its quality will meet absolutely the following specifications; . . . V. Method of Delivery: The deliveries of kerosene ex the installation of the supplying company will be made in bulk or in drums belonging to the reception services—the supplying company having no drums returnable of its own for (such) deliveries. The drums of the reception services which will be filled by the supplying company will be D delivered to them duly sealed. The fuels (kerosene) in bulk, drums or tins will be delivered for transport ex the installation of the supplying company on land or sea transport conveyance of the reception services—the supplying company not assuming any responsibility to transport (them) to any other point outside their own installation."

E In cl. X, the supplying company assumed the obligation of having available the installation necessary for full servicing of the deliveries and equipment for filling drums, tank lorries and tin cans. Clause XI provided:

"Because the kerosene for the State Monopoly and for the Admiralty and which is covered by this agreement, is imported duty free in the country deliveries must be made from stocks in transit at the Eleussis Installation F of the supplying company."

By cl. XII:

"Payment of the value in foreign exchange and of the servicing expenses and the legal profit: The payment of the value f.o.b. payable abroad of the kerosene sold to the ministry and of the expenses for servicing and of G the profit will be made through irrevocable credits established with the Bank of Greece by order of the ministry the soonest possible after the present is signed as follows: 1. For the value f.o.b.: By establishing irrevocable confirmed credit in favour of [the Soviet exporting authorities] payable through the Greek-Russian clearing account on presentation of the following documents—partial shipment allowed: (a) Full set of clean bill H of ladings of actual shipment on board tanker with destination Piraeus, issued to the order of the Ministry of Commerce (Management of State Purchasers). (b) Commercial invoices . . . (c) Certificate of Roumanian or U.S.S.R. origin",

and then certificates as to analysis at the port of shipment. The provision regarding freight stated:

I "As regards the freight payment will be made through a separate divisible and transferable credit in foreign exchange established with the Bank of Greece in favour of the supplying company . . . This credit is payable . . . after the tanker which carries the product arrives at Eleussis against presentation of the following documents, i.e. (a) invoice acquitted (b) official copy of the bill of lading not negotiable and (c) signal of the Eleussis customs authorities that unloading of the kerosene at the installation of the supplying company begun."

By cl. XIII:

> "The import licence and the shipping documents of the above kerosene which will be imported for account of the ministry will be issued in the name of the Ministry of Commerce . . ."

By cl. XV:

> "The supplying company will notify the ministry about each shipment effected in accord with this contract, as soon as each shipment is made . . . so that the ministry may insure the cargo."

By cl. XVI, dealing with "Loss of weight":

> "A. During the voyage: The usual loss of weight during the voyage of kerosene carried from abroad which will be to the charge of the ministry is fixed to a maximum percentage of 0.50 per cent. Any higher percentage of ocean leakage verified as per the relative customs protocol at the unloading will be to the charge of the supplying company which is responsible to refund the difference either in product or in foreign exchange . . . The percentage of such ocean leakages will be calculated on the total of the cargoes of this contract and their verification will be made on basis (by comparing) the quantity mentioned in the bill of lading and in the customs protocols . . ."

Clause XVI B, regarding loss of weight during storage, stated:

> "The exact quantity of kerosene delivered to the State Monopoly and the Admiralty must be equal to the quantity unloaded from the tankers into the installation of the supplying company and which has been verified as per the customs protocol . . ."

Clause XIX contained the following provision, headed "Quality Reception":

> "The quality control of the kerosene stored in transit at the installation of the supplying company will be made in accord with the provisions of the customs code."

There was no information before the umpire or the court what the provisions of the customs code were.

The charterers, under a charterparty dated Mar. 12, 1958, chartered the tanker Stamura from owners, Gardano & Giampari. The charterparty was in the form of a tanker voyage charterparty covering the shipment from Constanza to Piraeus of the full and complete cargo of kerosene, to be delivered at Piraeus on payment of the freight of $3.90 "per ton of 20 cwts. of oil intake quantity". It contained an arbitration clause to the effect that any dispute arising during the execution of the charterparty should be settled in London. The cargo was loaded on Mar. 25, 1958, and a bill of lading was issued, reciting that 915,534 kilograms of kerosene had been shipped "in good order and condition" by a Russian firm "to be delivered in the like good order and condition—" to the Ministry of Commerce, State Purchases Department, Athens. The vessel arrived at Piraeus on Mar. 28, 1958, and thereafter the charterers alleged shortage, discoloration and contamination. They withheld part of the freight amounting to $3,514.35 against what they alleged to be their set-off or counterclaim to cover the shortage, discoloration and contamination, and other expenses to which they claimed to have been put under the contract of Nov. 29, 1957. The matter was referred to arbitration in London but as the arbitrators were unable to agree, an umpire was appointed. Before the umpire, the owners contended by way of a preliminary point that the charterers had no right of suit on the charterparty and that all rights of suit had passed to the Greek government. The umpire found as a fact that, at all material times, by virtue of Greek law, the Greek government had the sole right of import and sale of kerosene into Athens, Piraeus and Eleussis, and that the charterparty was entered into by the

A charterers in order to comply with their obligations to the Greek government under the contract of Nov. 29, 1957. He also found that the respective foreign laws applicable to the contract of sale, the charterparty and the bill of lading, were in no material respect different from the law of England.

The question for the opinion of the court was whether, on the foregoing statement of facts and on the true construction of the documents, which included the B contracts with the Greek government, the charterparty and the bill of lading, the Greek government was entitled, to the exclusion of the charterers, to claim against the owners in respect of shortage, contamination, poor condition and poor quality arising after shipment and before discharge of the cargo of kerosene.

S. O. Olson for the owners.

R. A. MacCrindle for the charterers.

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McNAIR, J., stated the facts, read the relevant items of the contracts of sale between the charterers and the Greek government, and continued: It was submitted by counsel for the owners that the contract of Nov. 29, 1957, was really a document of a dual nature. In the first place, it was a c. & f. contract containing the obligations which are comprised in the conception of a c. & f. D contract; and, secondly, it comprised a servicing agreement to cover services rendered to the oil after delivery. On the other hand, it was submitted that, although this contract (which is called a contract of sale) has certain elements which bear some resemblance to a c. & f. contract, in fact, on its proper construction, it was a contract providing for deliveries to be made ex installation. I will consider later which of those views of the contract is acceptable, if either is E acceptable.

Following on the making of that contract, the charterparty was entered into on Mar. 12, 1958, between the owners and the charterers, and, quite clearly, as the learned umpire found, it was entered into with a view to part performance of the contract of sale to which I have just referred. This charterparty is in the familiar form of a tanker voyage charterparty. It provides for the loading of a F full and complete cargo of kerosene from the factors of the charterers in bulk,

> "and being so loaded shall therewith proceed (as ordered on signing bills of lading) direct to Piraeus . . . and there deliver the same on being paid freight at and after the rate of $3.90 per ton of 20 cwts. of oil intake quantity."

That freight provision is different from the freight provision in the sale contract, which was a payment of $3.92 per metric ton delivered Eleussinia. The charter- G party provided that freight should be payable "before breaking bulk in cash, without discount, in transferable sterling, less any advances made by the captain". It contained the usual exceptions clauses, and, in cl. 16, it states:

> "The captain is bound to keep the tanks, pipes and pumps of the vessel always clean, but at the expense of the charterers if they load in the tanks H oils of different nature to those previously shipped. The vessel is not to be responsible for any consequence arising through charterers shipping different kinds of oil. The vessel is not to be accountable for leakage."

Then there is the arbitration clause. Finally, with regard to documents, there is exhibited a bill of lading dated Mar. 25, 1958, at Constanza, reciting that there had been

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> "shipped in good order and condition by [the Soviet Exporting Authority] in the Italian motor/steam vessel called the Stamura . . . bound for Piraeus [the quantity of kerosene in kilograms I have already stated] to be delivered in the like good order and in condition at the aforesaid port of discharge unto Ministry of Commerce State Purchases Department, Athens."

On those documents, the first submission made on behalf of the owners is that, inasmuch as, in the bill of lading, the Ministry of Commerce, State Purchases Department, Athens, is named as the consignee, there was transferred to it by

virtue of s. 1 of the Bills of Lading Act, 1855 (1), and vested in it, all rights of suit, and it was made subject to liabilities in respect of such goods as if the contract had been made with itself. Accordingly, it was argued that the answer to the question posed by the umpire must be in the affirmative, namely, that the Greek government is entitled, to the exclusion of the charterers, to claim against the owners in respect of shortage, contamination, poor condition and poor quality. That is obviously a very attractive and simple way of putting the case, but it must be borne in mind that, before s. 1 of the Bills of Lading Act, 1855, operates in favour of the consignee or indorsee, it must be proved that, on or by reason of the consignment or indorsement, the property in the goods must pass to him. The main problem here is whether, on the proper construction of what I would call the sale contract, the property in the goods did pass to the Greek government on the consignment mentioned in that bill of lading. It is quite true that in an ordinary contract of sale in the traditional c.i.f. or c. & f. form the seller discharges his obligations as regards delivery by tendering a bill of lading covering the goods. It is not necessary for me here to state all the qualifications involved, but the transaction is essentially one which has been correctly described as a sale of goods performed by delivery of documents, and in the normal way the property passes when the documents are taken up.

It seems to me, however, that this contract between the Greek government and the charterers cannot properly be regarded as a contract comprising the normal incidents of a c.i.f. or c. & f. contract. The most striking difference between this contract and the contracts to which I have just referred seems to me to lie in the delivery provisions. In a number of the clauses to which I have referred, delivery is stated to be made ex the Eleussis Installation, and the method of delivery to be either into barrels or tins to be filled at the installation or in bulk into tankers, either road or sea, provided by the receiving company. Furthermore, we have this provision that the loss between the shipping and delivery is to be wholly at the risk of the charterers. Secondly, although the ultimate price or figure paid by the Greek government is split up into three different components, it is significant that they are never under an obligation towards the charterers to pay the freight due under the charterparty; they are under obligation to pay quite a different freight, namely, a freight of $3.92 per metric ton delivered as against a freight of $3.90 per English ton of twenty hundredweights intake. Furthermore, the provision as to shortage to which I have already referred, which places on the Greek government the risk of ocean shortage only up to 0.5 per cent., and imposes the risk of any shortage over that figure on the charterers, is quite out of line with the ordinary obligations and assumptions of risk under a c.i.f. or c. & f. contract. Nor do I think it clear on this contract that the charterers' obligations as to the condition of the kerosene are in any way limited, as they normally are in a c.i.f. contract, to shipping goods of the contract description in a condition in which they will normally arrive by the ordinary course of ocean transit in the same condition. It is an open question (which I do not decide, but it may be a question which the arbitrator or the umpire will have to decide) whether or not under this contract the charterers are liable for the condition of the goods at the point of delivery, namely, on delivery from their installation. In all those circumstances, I have come to the conclusion that I am not satisfied that this is a case where the property in the goods has passed to the Greek government on or by reason of the consignment made by the bill of lading. If that view is right, it is sufficient to justify an answer to the question put by the umpire in the negative.

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(1) Section 1 provides: "Every consignee of goods named in a bill of lading . . . to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment . . . , shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

A It is right, however, that I should deal with certain of the other submissions made on behalf of the charterers on the basis that this is a transaction of the nature of an ordinary c.i.f. contract. Counsel for the charterers' argument, which he supported by authority, was, as I understood it, that it was irrelevant from the point of view of the charterers' right of suit whether the property remained in the charterers or was in the charterers at any material time. I think that B it is quite clear on the facts that, although this bill of lading was taken out in the name of the Soviet authorities as shippers, they were shipping as agents for the charterers in the performance of their sale contract, and the property must have passed from the Soviet authorities to the charterers. It seems to me, on the authority of the cases to which I was referred by counsel for the charterers, namely, *Davis* v. *James* (2), *Joseph* v. *Knox* (3), and *Dunlop* v. *Lambert* (4), C that a charterer, on the assumption that he is the original party to the bill of lading, is entitled to sue for substantial damages whether or not the property and the risk remained in him. It is argued that those decisions were decisions before the Bills of Lading Act, 1855. In the matter of date, that is right, but those decisions have, since the Bills of Lading Act, 1855, been regarded as still good law. For instance, I find in Scrutton on Charterparties (13th Edn.), p. 292 D (for which Scrutton, L.J., was responsible) that it is stated (as, indeed, it is stated with slight variations in the present edition (5)) under the article dealing with " Who Can Sue for Failure to Carry Goods Safely ", that

> " In contract, there can sue:—(1) the shipper, unless he acted merely as agent for another, in which case the principal can sue and the agent cannot ",

E the last few words of that being subsequently qualified. To the same effect I find that, in the current edition of Carver's Carriage of Goods by Sea (10th Edn.), p. 43, where these cases are set out, no suggestion is made that they have ceased to be good law by virtue of the Bills of Lading Act. Furthermore, in the decision of Bray, J., in *Den of Airlie S.S. Co., Ltd.* v. *Mitsui & Co., Ltd. and British Oil & Cake Mills, Ltd.* (6) (though, on the point to which I am about F to refer, his decision was subsequently held by the Court of Appeal (7) not to be necessary because they decided the case on another point) it is clear that Bray, J., regarded the shipper as still entitled to sue, at any rate in respect of matters for which he still remained at risk. There is no doubt that that was a case which was really very similar to this, inasmuch as the charterers were the sellers under an f.o.b. contract. They passed the documents on to the buyers, G and, when the delivery from the ship was made, the buyers, on the sellers' instructions, withheld part of the freight in respect of shortage. The charterers claimed arbitration in respect of that shortage, and an attempt was made by the shipowners to obtain judgment from the court restraining the charterers from proceeding with the arbitration on the ground that they had no right of suit. It is not unlike the position here contended for by the owners. It was held, H however, by Bray, J. (6), that, inasmuch as the charterer was still at risk as regards part of the goods, he still had a right of suit. Now I have not decided here the extent of the risk remaining with the charterers, though I have indicated certain material matters on that point, but it seems to me that the decision in *Den of Airlie* (6) is really fatal to the main submission advanced by the owners, namely, that, merely by virtue of s. 1 of the Bills of Lading Act, 1855, the whole I rights of suit are transferred so that the Greek government alone has the exclusive right to sue in respect of the matters mentioned in the question.

Accordingly, though I confess that I find the task of construing a Greek contract through an English translation not a task which is particularly easy, or one the

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(2) (1770), 5 Burr. 2680.
(3) (1813), 3 Camp. 320.
(4) (1839), 6 Cl. & Fin. 600.
(5) 16th Edn., p. 286.
(6) (1912), 12 Asp. M.L.C. 97; 17 Com. Cas. 116.
(7) (1912), 12 Asp. M.L.C. 169; 17 Com. Cas. 124.

discharge of which can give one great confidence, I have come to the conclusions that I have stated as to the construction of the documents. I accordingly answer the question stated in the Special Case that, on the true construction of the documents, the Greek government is not entitled, to the exclusion of the charterers, to claim against the owners in respect of shortage, contamination, poor condition and poor quality on discharge of the said cargo of kerosene. Therefore, inasmuch as I have answered the question in the same way as the umpire, his award stated in para. (r) will stand (8).

Solicitors: *Crawley & de Reya* (for the owners); *Clyde & Co.* (for the charterers).

[*Reported by* KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

Re DAVIS INVESTMENTS (EAST HAM), LTD.

[COURT OF APPEAL (Donovan and Danckwerts, L.JJ.), October 20, 1961.]

Company—Winding-up—Compulsory winding-up—Contributory's application—Just and equitable—Deadlock—Evidence—Statutory affidavit only evidence—Articles of association not in evidence—Possible courses open to shareholders and directors not shown—Private company having two shareholders—Dismissal of petition—Companies Act, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 222 (*f*).

A company had a capital of one hundred ordinary shares of £1 each. There were two shareholders each holding fifty shares; the two shareholders were the only directors of the company. One of the shareholders presented a petition for winding-up of the company on the ground that he had lost confidence in his co-director and was unable to continue to associate with him in the efficient conduct of the business of the company. He claimed that in the circumstances it was just and equitable that the company should be wound-up. The petition was supported by the statutory affidavit. No other evidence was filed, and the articles of association of the company were not stated in the petition nor were they in evidence before the court. The respondent shareholder opposed the petition.

Held: the mere statement in a contributory's petition that the petitioner (being one of two shareholders holding equal amounts of shares in a private company) had lost confidence in the other shareholder and could no longer associate with him in the company's business, though verified by the statutory affidavit, was not sufficient without evidence of the legal rights of the parties in the company (e.g., without putting in evidence the articles of association) to establish that it was just and equitable for the company to be wound-up, because without such evidence the court could not decide whether the difficulties could be solved by adopting some course authorised by the constitution of the company; therefore, the petition would be refused.

Re Yenidje Tobacco Co., Ltd. ([1916] 2 Ch. 426) considered.

Dictum of WYNN-PARRY, J., in *Re S. A. Hawken, Ltd.* ([1950] 2 All E.R. at p. 413) applied.

Appeal dismissed.

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(8) Paragraph (r) read: "I award accordingly (by way of interim award and subject to the answer of the court to the question hereinafter stated) that if the Stamura's kerosene was delivered short or contaminated or poorer in condition or quality than those stipulated for in the said contract and if in respect of these matters or any of them the owners made a breach of their contract of carriage, then (subject always to any defence on the merits or lack of interest in the charterers (but not that the Government of Greece are the proper claimants) or otherwise howsoever which the owners may be able to make good) claim in respect of the above matters may properly be tried out against the owners by the charterers."

A [As to winding-up on the ground that it is just and equitable, see 6 HALSBURY'S LAWS (3rd Edn.) 534, 535, para. 1035; and for cases on the subject, see 10 DIGEST (Repl.) 856-865, *5638-5693*.

For the Companies Act, 1948, s. 222 (f), see 3 HALSBURY'S STATUTES (2nd Edn.) 639.]

B Cases referred to:

Hawken (S.A.), Ltd., Re, [1950] 2 All E.R. 408; 10 Digest (Repl.) 889, *5944*.

St. David's Gold Mining Co., Ltd., Re, (1866), 14 L.T. 539; 10 Digest (Repl.) 1114, *7728*.

South Staffordshire Tramways Co., Re, (1894), 1 Mans. 292; 10 Digest (Repl.) 889, *5942*.

C *Yenidje Tobacco Co., Ltd., Re*, [1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530; 10 Digest (Repl.) 863, *5683*.

Appeal.

This was an appeal by Ivan Wainstain, a contributory of Davis Investments (East Ham), Ltd., the respondent company, from an order of PLOWMAN, J., dated July 24, 1961, dismissing the appellant's petition for the winding-up of the D company by the court. The facts are stated in the judgment of DANCKWERTS, L.J.

M. Finer for the appellant, the petitioner.

R. B. S. Instone for the respondent, Alfred Abraham Davis.

The respondent, Davis Investments (East Ham), Ltd., was not represented and did not appear.

E **DANCKWERTS, L.J.**, delivered the first judgment at the request of DONOVAN, L.J.: This is a petition presented by a contributory for the winding-up of a company which has a share capital of £100 divided into one hundred ordinary shares of £1 each. There are two shareholders: the petitioner is one and he holds fifty of the shares and the other is the respondent Mr. Davis (hereinafter called the respondent) who holds the other fifty. The company is also a respondent but it is F not represented, because in the situation which has arisen, there was no power to give instructions for such representation. The company was formed for the purpose of developing certain leasehold property which is referred to in the petition. The company was the leaseholder of that property, but the petition does not state the period of the lease, and except for one provision of the lease to which the petition refers, there is no further information about the matter. G Apparently a proposition of building five shops on the property in question was involved and, though I do not know whether five have been built, four have been let. Then the question arose between the two shareholders and directors (for they are both directors) whether the company's leasehold interest should be sold and the profits divided, which the petitioner in the petition alleges (1) was the original agreement between the two persons, or whether, as the respondent H apparently would prefer, the properties should be retained as an investment. That in abbreviated form is what is set out in the petition, in para. 7 (b) of which there is a reference to the position of the respondent. It states:

> " The [respondent] is himself personally the lessee of No. 3, High Street North, East Ham aforesaid, which adjoins one of the said shops. The company's own lease of the said shops contains a proviso to the effect that if I the said shops and the said adjoining premises cease to be vested in persons who are associated in business and shall not be vested in the same person the company may be compelled to surrender the lease of the said fifth shop or to remove all buildings from the site occupied by the same. The full terms and effect of the said proviso did not become known to [the petitioner]

(1) This was alleged in para. 7 (a) of the petition. Paragraph 6 stated the immediate purpose for which the company had been formed. Paragraphs 1-5 were concerned with the incorporation, registered office, nominal and issued capital and directors, and the objects of the company. The remaining paragraphs are set out in the judgment.

until Nov. 7, 1960. By reason of the said proviso a conflict of interest arises for the [respondent], in that the exploitation by him of the full value of the said adjoining premises by his disposing of the same might lead to the loss to the company of the said fifth shop. Since the said Nov. 7, 1960, there have been considerable negotiations between [the petitioner] and the [respondent] for dealing with the difficulties arising by reason of the premises and various solutions have been offered, the last whereof was an offer by the [respondent] to purchase [the petitioner's] shares in the company on terms which are not acceptable to [the petitioner]. (8) [The petitioner] has lost confidence in the [respondent] and is unable to continue to associate with him in the efficient conduct of the business of the company. (9) The company is solvent, and in a winding-up there would be a substantial surplus for the shareholders. (10) In the circumstances it is just and equitable that the company should be wound-up."

I have read those paragraphs in full because nowhere else is there to be found the grounds which are alleged to justify the making of a winding-up order in this case, the only supporting evidence being the formal affidavit, sometimes known as the statutory affidavit (2), which very often, though not in this case, verifies by hearsay the allegations contained in the petition.

The petition came before PLOWMAN, J., and no evidence was put in on behalf of the respondent, but the objection was taken, in the nature of demurrer really, that the petition does not show any sufficient case for the making of a winding-up order. PLOWMAN, J., among other things, pointed out that he had not got the articles of the company before him and could not understand, therefore, the legal rights of the parties. From that order the petitioner appeals and claims that the position is similar to that of partners in a partnership business, and that when the partners cannot agree, that is a sufficient ground in the case of a partnership for dissolution. On the same principle which has been applied by the courts in certain cases to which we have been referred, such as the well-known case of *Re Yenidje Tobacco Co., Ltd.* (3), the petitioner contends that there is sufficient to entitle him to a winding-up order in the present case, notwithstanding the objection and opposition of the respondent, the other shareholder. This is not a case of a petition by a creditor for a winding-up order because of the inability of the company to pay its debts, where, once the debt is shown to be a genuine debt, a winding-up order is made as a matter of course. It must depend on the provision in the Act (4) giving power to wind-up a company where it is just and equitable, so that it must be shown that it is just and equitable that the company should be wound-up. That is not so simple and uncomplicated a matter as an ordinary creditor's winding-up petition. We have been referred to cases of winding-up where the persons interested in the company could not agree, and these have some analogy to the case of partners. These are an application of the provision that a company may be wound-up where that is just and equitable, but really are an extension of the ordinary practice of the court. The present case is one which is unusual rather than purely formal and the petitioner must make out his case. It is not necessary for the person opposing the winding-up to do anything, as it seems to me, unless the petitioner does make out his case. Therefore, it may well be necessary that the petitioner should supplement the ordinary statutory affidavit by an affidavit putting in evidence and proving the facts which justify and require an order by the court, and in some cases that may obviously, as has been pointed out in the books, involve exhibiting documents on which the matter depends. In the present case the most obvious thing is that the position of the contending

(2) Viz., Form 9 in the Appendix to the Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), wherein the petitioner deposed that such of the statements in the petition as related to his own acts and deeds were true, and such as related to the acts and deeds of any other person he (the petitioner) believed to be true.

(3) [1916] 2 Ch. 426.

(4) See the Companies Act, 1948, s. 222 (f).

A parties may well be decided by the terms of the articles of association. It may be that the apparent differences can be overcome through the operation of those articles: we simply do not know. It may be there could be a meeting of the company and the shareholders would be evenly divided and the chairman might have a casting vote which would enable the company to pass a resolution removing one of the contending parties from the position of director and appointing B a new director, and so consequently the organisation and administration of the company could proceed thereafter perfectly efficiently. That would be a result which, if it was not done dishonestly, would be in accordance with the constitution of the company. Thus it would be something in accordance with terms which both shareholders had entered into on the formation of the company, and which were binding on them. None of that can we tell, and it seems to me, C therefore, that in the absence of evidence of that kind, if there are material matters of that sort, they must be found in the petition itself. In this case they are not found in the petition itself, and, therefore, I think that the judge reached the right conclusion and that this appeal should be dismissed.

DONOVAN, L.J.: I agree. Counsel for the petitioner's argument goes to D this length: that in a case of a two-man company, if the shareholders, being equal in their shareholding, fall out, one of them alleging that further co-operation is impossible, then the court, in the absence of a reply from the other shareholder, must at once treat them as though they were partners, and order a winding-up, as it would, in a partnership case, order a dissolution. I do not think that is the law. In *Re S. A. Hawken, Ltd.* (5), I find WYNN-PARRY, J., saying this (6):

E "The result of the decided cases appears to be that, while the statutory affidavit is always necessary, it is not always sufficient: see *Re St. David's Gold Mining Co., Ltd.* (7) and *Re South Staffordshire Tramways Co.* (8), and it is never sufficient where the petition is based on allegations of fraud. In such cases the facts of the alleged fraud must be stated on affidavit; [and certain cases are cited]. The court has never attempted to state exhaustively F the circumstances in which, apart from cases based on allegations of fraud, the statutory affidavit is to be regarded as insufficient. Each case must depend on its peculiar facts."

Looking at the facts, so far as he knew them, in this case, PLOWMAN, J., said:

"Here I have no evidence at all what the rights of the petitioner and the G respondent are, and I am not prepared to make an order on this petition as it is—simply on the statutory affidavit. It seems to me that in a case of this sort it is certainly advisable that it should be supported by something more than the mere statutory affidavit."

Taking that view, in his discretion he dismissed the petition, and I think, for the reasons which DANCKWERTS, L.J., has given, that he was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Saunders, Sobell, Leigh & Dobin* (for the petitioner); *D. J. Freeman & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(5) [1950] 2 All E.R. 408.
(6) [1950] 2 All E.R. at p. 413.
(7) (1866), 14 L.T. 539.
(8) (1894), 1 Mans. 292.

R. *v.* ESSEX QUARTER SESSIONS, *Ex parte* LARKIN.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Veale, JJ.), October 25, 1961.]

Quarter Sessions—Appeal to—Abandonment of appeal—Application to withdraw notice of abandonment—No power to entertain application unless abandonment a nullity, as through mistake or fraud.

Although there is inherent jurisdiction to decide whether a notice of abandonment of a criminal appeal is a nullity, as having been given under mistake or as a result of fraudulent inducement, yet in the absence of express statutory power no appellate criminal court can entertain an appeal after it has been validly abandoned; in respect of this principle quarter sessions is in no different position from the Court of Criminal Appeal (see p. 931, letter G, and p. 932, letter D, post).

R. v. *Moore* ([1957] 2 All E.R. 703 n.); *R.* v. *Caddy* ([1959] 3 All E.R. 138 n.) applied.

[As to abandonment of appeal to quarter sessions, see 25 HALSBURY'S LAWS (3rd Edn.) 302, para. 589.]

Cases referred to:

R. v. *Caddy*, [1959] 3 All E.R. 138 n.; 43 Cr. App. Rep. 198; [1959] 1 W.L.R. 868; 3rd Digest Supp.

R. v. *London Quarter Sessions, Ex p. Rossi*, [1956] 1 All E.R. 670; [1956] 1 Q.B. 682; 120 J.P. 239; [1956] 2 W.L.R. 800; 3rd Digest Supp.

R. v. *Moore*, [1957] 2 All E.R. 703 n.; 41 Cr. App. Rep. 179; [1957] 1 W.L.R. 841; 3rd Digest Supp.

Motions.

These were two applications by way of motion by Christopher Wren Larkin, pursuant to leave granted by PLOWMAN, J., on Sept. 29, 1961, (i) for an order of certiorari to bring up and quash a decision of the Appeal Committee of Essex Quarter Sessions given on Sept. 13, 1961, dismissing an application by the applicant for leave to withdraw a notice of abandonment of an appeal which he had made to quarter sessions on Sept. 5, 1961, against his conviction at Billericay Magistrates' Court on Aug. 22, 1961, of receiving two registration plates knowing them to be stolen, contrary to s. 33 (1) of the Larceny Act, 1916, for which he was sentenced to six months' imprisonment; (ii) for an order of mandamus that the justices of the appeal committee hear and determine the applicant's appeal.

The facts are set out in the judgment of LORD PARKER, C.J.

F. Irwin for the applicant.

D. Macrae for the respondents.

LORD PARKER, C.J.: In these proceedings, counsel moves on behalf of one Christopher Wren Larkin for an order of certiorari to bring up and quash a decision of the Appeal Committee of Essex Quarter Sessions given on Sept. 13, 1961, refusing to allow the applicant to withdraw a notice of abandonment of an appeal which he had made to quarter sessions. The applicant also asks for an order of mandamus which is in the nature of ancillary relief, ordering the appeal committee of quarter sessions to determine his application according to law.

The short facts are as follows: On Aug. 22, 1961, the applicant was convicted before the Billericay justices of receiving. The details do not matter. On Aug. 25 he served a notice of appeal which, under the relevant legislation, had to be served on the clerk to the justices sitting at Billericay and the superintendent of police. On the same day, he applied in writing to the Vacation judge (WIDGERY, J.) for bail, and on Sept. 4, 1961, his application was refused. Meanwhile, his solicitor had applied for legal aid, which was refused in the first instance by the

A justices, but granted on Sept. 5 by quarter sessions. On that day, at a time when he knew that his application for bail had been refused but before he had heard the result of his application for legal aid, he became depressed. He was advised by the prison authorities to consider further the question of appeal and, having done so, he came to the conclusion that, without bail and without legal assistance, he would be unable to prosecute his appeal effectively. That statement of the B applicant's frame of mind on Sept. 5 is taken from the affidavit sworn in these proceedings by the articled clerk to the firm of solicitors acting for him as being the evidence which he gave before quarter sessions, and it appears to me from the judgment of the learned chairman that that was, broadly speaking, accepted. That same day after writing the letter abandoning his appeal, he heard that he was granted legal aid and, in those circumstances, at the earliest opportunity, C namely, on Sept. 7, he wrote withdrawing the abandonment he had made on Sept. 5. The case was listed for Sept. 13 and, when it was called on, counsel for the applicant explained what had happened and intimated, quite properly, to quarter sessions that his first task was to apply to them to allow the applicant to withdraw his notice of abandonment of the appeal. That application was refused, and it is that decision which it is sought to quash in these proceedings.

D The learned chairman, His Honour JUDGE GAGE, gave a long and careful judgment, which is before us. He referred to the fact that, as far as he knew and as far as counsel had ascertained, this particular point in connexion with quarter sessions never seems to have arisen before. He went through the relevant legislation, to which I find it unnecessary to refer. It is sufficient to say that, whereas provision is made for the abandonment of appeals both in s. 85 of the E Magistrates' Courts Act, 1952 (1), and in r. 60 of the rules made thereunder (2), there is no reference to any power to allow an abandonment to be withdrawn. Equally, let me say at once that there is no provision to the effect that, once an appeal is abandoned, it is deemed to be dismissed, which is the provision, as I will show hereafter, in respect of appeals to the Court of Criminal Appeal. Nevertheless, s. 85 of the Magistrates' Courts Act, 1952, does provide what is to happen F when an abandonment is given, and specifically provides for the court from whom the appeal is made being able to make an order on the party who has abandoned to pay such costs of the other party as have been incurred prior to the abandonment of the appeal. In those circumstances, the learned chairman went on to refer to the practice and the decisions in regard to appeals to the Court of Criminal Appeal and also in courts-martial appeals. It is really unnecessary to refer to G the practice in regard to those appeals in detail. It is fully covered by the judgment of LORD GODDARD, C.J., in *R.* v. *Moore* (3) in regard to appeals to the Court of Criminal Appeal, and by SLADE, J., in the case of courts-martial appeals in *R.* v. *Caddy* (4). It is sufficient to say that, in regard to such appeals, the court has always taken the view that, while there is no jurisdiction in the court to consider an application to withdraw abandonment, there is, nevertheless, H inherent jurisdiction to decide whether a notice of abandonment is, in fact, a complete nullity as having been given under mistake or as the result of fraudulent inducement, in which case they still have seisin of the appeal and there

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(1) Section 85, so far as material, reads: "(1) An appellant may abandon an appeal from a magistrates' court to quarter sessions by giving notice in writing, not later than I the third day before the day fixed for hearing the appeal, to the clerk of the court against whose decision the appeal is brought; and the clerk shall thereupon give notice of the abandonment to the other party to the appeal and to the clerk of the peace."

(2) I.e., the Magistrates' Courts Rules, 1952, r. 60, which provides, so far as material: "(2) Where notice to abandon an appeal has been given by the appellant, any recognisance conditioned for the appearance of the appellant at the hearing of the appeal shall have effect as if conditioned for the appearance of the appellant before the court from whose decision the appeal was brought at a time and place to be notified to the appellant by the clerk of that court."

(3) [1957] 2 All E.R. 703 n.; 41 Cr. App. Rep. 179.

(4) [1959] 3 All E.R. 138 n.; 43 Cr. App. Rep. 198.

never has been an abandonment. Applying those principles, the learned chairman pointed out, as I think is conceded, that there are no facts here which could enable the court to say that the abandonment was a nullity. It was a perfectly deliberate act made without any fraudulent inducement and without mistake. The learned chairman recognised that, of course, those decisions were not binding on him sitting as the appeal committee of quarter sessions, but he said that they were most persuasive authority, and he found no reason to act otherwise than in accordance with them.

Counsel for the applicant, to whom the court is indebted for his careful argument, says, quite rightly, that quarter sessions has inherently a wide discretion, and he refers to cases such as *R.* v. *London Quarter Sessions, Ex p. Rossi* (5), where it was pointed out that quarter sessions has very considerable power and discretion to set aside its own orders. He also points out that there is nothing equivalent to r. 23 of the Criminal Appeal Rules, 1908, (6) to the effect that when a notice of abandonment is given the appeal is deemed to be dismissed, and he points to a number of distinctions which he claims should enable quarter sessions to exercise a wide discretion in the matter and not a discretion limited as the Court of Criminal Appeal and the Courts-Martial Appeal Court have treated it. For my part, approaching this as a matter of first principles, it seems to me that no court, whether the Court of Criminal Appeal, the Courts-Martial Appeal Court or the appeal committee of quarter sessions, can, in the absence of express statutory power, deal with an appeal once it is abandoned. The jurisdiction of any appellate court is statutory and, in the absence of being seised with an appeal, they have no discretion at all. In that respect, the position is quite different from that in *R.* v. *London Quarter Sessions, Ex p. Rossi* (5), where a court having seisin of an appeal has an inherent jurisdiction in regard to setting aside its own orders. All that an appeal court can do in circumstances such as these is to look at the position to see whether there has been an abandonment. Once they find that there is an abandonment, in my judgment they can do nothing further in the matter. If, however, on looking into it they find that there is in fact no abandonment because the abandonment has been made under mistake or fraudulent inducement, then, of course, it is open to them to say so. It is a nullity and, it being a nullity, they remain seised of the appeal.

I should add that, on any view, it would be lamentable if, contrary to my judgment, the powers of quarter sessions were in any way different from the Court of Criminal Appeal and the Courts-Martial Appeal Court. I think that the learned chairman was perfectly right in treating the decisions of those courts as persuasive authority and, in the circumstances of this case, finding in effect that there had been a perfectly valid abandonment and that there were no grounds on which it could be said that that abandonment was a nullity. In these circumstances, I would refuse these applications.

ASHWORTH, J.: I agree.

VEALE, J.: I also agree.

Applications refused.

Solicitors: *Alan, Edmunds & Phillips*, agents for *Nelson Mitchell & Williams*, Southend-on-Sea (for the applicant); *Sharpe, Pritchard & Co.*, agents for *T. Hambrey Jones*, Chelmsford (for the respondents).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(5) [1956] 1 All E.R. 670; [1956] 1 Q.B. 682.

(6) Rule 23, so far as material, reads: "An appellant at any time after he has duly served notice of appeal or of application for leave to appeal . . . may abandon his appeal by giving notice of abandonment thereof in the form (3) in the schedule to these rules to the registrar, and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal".

A

ZAMET AND OTHERS v. HYMAN AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Donovan and Danckwerts, L.JJ.), October 13, 16, 17, 18, 1961.]

Equity—Undue influence—Engaged couple—Presumption—Elderly parties—Waiver by bride of statutory rights to estate of intended husband in consideration of promise to pay lump sum on his death—No independent advice—Insufficient information as to intended husband's fortune, etc.—Inadequacy of lump sum—Transaction set aside.

B

In such transactions as those involving a deed of arrangement or settlement (as distinct from, e.g., an extravagant gift of a ring) made between an engaged couple, where the transaction appears on its face to be much more favourable to one party than to the other, the court may, in the circumstances of the case, find that a fiduciary relationship existed such as to cast an onus on the party benefited to prove, if the transaction is to stand, that it was completed by the other party after full, free and informed thought about it (see p. 938, letter B, and p. 943, letter B, post; contrast p. 934, letter A infra); this onus, or presumption of undue influence, may so arise even though the parties to the intended marriage are not young (see p. 937, letter I, and p. 943, letter C, post).

C

D

Test stated by LORD ELDON, L.C., in *Huguenin* v. *Baseley* ((1807), 14 Ves. at p. 300) approved.

Z., a widower, aged seventy-nine, who had a fortune worth about £10,000, and had made some years ago a will under which his property would go to children of his first marriage or remoter issue, became engaged to marry the second defendant, a widow, aged seventy-one. She reposed trust in Z. and wanted to marry him. By marriage she would give up employment and a pension. Three days before the marriage took place, the second defendant, by an arrangement made by Z., went, accompanied by her son-in-law, to the office of a solicitor employed by Z., where at the end of an interview lasting about fifteen minutes she executed a deed that had been engrossed before the interview. The deed stated that the defendant thereby relinquished "all rights that she may have under . . . the Inheritance (Family Provision) Act, 1938, or the Intestates' Estates Act, 1952, or . . . any statutory enactment or modification thereof against [Z.] his executors and administrators . . ." in consideration of the payment of £600 on the death of Z., contingent on the proposed marriage being solemnised. The effect of the statutes mentioned above and the terms of the deed were explained by the solicitor to the defendant, but she was not told the size of Z.'s fortune nor that his remarriage would revoke his will, nor of the possibility of future testamentary dispositions. The marriage took place and, nearly three years later, Z. died intestate. In an action by children of Z.'s first marriage for a declaration that the second defendant was excluded by the deed from the estate of Z., save in respect of the £600, the second defendant counterclaimed that the deed was not binding.

E

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G

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Held: (i) the deed was not enforceable and should be delivered up for cancellation for the following reasons—

I

(a) (per LORD EVERSHED, M.R., and DANCKWERTS, L.J.), in the present case the facts that the second defendant trusted Z. and was anxious to marry him had imposed on him an obligation of candour and protection, and the plaintiffs had not established that the second defendant had entered into the deed only after full, free and informed thought about it.

(b) (per DONOVAN, L.J.), the evidence had established that the second defendant reposed trust and confidence in Z., who, accordingly, owed her a duty to explain the transaction to her in proper detail; the plaintiffs had not established that this duty had been discharged.

(ii) the court could not, by qualifying in some way the relief granted, in effect substitute for the agreement another bargain which the parties thereto had not made (see p. 941, letters G and H, post).

Per DONOVAN, L.J.: in the case of an engaged couple it should be proved, as distinct from being presumed, that the impugned transaction resulted from an abuse of confidence and trust (see p. 942, letter D, post).

Appeal dismissed.

[As to undue influence in relation to persons engaged to inter-marry, see 17 HALSBURY'S LAWS (3rd Edn.) 681, para. 1311, text and note (k); and for cases on the subject, see 12 DIGEST (Repl.) 120, *709-712*.]

Cases referred to:

Coomber, Re, Coomber v. *Coomber*, [1911] 1 Ch. 723; 80 L.J.Ch. 999; 104 L.T. 517; 25 Digest 260, *844*.

Huguenin v. *Baseley*, (1807), 14 Ves. 273; 33 E.R. 526; 12 Digest (Repl.) 111, *657*.

Lloyds Bank, Ltd., Re, Bomze and Lederman v. *Bomze*, [1931] 1 Ch. 289; 100 L.J.Ch. 45; 144 L.T. 276; 12 Digest (Repl.) 120, *709*.

Lovesy v. *Smith*, (1880), 15 Ch.D. 655; 49 L.J.Ch. 809; 43 L.T. 240; 12 Digest (Repl.) 120, *711*.

Page v. *Horne*, (1848), 11 Beav. 227; 17 L.J.Ch. 200; 11 L.T.O.S. 121; 50 E.R. 804; 12 Digest (Repl.) 120, *710*.

Appeal.

This was an appeal by the plaintiffs, Joseph Zamet, Bernard Zamet, Hal Zamet and Nathan Zamet, from a judgment of PENNYCUICK, J., dated Dec. 9, 1960, whereby he dismissed the plaintiffs' claim and granted the counterclaim of the defendants, Freda Hyman who was sued as an administratrix of the estate of Morris Zamet, deceased, and Bluma Zamet, sued both in that capacity and in her personal capacity. The plaintiffs and the first defendant were the children of the deceased by his first wife, who died on May 12, 1954, and the second defendant was the widow of the deceased, whom he married on Aug. 7, 1955. By his will dated Dec. 1, 1949, the testator bequeathed all his estate, if his then wife should not survive him, in trust for his children. On July 20, 1955, the deceased, then aged seventy-nine, signed a letter to his solicitor in the following terms:

"I write to inform you that I have come to an arrangement with my wife-to-be that I make her a marriage settlement of £600 . . . at my death and that she will have no further claim to my estate whatsoever. I intend to marry Aug. 7 and will you please arrange same before that date . . . P.S. Her name is Bluma Shonberg."

On Aug. 3, 1955, the second defendant, then aged seventy-one, by arrangement, went to the solicitor's office accompanied by her son-in-law. At the end of an interview lasting some fifteen minutes she executed and signed a document in the following terms:

"An agreement made this 4th day of August, 1955, between Morris Zamet (hereinafter called Mr. Zamet) of the one part and Bluma Shonberg (hereinafter called Mrs. Shonberg) of the other part. Whereas: (1) The parties hereto have both been previously married and each of them widowed by the loss of their respective spouses. (2) The parties are desirous of marrying each other. (3) The parties hereto have by their first marriages children and grandchildren living and both appreciate their obligations in this respect. Now this deed witnesseth as follows: (1) Mrs. Shonberg hereby relinquishes all rights that she may have under the law at present in existence whether by virtue of the Inheritance (Family Provision) Act, 1938, or the Intestates' Estate Act, 1952, or by virtue of any statutory enactment or modification thereof against the said Mr. Zamet his executors and administrators and in

A consideration of the aforesaid relinquishment of any such claims Mr. Zamet hereby grants to Mrs. Shonberg the sum of £600 which sum shall be contingent upon the proposed marriage taking place between the parties hereto and such sum shall only be payable on the death of Mr. Zamet."

The solicitor explained the general effect of the document to the second defendant, B but did not tell her its full significance and she did not know at the time the size of the deceased's fortune. The parties married on Aug. 7, 1955. The deceased died intestate on July 27, 1958, and letters of administration of his estate were granted to the defendants on May 25, 1959. The value of his estate was about £10,000. The plaintiffs issued a writ against the defendants on June 22, 1959, and by their statement of claim delivered June 24, 1959, they sought (inter alia) a declaration C that the second defendant in her personal capacity was under and by virtue of the agreement of Aug. 4, 1955, entitled to receive the sum of £600 from the deceased's estate but otherwise was excluded from all rights which the second defendant might but for the said agreement have had against the said estate under the Inheritance (Family Provision) Act, 1938, or the Intestates' Estate Act, 1952, or under any statutory enactment. By her defence and counterclaim delivered on D Oct. 15, 1959, the second defendant pleaded (so far as is material) in para. 3 of her defence:

"This defendant admits that the agreement [viz., the agreement dated Aug. 4, 1955] (hereinafter referred to as 'the agreement') . . . bears her seal and signature . . . This defendant denies that the agreement is binding upon her. The circumstances under which this defendant signed and sealed E the agreement are as follows. On or shortly before Aug. 4, 1955, and at a time when the deceased and this defendant were engaged to be married the deceased orally informed the defendant that he was proposing to give to this defendant the sum of £600 but that this defendant would have to see his solicitor and sign a document. This defendant accordingly went to the office . . . of the deceased's solicitor, Mr. D. J. Freeman, on Aug. 4, 1955, F when the said Mr. D. J. Freeman read the agreement to this defendant but did not explain the contents or effect thereof to this defendant. This defendant thereupon at the oral request of the said Mr. D. J. Freeman affixed her seal and signature to the agreement. This defendant, who is unfamiliar with the English language and without business experience, so affixed her seal and signature, under a mistake, as to the nature and effect of the agreement G in that she understood that it gave her the sum of £600 and did not understand that it purported to affect her rights in the estate of the deceased in the event of her surviving him. In the alternative, as hereinbefore stated, this defendant was on Aug. 4, 1955, engaged to be married to the deceased and had complete confidence in him in regard to financial matters. The deceased accordingly stood in a confidential relationship to this defendant. H This defendant did not have any independent legal advice in relation to the agreement. The terms of the agreement were in fact highly disadvantageous to this defendant. In the circumstances aforesaid the execution of the agreement by this defendant was procured by the undue influence of the deceased. In the further alternative, the agreement is void as ousting or tending to oust the jurisdiction of this Honourable Court under the Inheritance (Family I Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, or is otherwise void as being contrary to public policy. In the further alternative, this defendant will contend that if, which is not admitted, the agreement is prima facie valid the plaintiffs not being parties thereto are not entitled to enforce the terms thereof."

The second defendant by her counterclaim repeated para. 3 of her defence, and counterclaimed for a declaration that (so far as is material) the agreement was obtained by the undue influence of the deceased and was not binding on her or

was not enforceable at the instance of the plaintiffs. At the trial PENNYCUICK, J., delivering judgment, stated that the first question was "Did the husband [Z.] and the wife [the second defendant] while engaged stand in such a relation that confidence was necessarily reposed by the wife and the influence which naturally grows out of that confidence was possessed by the husband?". Having referred to two text-books and to authorities he concluded on this question:

> "I am not myself concerned, I think, to say one way or another whether the principle as formulated in HALSBURY* or that formulated in SNELL† is right, because it seems to me that upon either basis the confidential relation clearly existed in the present case at the relevant date between [Z.] and the [second defendant]. If it exists automatically by reason of the fact there is no more than a probability that it existed, that is to say, the existence may be readily inferred, I hold upon the facts before me that the existence should be inferred. Upon this point I accept the evidence of the [second defendant] that she had trust in her husband. I can find nothing in the circumstances nor in any of the evidence which has been given which properly leads me to a different conclusion on this point."

His Lordship (PENNYCUICK, J.), then considered the special duty of care that Z. owed in such circumstances, and found that the plaintiffs had not discharged the burden of showing that the transaction, viz., the agreement, was a result of the free exercise of the will of the second defendant; though His Lordship concluded on the evidence that the second defendant understood the purport of the agreement when she executed it.

Michael Stranders, Q.C., and *M. Finer* for the appellants, the plaintiffs.

Harold Lightman, Q.C., and *Jeremiah Harman* for the respondents, the defendants.

LORD EVERSHED, M.R.: The substantial question is whether a document executed under seal on Aug. 4, 1955, by two persons then engaged to be married, can now be held to stand. After hearing the careful arguments on both sides, I for my part conclude, as did the learned judge, that it cannot stand.

The two signatories to this document were engaged to be married. They were not young people: the man was aged seventy-nine and was himself a widower, his first wife having then died about a year before: the woman was somewhat younger, seventy-one years, and she was a widow, her first husband having died several years before. Both had grown-up children and I gather grandchildren also. The basis of the attack on this document (1), is that when regard is had to the relationship then subsisting between the two signatories, the court must draw the conclusion that the man owed such a duty of candour and, as it is sometimes said, of protection to the woman that the onus is cast on those who support the document of establishing affirmatively that the woman executed this document not merely understanding its effect, but as a result of full, free and informed thought about it—a phrase which I gratefully take from Mr. Harman's argument. There are, therefore, clearly two stages: first, does the premise arise and are the circumstances here such that there was imposed the obligation, which I have already tried to define, on the man? If the answer to that be affirmative, then have the plaintiffs in the action, who seek to support the document, proved affirmatively the necessary degree of informed thought on the part of the woman? The learned judge dealt with the case in that way and I shall follow him.

He first of all considered what under our law is the consequence of the relationship between a man and woman of being engaged to be married. He cited passages from two leading text-books, 17 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), at p. 681, and SNELL'S PRINCIPLES OF EQUITY (24th Edn.), at p. 507. Both those

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* 17 HALSBURY'S LAWS (3rd Edn.) 681.

† SNELL'S PRINCIPLES OF EQUITY (24th Edn.) 507.

(1) The relevant terms of the document are at p. 934, letter J, ante.

A citations undoubtedly support the view that the relationship subsisting between a man and a woman engaged to be married is one that does or may give rise to what I have referred to as the obligation of candour and protection. I shall not repeat the citations from those two text-books, but I will add to them one other citation to which counsel for the appellants referred us from PROFESSOR HANBURY'S MODERN EQUITY (7th Edn.), at p. 630. I find this passage under the general B heading: "Undue Influence", after referring to particular categories of relationship such as those subsisting between parent and child, solicitor and client, and the like:

> "Among other relations in which the presumption has been held to arise are those of physician and patient and of guardian and ward. Curiously C enough, it has been held not to arise in the case of husband and wife; but there is good authority for applying it in the case of an engaged couple. It is very strange that for this purpose a girl should be presumed to yield an obedience to her fiancé that she ceases to show to him as soon as he becomes her husband. In *Huguenin* v. *Baseley* (2), LORD ELDON set aside a voluntary settlement, made by a widow on a clergyman and his family; the clergyman was unable to discharge the onus of proving that the settlement was the free D act of the widow, uninfluenced by him."

As regards married couples, I think as MAUGHAM, J., indicated in *Re Lloyds Bank, Ltd., Bomze and Lederman* v. *Bomze* (3), that the apparent anomaly to which Professor Hanbury alludes is in some part at least due to the fact that the courts do not normally infer or apply the strict legal canons to what passes between E husband and wife in the ordinary course of marriage. The citations to which I have alluded, however, and to which I have made one addition undoubtedly do, I think, establish strong authority for the view that as between an engaged couple this so-called presumption may arise. I use deliberately the word "may". The first case which is cited in HALSBURY in support of this so-called presumption of the law, namely, *Page* v. *Horne* (4), is one decided more than one hundred years F ago in 1848. That was a case in which two engaged persons, having first made a settlement to operate on their intended marriage, then shortly before the marriage revoked it to the great advantage of the man. My predecessor, LORD LANGDALE, M.R., said this in the course of his judgment (5):

> "It is true that no influence is proved to have been used; but no one can say what may be the extent of the influence of a man over a woman, whose G consent to marriage he has obtained."

The general proposition seems to have been accepted as part of our law ever since 1848. PENNYCUICK, J., referred to two cases, namely, *Lovesy* v. *Smith* (6), and the case before MAUGHAM, J., to which I have already referred, *Re Lloyds Bank, Ltd.* (3). It is, of course, quite plain that the facts of those cases, particularly the H former, differ considerably, to say the least, from the facts in the present case. In *Lovesy* v. *Smith* (6) the man who was party to the engagement was a solicitor and had been the woman's professional adviser before the engagement. I repeat that in the later case MAUGHAM, J., threw no doubt on the validity of the broad proposition that I have stated. True, in that case, the two parties to the intended marriage were young, but I agree for my part with what is said here on the I respondents' side that there can be no necessary distinction between the case where the parties are young and where the parties are mature or, as here, relatively elderly. Indeed, it may well be that in the case of an engagement between two elderly persons the influence liable to be exercised would be greater, in modern times at any rate, than in the case of young people. I do not forget that this is 1961 and what might have been said of the position, independence, and the like,

(2) (1807), 14 Ves. 273.
(3) [1931] 1 Ch. 289.
(4) (1848), 11 Beav. 227.
(5) (1848), 11 Beav. at p. 235.
(6) (1880), 15 Ch.D. 655.

of women in 1848 would have to be seriously qualified today. It may well be in some cases that the court would rightly draw the inference of a fiduciary relationship existing not in the man towards the woman but in the woman towards the man. But taking, I hope, a sensible view of the position of women in modern society, I cannot be persuaded that this court ought now to say that these principles, illustrated in the cases which I have mentioned, have ceased altogether to be part of our law. I say only that in modern conditions, at any rate, the existence of such influence should not necessarily be assumed in every case. I would put it somewhat thus—that in any transaction of the kind of a deed of arrangement or settlement (and I make that qualification bearing in mind what counsel for the appellants put to us of the case of a young man who may be persuaded to give an extravagant engagement ring to his fiancée) made between an engaged couple which on its face appears much more favourable to one party than the other, then in the circumstances of the case the court may find a fiduciary relationship of the nature that I have mentioned, so as to cast an onus on the party benefited of proving that the transaction was completed by the other party only after full, free and informed thought about it. I take that to be the general proposition of law which should be applied in this case. I do not attempt any further statement of the law, but where the circumstances justify it, then I think that it does follow that we have to ask the classic question (or a question analogous to it) which, in *Huguenin* v. *Baseley* (7), LORD ELDON, L.C., did ask:

> "The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf."

If that is the right principle of law, then I turn to the circumstances of this case. I am bound to say they lead me unhesitatingly to conclude that there was here such a relationship as invoked such an answer to LORD ELDON'S question as to impose on those who assert the validity of this document, the onus of proving the necessary thought and information. The document itself is in this form. [HIS LORDSHIP then read the agreement dated Aug. 4, 1955, the terms of which are set out at p. 934, letter I, ante, and continued:] That document was, as I say, signed and sealed. I shall say something presently about the occasion of its execution and sealing. On the face of it, it is obviously a somewhat startling document. The woman, the second defendant, pledges herself to release for £600 any claim she might have against the man (Mr. Morris Zamet, hereinafter called "the deceased") or his estate under the statutes named or indicated. The point was at one time raised whether the statutory rights which were released would include those under the Administration of Estates Act, 1925. The learned judge held that the clause was apt to cover such rights and I think that answer was clearly right and no serious argument has been addressed to us to the contrary.

Two points on the face of the document stand out very large. The first is: what is the position or what was the intended position in regard to the deceased's will, if he made one, taking effect on his death? The second is: in judging of the character of the bargain, what sort of estate did the deceased have or was he likely to have at his death, all rights in which were given up for this sum of £600? Those two questions are, indeed, very puzzling and, before saying more about them, I will make some reference to the history which led up to the execution of that agreement on Aug. 4, 1955. The first document that we have is dated July 6, 1955, and is a record in the books of Mr. Freeman, the solicitor who witnessed the signatures on the document, as follows:

> "Attending [the deceased]. He informed me that he was re-marrying and wished to deal with his property so that his future wife would be able

(7) (1807), 14 Ves. at p. 300.

A to live there for the rest of her life. Advised him accordingly on the basis that there would be no children of the marriage."

Mr. Freeman was asked before the learned judge if he could expand his recollection of the interview so recorded, but he said (and I quite accept it) that it being some five years ago, he really could not add very much. On the face of it, however, it would appear that he had informed the deceased of what would be requisite B if his future wife lived in his house for the rest of her life after he had died. The next document is dated July 20. It is a letter to Mr. Freeman signed by the deceased. It was an unsolved question who in fact wrote the body of the letter. It was suggested, and the suggestion certainly has force in it, that it certainly was not the deceased. The signature includes the initial " M " which is written quite differently from the capital " M " at the beginning of the letter where it C says: " Dear Mr. Freeman ". Still we cannot pursue that, for the problem is unsolved. The letter says:

> " I write to inform you that I have come to an arrangement with my wife-to-be that I make her a marriage settlement of £600—six hundred pounds at my death and that she will have no further claim to my estate whatsoever. I intend to marry Aug. 7 and will you please arrange same before that D date. Yours faithfully, M. Zamet. P.S. Her name is Bluma Shonberg."

It seems that Mr. Freeman was away when that letter reached his office. What happened was that on his return he prepared at once an engrossment of the document executed on Aug. 4 which I have already read and also, apparently, two copies. On Aug. 3 or thereabouts it was arranged that the second defendant should go round to Mr. Freeman's office. She went round accompanied by her E son-in-law, a Mr. Bramson, and there then took place an interview lasting, it was said, some fifteen minutes or more, at the end of which this document was executed. Mr. Freeman, not unnaturally, was asked several questions in cross-examination as to the extent to which he had explained the effect of the document. He said that he had explained the background, that is to say, he stated (I assume in simple and short language) what precisely was the effect of the statutes indi- F cated, namely, the Inheritance (Family Provision) Act, 1938, and the Intestates' Estates Act, 1952, related as it is to the Administration of Estates Act, 1925. What is startling, as I think, is that no suggestion was made to the effect that Mr. Freeman explained to the second defendant what the deceased's fortune was or was likely to be or what might happen about a will. The fact is, as we now know, that the deceased had made a will during his marriage with his first wife which, G of course, still operated until his re-marriage. Under that will, in the events which had happened, it seems that his property would go to his children or remoter issue. I do not know whether he thought that that will remained or would remain operative after the marriage: or whether he had any idea of making another will. There appears to have been no discussion of the effect or possible effect of any testamentary dispositions or of what the deceased had in mind if he made or ever H thought of making another will. It does not appear to have been explained what would happen if the deceased died intestate, as in fact he did. There is no evidence whatever that anything was said as to the extent of the deceased's fortune. As regards the last point, the learned judge stated at the beginning of his judgment:

> " The husband died on July 27, 1958, and not having made another will he accordingly died intestate. His estate at his death was something under I £10,000. I should perhaps say that it was apparently appreciably less in 1955, though the exact amount is not known."

If I may venture a correction, it would appear, from what we have been told, that his estate at his death was probably more than £10,000. The house in which he lived was valued for probate at his death at £3,500 and we are told it may now be worth more. I am not disposed for myself to agree with the view that in 1955 the estate was appreciably less. Let me, however, assume that any fortune the deceased was likely to dispose of and had was in the region of £10,000.

I turn back to the document, from which it appears that the second defendant was agreeing under seal to give up any right whatever against the estate of her husband-to-be, an estate, as I say, of some £10,000, in consideration of accepting £600 after his death. It is, on the face of it, obviously an extravagantly one-sided document. I have also, I confess, been gravely disturbed by the apparent absence of any sort of advice given either to the deceased (and still less to the second defendant) by Mr. Freeman. I must not be taken to be accusing Mr. Freeman of any impropriety. He may have assumed things which were not in fact correct: he may have made a mistake, but in judging this case common sense requires one to put oneself in the position occupied then by the deceased or the solicitor and ask whether what was done was right. The fact is that Mr. Freeman had already engrossed this document. Mr. Zamet was not an old client of his; Mr. Freeman was quite a young man at the time and his real client was one of the deceased's sons. I do not know whether Mr. Freeman had ever explained to the deceased what the effect of marriage would be on his will, but the essential and startling fact is this, that the second defendant, who said she trusted the deceased and was anxious to marry him because of her feelings for him, goes round to the office of her fiancé's solicitor, is then presented with an engrossment of this astonishing document, is, I will assume, told the substance of the effect on her of the Inheritance (Family Provision) Act, 1938, and the Intestates' Estates Act, 1952, and then executes the document. The learned judge was obviously not greatly impressed, if I may say so, by the second defendant's evidence. Counsel for the appellants has made great point of the fact that in the letter of July 20 the deceased stated that he had come to an arrangement with his wife. True it is that the document itself is not evidence against the second defendant, but counsel fairly points out that the learned judge, after hearing the second defendant state on oath that the first time she heard of this so-called arrangement was the day before, viz., Aug. 3, said that he would not as against the dead man be disposed to accept her evidence without corroboration as sufficient proof of that fact. Counsel for the appellants has said (and this is a forceful part of his argument) that the court ought to take it, since the deceased was, and the second defendant said that he was, an honourable man; that all this had been fully explained to the second defendant, as she then was, and that Mr. Freeman had reason to suppose that it was all cut and dried between them so that the execution of the document was little more than a formality. Counsel for the appellants also pointed out that the son-in-law was there too and that he could have intervened if he had thought that his mother-in-law ought to have further advice. I see the force of the argument but I must say for my part that it does not suffice. Although the learned judge expressed the view that I have mentioned about the second defendant's evidence, he has certainly not found as a fact, having heard her, that she did know all about it, that she was fully informed of the significance of this arrangement before ever she went to Mr. Freeman's office on Aug. 4. In all the circumstances it seems to me, failing such proof, it is inevitable that the document which she executed was of so seriously a one-sided character as to fall within the general principle which I have stated. I have expressed my own view during the argument, which is one of grave doubt whether the deceased himself really understood what the result of the marriage would be on his existing will and other matters. I wish not to say unfair or unkind things about Mr. Freeman, but it seems to me extraordinary that a solicitor, a member of that learned and honourable profession, apparently took no steps really to satisfy himself that this strange bargain was, and had been, fully understood. As counsel for the appellants observed: the second defendant, who was not a woman of completely passive disposition, might have said, " I do not think this is fair ". Then he was asked what would have been the result of that and counsel for the appellants replied instantly, " Well, the marriage probably would not have come off ". That surely is the kernel of the matter. The second defendant was anxious to marry. She said that she was fond of the deceased and she trusted him. From her own financial position, the

A marriage was not particularly advantageous because, for one thing, income which I gather she had earned in the way of doing work on surgical instruments would cease. If the truth is that she was really anxious to marry this gentleman, that supports very strongly the view put forward in the text-books that there does or may exist the sort of relationship between a man and a woman to whom he is engaged which does impose the duty on him of full candour and, indeed, of B protection.

I, therefore, entirely agree with the learned judge that this document, embracing an arrangement so remarkable between persons who stood in the relationship that the deceased and the second defendant did on Aug. 4, is one which requires strict proof, if the document is to stand, that when the second defendant executed it, she did so fully understanding its significance and after (I repeat the phrase C which I have used before) full, free and informed (and, particularly, informed) thought about it. The learned judge held that she did understand what the result would be, no doubt having listened to Mr Freeman, but that itself will not suffice, given that the premise which I have mentioned is established. I revert again to the words of LORD ELDON, L.C. (8):

> " The question, is, not whether she knew what she was doing, had done, or D proposed to do, but how the intention was produced . . ."

I pass to the essential second problem which arises in this case, namely, whether the appellants have proved that the second defendant really did understand and was fully informed about this transaction? The learned judge had the advantage of seeing the second defendant in the witness-box. I will not go into the matter of how much or how well she understood the English language or all the questions E put to her. Reading the transcript, one might say that her evidence does not in all respects seem very satisfactory and persuasive; but the learned judge heard it. The son-in-law's evidence was apparently unsatisfactory to the extent that neither side felt disposed to place any reliance on it. As a conclusion of fact, however, the learned judge held that the onus had not been discharged. He had seen, and attended to the evidence of, the second defendant and there was also the evidence F of Mr. Freeman, to which I am not further going to allude. Suffice it to say that if that question arises to be determined, as I think it does, then I can see no good ground on which this court ought to differ in its conclusion from that of the learned judge: in other words, that the appellants did not discharge the onus on them so that in the result the document of Aug. 4 cannot stand.

That is not, however, quite the end of the matter, and for this reason. It was G alternatively submitted by counsel for the appellants that, after all, the second defendant is seeking to be relieved by a court of equity from a document which she signed and sealed and it is said that the arm of equity is not so short that it cannot in such circumstances relieve her from it but on terms. The submission, I must say, had for me an attraction but in the end of all I feel that really the court cannot, by way of qualifying the relief, in effect substitute some other bargain; H for that would really be the result. We should be saying that this bargain which she made cannot stand because she was not fully informed about it, but that, if there had been some other bargain, then that would have been something that the court would have approved and so we would substitute some other bargain. I do not think that is right and I think council for the second defendant is justified in saying that in cases of this kind, broadly known as undue influence cases, the I party affected is either relieved or not relieved from the transaction and there is no authority in the books for substituting in effect some other transaction.

In the end, therefore, I conclude that we should affirm the judgment of PENNYCUICK, J. It was suggested that we might omit the declaration on the counterclaim, but I cannot really see that there is any point in that. If we hold, as we do, that the appellants cannot set up and assert the validity of this document of Aug. 4, 1955, then it is only right to go on and say that the document is not

(8) (1807), 14 Ves. at p. 300.

enforceable and should be delivered up for cancellation. In the result, therefore, I think this appeal fails and should be dismissed. A

I only just add this. I do not know anything about the financial circumstances either of the second defendant or of her late husband's children. The second defendant will be aware that we have suggested that the case is one which might well be the subject of some arrangement between the parties. In the event the second defendant obviously comes very well out of the transaction and if it should be in her mind and heart to qualify voluntarily the advantage that she takes to do so, it would be just and would do her credit. I cannot and ought not to say more than that. B

DONOVAN, L.J.: I do not think that it ought to be presumed at the present day that between every engaged couple such a high degree of confidence and trust exists that undue influence is or may be possessed by the one over the other. Without being too cynical, one knows that not all engagements are idyllic affairs. No doubt in most cases there would be no engagement to marry, unless there were confidence and trust on both sides; but I think this should be affirmatively proved if, later on, one of the parties seeks to upset some disposition of property on the ground of undue influence. Next, it is not every fiduciary relationship which raises a presumption that a gift or similar transaction was procured by undue influence (see the decision of this court in *Re Coomber, Coomber* v. *Coomber* (9)) and in the case of engaged couples I think, for my part, that it should be proved, as distinct from being presumed, that the impugned disposition resulted from the abuse of such confidence and trust. Put in another way, it should be proved, and not simply presumed, that the engaged person making the disposition was not exercising a free and independent will. It would, I think, be unfortunate if every expensive gift by one fiancé to another should carry with it the risk of a subsequent lawsuit for undue influence, where the presumption would be against the recipient. Nothing in the decided cases really supports the view that that is or has ever been the law. They deal chiefly with cases where some person was out to feather his own nest, and have no application to cases where, at the time at any rate, love and affection would normally be the reason for the gift. C D E F

In the case before us it was pleaded (10) that confidence by the second defendant in her late husband was to be implied from the fact of the engagement. But at the trial there was affirmative evidence on the point which the judge accepted and on which he found that such confidence existed (11). No one can suggest that the form of pleading on this matter has worked any injustice to the appellants.

On the next point, whether the deceased was turning that trust to account by getting the lady to agree to this one-sided bargain, the defence alleged in terms that the agreement was procured by the undue influence of the deceased (12) and evidence on this matter was also adduced. Although, therefore, the learned judge treated the matter as one of rebuttable presumption, I do not think that it can justly be said that this was the only case pleaded, however the argument may have gone. The reality of the matter is that all the evidence both ways was present, just as it would have been had there been no question of a presumption; and in these circumstances it would not be right in my opinion to decide this appeal on a point of pleading. Given that the second defendant reposed trust in the deceased when they became engaged, he clearly owed her the duty to explain this impugned transaction to her in proper detail so that she would have all the facts before her in order to enable a free and rational choice to be exercised. Had he done so she would have realised that she was being asked to give up the rights which would accrue to her on marriage for a song. I fully appreciate that the deceased may have thought that by this transaction he was doing the proper thing by both his children and his intended bride: but at the same time I think G H I

(9) [1911] 1 Ch. 723.
(10) Paragraph 3 of the defence and counterclaim is set out at p. 935, letters D to I, ante.
(11) See p. 936, letter C, ante. (12) See p. 935, letter H, ante.

A that the evidence established that he used his influence over her to obtain her agreement in the absence of figures which were essential to a free and independent decision by her. He would have had to place such figures before her independent solicitor, if she had employed one.

I agree, therefore, that the appeal fails with the consequences indicated by LORD EVERSHED, M.R.

B

DANCKWERTS, L.J.: I agree. I am in agreement with the observations which were made by LORD EVERSHED, M.R., in regard to the question of fiduciary relationship and presumptions, but I also find that I reach the same result on a slightly different ground which is similar to the one which has been expressed by DONOVAN, L.J. It seems to me that this agreement on its face is of such a C nature that some explanation must be given by the appellants to show that the second defendant really understood what was involved in the transaction. She was engaged to be married, and I agree entirely with the observations of LORD EVERSHED, M.R., that the situation and considerations which arise in that state cannot be confined to the case of a young woman. An elderly woman of seventy-one might well be in a state of flutter at the excitement of being engaged to be D married at her age. It is to be observed that she was giving up her employment, she was giving up a pension, and when her husband died, she might be of an age when it would be impossible for her to obtain gainful employment. In that situation she was to receive £600. It seems to me a ridiculous sum and quite impossible to support as being adequate provision for a wife of that age. Then again: what was she giving up on the occasion of her husband's death? First, E she was giving up any claim to succeed to his estate on his intestacy. It was said that that could be defeated by the making of a will. Second, she was also giving up any claim which she might have under the Inheritance (Family Provision) Act, 1938, to have reasonable provision made for her future existence out of his estate. I cannot believe that any woman would enter into a bargain of that kind if she appreciated the considerations which were involved.

F In those circumstances the appellants must have a case to answer and must show affirmatively that the second defendant fully understood the transaction and was in a position to appreciate what was involved and that she was none the less, of her own free will, entering into the transaction. In other words, much the same result as a presumption arises. Again there is an onus which has to be discharged by the appellants. It appears that when she was taken to her G husband's solicitor she received a very superficial explanation of the statutes to which reference was made. She was not told, and there is no evidence that she ever knew, the amount of her husband's estate. There is no doubt that if, as was suggested, she had asked how much he had got, she might have jeopardised her chance of being married.

In those circumstances it seems to me the learned judge reached the right H conclusion in holding that the appellants had not discharged the onus which was on them in this case, and for those reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *D. J. Freeman & Co.* (for the appellants, the plaintiffs); *W. R. Bennett & Co.* (for the respondents, the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

TURNER *v.* TURNER.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Davies, L.JJ.), October 11, 12, 13, 16, 1961.]

Divorce—Evidence—Magistrates' court order on similar issue—Probative value of findings—Corroboration—Weight to be given thereto at subsequent trial of divorce petition for cruelty—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 7 (2). B

Divorce—Appeal—Divisional Court—Jurisdiction—Application for re-hearing—Appeal by unsuccessful party to Court of Appeal on ground of misdirection—Whether "error of the court at the hearing" alleged—Matrimonial Causes Rules 1957 (*S.I.* 1957 *No.* 619), *r.* 36 (1). C

The parties were married in 1955. In January, 1958, the husband left the wife and she took out a summons for desertion in the magistrates' court, to which was added later an allegation of persistent cruelty. Both parties gave evidence on the hearing of the summons but there were no other witnesses. The magistrate found both persistent cruelty and desertion proved, ordered maintenance for the wife and inserted in the order a non-cohabitation clause. In May, 1959, the wife filed a petition for divorce alleging cruelty which at first was undefended but the husband later obtained leave to file an answer in which he cross-petitioned on the ground of cruelty. At the hearing of the suit, the trial judge had before him the notes of evidence in the magistrates' court and heard the evidence of the wife and of a doctor called by her who proved that, shortly after the break-up of the marriage, she had an anxiety neurosis which was consistent with her case, but might have had other origins. The judge heard evidence from the husband and two witnesses who lent some support to his case. The judge rejected the wife's evidence, saying that there was no corroboration, accepted the husband's evidence, and granted him a decree nisi. The wife appealed to the Court of Appeal and then applied to the Divorce Divisional Court under r. 36 (1) of the Matrimonial Causes Rules, 1957* for a re-hearing on the ground that the trial judge had not had before him six letters from the husband to the wife which might have helped both to establish her charges of cruelty and to refute the husband's charges of cruelty. These letters had been in the wife's possession but she had failed to produce them. The Divisional Court dismissed her application but gave leave to appeal to the Court of Appeal. By the Summary Jurisdiction (Married Women) Act, 1895, s. 5†, a magistrates' court order that an applicant be no longer bound to cohabit with a husband has the effect of a decree of judicial separation, and by the Matrimonial Causes Act, 1950, s. 7 (2), on a petition for divorce the court may treat a decree of judicial separation as sufficient proof of the cruelty on which it was granted. On the appeals, D E F G H

Held: (i) the appeal from the trial judge would be allowed and a new trial would be ordered on the ground that the trial judge had misdirected himself (a) in that he had not given proper weight to the probative value of the findings of the magistrate, which were reached at a point of time nearer to the happening of the events in question, (b) in that the wife, having obtained the magistrate's order, could not properly be described as having no corroboration at all, and (c) in not giving due weight to any corroboration afforded by the husband's admissions before the magistrates (see p. 949, letters F and I, p. 953, letter H, and p. 956, letter H, post). I

Dicta of LORD GREENE, M.R., in *Kara* v. *Kara and Holman* ([1948] 2 All E.R. at p. 17) applied.

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* Rule 36 is set out at p. 950, letter A, post.

† See now Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 2 (1) (a).

A (ii) the application for a re-hearing under r. 36 (1) of the Matrimonial Causes Rules, 1957, had been rightly dismissed because—

(a) the case was one in which the appellant on the appeal from the trial judge alleged "error of the court at the hearing" within r. 36 (1), for her appeal was not based solely on the absence of the letters at the hearing but also on misdirection, and accordingly r. 36 (1) was inapplicable, and

B (b) the whole matter should be left to be dealt with by the Court of Appeal on the appeal from the trial judge, as that court would have jurisdiction to admit further evidence, viz., the letters, and the probability that, according to the practice of the court and the circumstances of this case, the further evidence would not be admitted was no ground for directing a re-hearing under r. 36 (1) (see p. 954, letter H, to p. 955, letter B, p. 951, C letter I, and p. 957, letter A, post).

Prince v. *Prince* ([1950] 2 All E.R. 375) and *Wells-King* v. *Wells-King* ([1955] 1 All E.R. 585) followed.

Appeal from the judgment of His Honour JUDGE REWCASTLE, Q.C., allowed; appeal from the judgment of the DIVISIONAL COURT dismissed.

[As to the evidential effect of other proceedings on a petition for divorce, see D 12 HALSBURY'S LAWS (3rd Edn.) 374, para. 814; as to applications for re-hearing, see ibid., pp. 425, 426, para. 954; and for cases on the subject, see 27 DIGEST (Repl.) 595-598, *5571-5593*.

For the Matrimonial Causes Act, 1950, s. 7, see 29 HALSBURY'S STATUTES (2nd Edn.) 396; and for the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 2 (1) (a), see 40 HALSBURY'S STATUTES (2nd Edn.) 400.

E For the Matrimonial Causes Rules, 1957, r. 36, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 237.]

Cases referred to:

Corbett v. *Corbett*, [1953] 2 All E.R. 69; [1953] P. 205; [1953] 2 W.L.R. 1124; 3rd Digest Supp.

F *Harriman* v. *Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest (Repl.) 363, *3005*.

Hudson v. *Hudson*, [1948] 1 All E.R. 773; [1948] P. 292; [1948] L.J.R. 907; 27 Digest (Repl.) 517, *4603*.

Kara v. *Kara and Holman*, [1948] 2 All E.R. 16; [1948] P. 287; [1948] L.J.R. 1741; 27 Digest (Repl.) 516, *4602*.

G *Ladd* v. *Marshall*, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489; 3rd Digest Supp.

Manners v. *Manners and Fortescue*, [1936] 1 All E.R. 41; [1936] P. 117; 105 L.J.P. 26; 154 L.T. 271; 27 Digest (Repl.) 595, *5576*.

Peek v. *Peek*, [1947] 2 All E.R. 578; [1948] P. 46; *affd.* C.A., [1948] 2 All E.R. 297; 27 Digest (Repl.) 596, *5577*.

H *Petty* v. *Petty*, [1943] 2 All E.R. 511; [1943] P. 101; 112 L.J.P. 97; 169 L.T. 224; 27 Digest (Repl.) 596, *5579*.

Prince v. *Prince*, [1950] 2 All E.R. 375; [1951] P. 71; 27 Digest (Repl.) 597, *5580*.

Thompson v. *Thompson*, [1957] 1 All E.R. 161; [1957] P. 19; [1957] 2 W.L.R. 138; 3rd Digest Supp.

I *Wells-King* v. *Wells-King*, [1955] 1 All E.R. 585; [1955] 1 W.L.R. 309; 3rd Digest Supp.

Winter v. *Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 27 Digest (Repl.) 599, *5604*.

Appeals.

These were two appeals by the wife, Mary Dolores Turner. The first appeal was from a judgment of His Honour JUDGE REWCASTLE, Q.C., sitting as a special commissioner, given on Dec. 6, 1960, whereby he rejected the wife's petition for divorce on the ground of cruelty and pronounced on the same ground a decree in

favour of the husband on his answer. The wife sought a new trial. The second appeal was from a judgment of the Divorce Divisional Court (LORD MERRIMAN, P., and LLOYD-JONES, J.), given on June 15, 1961, dismissing the wife's application under the Matrimonial Causes Rules, 1957, r. 36 (1), for a re-hearing of the cause tried by Mr. Commissioner REWCASTLE. The ground of this application was that the commissioner had not before him at the trial six letters from the husband to the wife which might put a different complexion on the case and help to establish her charges of cruelty and to refute the husband's charges. These letters had been in the wife's possession but she had failed to produce them to her solicitors. The facts are set out in the judgment of HOLROYD PEARCE, L.J.

G. H. Crispin, Q.C., and *J. Amphlett* for the appellant wife.
F. Donald McIntyre, Q.C., and *T. A. C. Coningsby* for the respondent husband.

HOLROYD PEARCE, L.J.: The parties were married on Dec. 10, 1955. He was then twenty-five years of age, and she was twenty-three. He was a local government servant, but has since become a solicitor's articled clerk. There are no children of the marriage. On Jan. 13, 1958, after two stormy years, the husband left the wife. She took out a summons for desertion in Clerkenwell Magistrates' Court. On the return day of the summons, the wife asked for an adjournment to allege persistent cruelty, and no evidence was taken. On May 15, 1958, both parties gave evidence. There were no other witnesses. The husband was then willing to return to the wife. Mr. Robey, the stipendiary magistrate, found both persistent cruelty and desertion proved, and ordered 50s. per week maintenance for the wife. He inserted in the order a non-cohabitation clause. A few days later the husband wrote the first of the six letters which are the subject of her application under r. 36 (1). The wife filed a petition dated May 15, 1959, alleging cruelty. The husband filed no answer, and the case was set down undefended. In July, 1959, while the undefended suit was pending, the husband wrote the last of the six letters which the wife now wishes to adduce in evidence. On Oct. 15, 1959, the husband got leave to file an answer. Neither side obtained an order for discovery. On Dec. 5 and 6, 1960, the suit was heard by His Honour JUDGE REWCASTLE, Q.C., who had before him the notes of evidence given in the magistrates' court. No one except the wife and husband was aware of the existence of the husband's letters to the wife. The learned commissioner heard the evidence of the wife and of a doctor called by her. The doctor proved that, shortly after the break-up of the marriage, she had an anxiety neurosis which was consistent with her case, but might have had other origins. The commissioner had evidence from the husband and two witnesses who lent some support to his case. He accepted the evidence of the husband and his witnesses, and rejected that of the wife. After the case, the wife changed her solicitors, and obtained leave to appeal out of time. She then applied to the Divisional Court under r. 36 (1) for a re-hearing. In June, 1961, that application was heard and dismissed after a three days' hearing. The Divisional Court gave leave to appeal to this court.

Counsel for the wife formally asked us to admit the letters as fresh evidence in the appeal from the commissioner. But he admitted that, since they have been all the time in the wife's possession, and were available at the trial, they could not be admitted as fresh evidence in this court unless it is prepared to take the view that the principle set out in *Ladd* v. *Marshall* (1) should not be enforced in matrimonial cases since the public has an interest in them. That principle is not applied by the Divisional Court in applications under r. 36 (1): *Winter* v. *Winter* (2). In *Corbett* v. *Corbett* (3), however, this court decided that, apart from exceptional cases (which this is not), matrimonial cases in this court can claim no exemption from the principle in *Ladd* v. *Marshall* (1), and that fresh evidence

(1) [1954] 3 All E.R. 745. (2) [1942] 2 All E.R. 390; [1942] P. 151.
(3) [1953] 2 All E.R. 69; [1953] P. 205.

A will not be admitted if it was available at the trial. We cannot, therefore, admit the letters in the first appeal from the commissioner.

In that appeal, it is contended that the commissioner misdirected himself in saying that there was no corroboration of the wife's case when, in fact, she had, after a contested and more or less contemporary hearing, obtained an order in the magistrates' court. It is also contended that there was no sufficient evidence B to support the husband's case of cruelty, and no evidence of injury to health, and that the decision was against the weight of evidence. This is not the kind of case that can be tried by transcript. Indeed, it is not the kind of case that is easy to try on oral evidence. In the married life there was much passionate love, much quarrelling, much turbulence. It is quite clear from the husband's admissions in the magistrates' court that he had used violence to his wife and struck her, but C he contended that ninety per cent. of his violence was to restrain her. He said: "I would not say she always got the worst of it". All the members of the court have read the transcript of the evidence as a whole, and they have had the advantage of having many passages in particular drawn to their attention by counsel for the husband. The impression left on me is that, in the transcript, there is nothing to compel belief, but much that may be true. If it were a question D of deciding on the written word alone, I would have great difficulty. I certainly would not feel entitled to disagree with the finding of the commissioner who saw the witnesses. But has he directed himself properly to his approach to the problem, and has he given proper weight to the finding before the magistrates? He was clearly in error, with all respect, in saying that there was absolutely no corroboration at all. There was a more or less contemporary finding by an experienced E magistrate. The value of such a finding is that it results from an investigation of the demeanour and evidence of the parties before they have had months and even years of contemplation, during which each tends to come more and more to the conclusion that he or she was wholly in the right.

By the Summary Jurisdiction (Married Woman) Act, 1895, s. 5 (now the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 2 (1) (a)), it was provided F that a magistrates' court could order

> "(a) . . . that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation) . . ."

In *Harriman* v. *Harriman* (4), the full Court of Appeal considered the effect of a magistrates' order with a non-cohabitation clause which, under s. 5, had the effect G in all respects of a decree of judicial separation. It held that such a decree could not estop the Divorce Court. It was made clear, however, that it was of evidential value. FLETCHER MOULTON, L.J., there said (5):

> "The court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them. Hence the production of a decree for a judicial separation on the ground of cruelty is H not as a matter of law sufficient to make it the judicial duty of the court to accept as a fact that the respondent has been guilty of such cruelty; and if the circumstances under which the decree was obtained are such as to raise a doubt in the mind of the court as to whether the cruelty was in fact committed, it would be entitled and bound to require such additional evidence as should be sufficient to convince it of the fact. But, although this is so, I the respect paid to a judicial determination of a fact between parties (which in civil actions is evidenced by its creating a binding estoppel) would, I should presume, in ordinary cases lead the court to consider the fact of the cruelty to be adequately established by the production of the decree."

FARWELL, L.J., said (6), that the judge ". . . would have been free to require evidence of cruelty, even if the order had found cruelty on the face of it . . ."

(4) [1909] P. 123. (5) [1909] P. at p. 142.
(6) [1909] P. at p. 146.

KENNEDY, L.J. (7), took the view that a decree of judicial separation ought not to be treated in regard to matters on which the decree is based as constituting either conclusive proof by way of estoppel, or even as constituting prima facie proof, in the sense of being evidence on which, in the absence of proof by the adverse party, the court would be bound. *Harriman* v. *Harriman* (8) remained the authority on this point until 1937, when it became the subject of legislation. Into the Matrimonial Causes Act, 1937, s. 6, there was introduced the words which are now found in s. 7 of the Matrimonial Causes Act, 1950:

> "(1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, upon the same or substantially the same facts as those proved in support of the petition for divorce.
>
> "(2) On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion, or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner."

The section was thus, I think, adopting the approach of FLETCHER MOULTON, L.J., rather than that of KENNEDY, L.J. Since 1937, there has been an expression of opinion by LORD GREENE, M.R., in *Kara* v. *Kara and Holman* (9), on the weight to be attached to a magistrate's order: "There may, however, be something less than an estoppel, i.e., the findings may be treated as of strong probative value". And again (10):

> "A finding of a court of summary jurisdiction against one of the parties to a divorce suit who is accused of a matrimonial offence may be admitted as evidence that he or she has committed the offence charged, but, in our opinion, this does not absolve the court from examining the evidence given at the trial on the issues there raised."

The wife, therefore, in this case started on strong ground. She had in her favour the order of an experienced magistrate made when the evidence of the parties was still fresh. This, though in no sense conclusive, was prima facie of strong probative value. It is true that the wife was represented, and that the husband was not. But the learned magistrate appears to have recalled the wife to put some questions to her on behalf of the husband. It is true that, apparently, the husband was not furnished with particulars, but that is a matter of which, no doubt, the magistrate was aware. After hearing the case, he made a non-cohabitation order, which seems to indicate (especially as the parties were young, and the husband was willing for a reconciliation) that the magistrate found it to be a serious case of cruelty. No safe inference can be drawn from the fact that the wife applied first for a summons on the ground of desertion, and then, before the hearing of the evidence, asked for a further summons on the ground of cruelty. For when a cruel husband has left home, it is, in my experience, not infrequent for a case to be started as a case of simple desertion, thus avoiding much recrimination and expenditure of time. When, however, it is found that the husband is offering to return, it becomes necessary for the wife and her advisers and the court to embark on the full rigours of a cruelty case.

Although a wife starts on strong ground, as here, with an order in her favour—an order having the effect of a decree of judicial separation—it is always possible that the Divorce Court will, after hearing the evidence on both sides, conclude that, for some reason, the first court did not have the same advantage for ascertaining the truth as the Divorce Court has, and that it was mistaken in its view. On forming a firm opinion on credibility, it may feel itself compelled to disregard

(7) [1909] P. at p. 156.
(8) [1909] P. 123.
(9) [1948] 2 All E.R. at p. 17; [1948] P. at p. 288.
(10) [1948] 2 All E.R. at p. 17; [1948] P. at p. 289.

A the order in her favour. But it must do so with a realisation that the order is prima facie of definite probative value. It should, in my view, remember that against the advantage of a more leisurely and scientific investigation in the Divorce Court must be weighed the advantage of a more contemporary and direct confrontation of the parties and their stories in the magistrates' court before time and the reiteration of their stories to their advisers has had its effect. The weight B of these respective advantages will, of course, depend on circumstances. If the court does not put the order into the scales on her side at all, the matter is not properly weighed. How does the learned commissioner deal with this? He says:

> "Of course, the onus of proving the cruelty in each case rests upon the party alleging it, and the wife has come here and told a story of which there is absolutely no corroboration at all. I do not regard the doctor's evidence as C materially corroborating the wife's story, and one thing I noticed about that evidence was he said the wife came to see him because she said she had a sore throat; he made up his mind she was suffering from an anxiety neurosis, or something of that kind. I have to make up my mind whether I believe the wife's uncorroborated evidence and I do not. It is the most remarkable story that she told, and it was supported, if that is support, really by nothing D much more than the fact that she had obtained an order from the learned stipendiary magistrate, an order on the ground of her husband's desertion and persistent cruelty. I am not bound by that order, and I confess, in the circumstances, I am not quite sure why it was made. Now, when one tests the wife's story it seems to me that it breaks down in many places. Even when she was going to the magistrates to try and obtain an order against her hus- E band and she took out her summons there was nothing about cruelty, not a word; cruelty was introduced only at the first hearing by an amendment adding a charge of cruelty, and I am satisfied that the husband, who was not represented legally at the hearing, was not put into a position properly to defend himself against the charge of cruelty."

F With all respect to the learned commissioner, that is, in my judgment, a misdirection. A wife who has obtained an order in her favour cannot properly be described as having no corroboration at all. He goes on to say that the strangling incident, which was admittedly spoken of by the wife at the magistrates' court, could not conceivably be true because it was not there mentioned by her until she was recalled. In my view, so compelling an inference should not be drawn. The commissioner then deals with an allegation about a blow on her arm which he G disbelieves, and says:

> "In those circumstances, I think the wife has wholly failed to satisfy the onus that is on her to make out a charge of cruelty which she alleges against her husband."

He appears to have disregarded the corroboration afforded to the wife's story H to some extent by such admissions by the husband in the magistrates' court as that he had used some violence to her and struck her, that ninety per cent. of his violence was to restrain her, and that he would not say that she always got the worst of it. With all respect to the learned commissioner, I feel compelled to the view that he misdirected himself, and did not give adequate weight to the matters in the wife's favour. Thereby the findings in respect of the wife's prayer are I vitiated. This applies with possibly even greater force to the decree in the husband's favour. I would, accordingly, allow the appeal.

I must not be taken to express any opinion whatever whether either, both, or neither are entitled to a decree. In this kind of case a transcript is very little guide. The parties have differently impressed the magistrate and the learned commissioner, both persons of experience. It may well be that, at the re-hearing, the judge will take the same view on credibility as the learned commissioner; but if he does, that view must be taken after giving due consideration to the probative value of the decree and any corroboration by way of admissions.

The appeal from the Divisional Court, therefore, becomes academic. But, out of deference to the Divisional Court and to counsel's careful argument, it is necessary to express an opinion on it. Rule 36 reads:

> " (1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate, Divorce and Admiralty Division . . .
>
> " (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal."

The question whether a case should go by application to the Divisional Court or by appeal to the Court of Appeal, therefore, turns on whether an " error of the court at the hearing is alleged ". Those apparently simple words create great difficulties when they are scrutinised in relation to particular circumstances. Obviously error is not alleged by an allegation that the court came to the wrong decision, since, if it had not done so, there could be no application to either court.

In *Manners* v. *Manners and Fortescue* (11), SIR BOYD MERRIMAN, P., dealt clearly with the origin of the jurisdiction under r. 36 as it now is. In later cases—*Winter* v. *Winter* (12); *Petty* v. *Petty* (13); *Peek* v. *Peek* (14), LORD MERRIMAN, P., in particular and other judges sitting with him in the Divisional Court have indicated the dividing line between cases that properly come within r. 36 (1) and cases that should go to the Court of Appeal under r. 36 (2), and expressed an insistence that the Divisional Court should avoid trespassing on the exclusive jurisdiction of the Court of Appeal. LORD MERRIMAN, P., summed up the dividing line succinctly in the latter case (15):

> " Is the allegation which is made against the decision an allegation that the court went wrong on the materials before it, or is it an allegation that the court went wrong because evidence on a vital matter was concealed from the court?"

WALLINGTON, J., also said (16):

> " It seems to me that one of the objects of r. 36 is to enable this court to secure, as far as possible, that there shall be a trial of the real issue between the parties before permitting an appeal to the Court of Appeal . . . The effect of the rule, as I understand it, is this:—If a party to a motion comes to this court and, either expressly or by necessary implication, alleges that the judge who heard the case to which the motion relates made such a mistake or error as resulted in a wrong conclusion, then the matter is not one for this court but is one that must go to the Court of Appeal in the ordinary way."

The observations of LORD MERRIMAN, P., and WALLINGTON, J., were expressly approved by TUCKER and SOMERVELL, L.JJ., in the Court of Appeal (17). In *Prince* v. *Prince* (18), SIR RAYMOND EVERSHED, M.R., reading the judgment of the court, made a careful analysis of the cases. The facts in that case were these. A wife charged with adultery had rebutted the evidence of adultery by swearing that a married woman neighbour had been in the house at the crucial times. The neighbour was not called, and the wife succeeded. The husband's solicitor traced the neighbour, who stated that she had not been anywhere near the house at the material times. The husband made no application to the Court of Appeal, but rested his case solely on the application to the Divisional Court. That court dismissed the application on the ground that it had no jurisdiction to entertain it since the husband could have applied to the Court of Appeal on the

(11) [1936] 1 All E.R. 41; [1936] P. 117.
(12) [1942] 2 All E.R. 390; [1942] P. 151.
(13) [1943] 2 All E.R. 511; [1943] P. 101.
(14) [1947] 2 All E.R. 578; [1948] P. 46; *affd.* C.A., [1948] 2 All E.R. 297.
(15) [1947] 2 All E.R. at p. 585; [1948] P. at p. 60.
(16) [1947] 2 All E.R. at p. 585; [1948] P. at p. 61.
(17) [1948] 2 All E.R. at pp. 302, 303. (18) [1950] 2 All E.R. 375; [1951] P. 71.

A ground that the judge's decision was against the weight of evidence, and asked for leave to call fresh evidence before the Court of Appeal, and because the husband's complaint necessarily alleged error on the part of the court in wrongly estimating the evidence. In the judgment of the court in *Prince* v. *Prince* SIR RAYMOND EVERSHED, M.R., said (19):

B "Before passing from *Peek* v. *Peek* (20) we would point out: (a) So far as the question of trespassing on the exclusive jurisdiction of the Court of Appeal is concerned, the defended case stands in a different light from the undefended case. If undefended, the respondent has in the ordinary course no right of appeal. If defended, the respondent has a right of appeal, and a further right in certain circumstances to call fresh evidence. In such a case the Court of Appeal may either hear the fresh evidence and dismiss the suit, or order C a re-hearing, or dismiss the appeal. (b) Where the case is defended, and the trial judge on the vital issues prefers one set of witnesses to the other set, it appears to us that an error in the court at the hearing is, and must be, alleged if it is sought to call further evidence in order to try to persuade the court on a re-hearing that the judge's preference was erroneous. We think there is a difference, albeit a fine one, between an incorrect selection of D conflicting testimony and an erroneous inference drawn therefrom, and an inference drawn from undisputed evidence which was justifiable on the materials before the court, although subsequently proved to be incorrect."

And again (21):

"Though the distinction is a fine one there is, we think, a real difference E between such a case as that supposed where the judge having evidence before him has (erroneously), failed to accept it or to draw the right inference from it, and the case earlier mentioned where the judge because the evidence has been unchallenged and could not be tested, had, in effect, no option but to accept it. The distinction corresponds with the presence or absence of jurisdiction in the Court of Appeal. In the former case the unsuccessful party F alleges (as in the latter he does not) error in the court. In the former case we think the Divisional Court would not have jurisdiction under r. 36, because the Court of Appeal has it and because error in a limited sense at least must be alleged."

I can find no justification for drawing a distinction between documents and oral evidence. There is no relevant difference between cases where a missing document G could have shown the judge where the truth lay, and cases where a missing witness could have done so. One cannot, therefore, distinguish *Prince* v. *Prince* (22) on that ground.

Counsel for the wife sought to argue that "error is alleged" meant alleged for the purpose of the application under r. 36 (1), and that the fact that an appeal on another point is going to the Court of Appeal can be disregarded. But in H *Wells-King* v. *Wells-King* (23) the Divisional Court rejected such an argument. LORD MERRIMAN, P., said (24):

"In effect, having taken appropriate steps to ensure that they were in time, whichever way the spin of the coin resulted, we are now asked to deal in isolation with one aspect of a matter which seems to me to be indivisible."

I The court held that regard should be had to the case as a whole; and since the case, if so regarded, was one in which error of the court at the hearing was being alleged, the appeal should be dealt with by the Court of Appeal under r. 36 (2). I agree with LORD MERRIMAN, P., in his judgment in the present case when he

(19) [1950] 2 All E.R. at p. 383; [1951] P. at p. 82.
(20) [1947] 2 All E.R. 578; [1948] P. 46.
(21) [1950] 2 All E.R. at p. 384; [1951] P. at p. 83.
(22) [1950] 2 All E.R. 375; [1951] P. 71.
(23) [1955] 1 All E.R. 585.
(24) [1955] 1 All E.R. at p. 587.

says that it remains an open question whether

> " it may be immaterial to consider what happened at the trial, provided that the party seeking a re-hearing is basing his whole case on something quite irrespective of the course the case in fact took on the material before the court "

(see per SIR RAYMOND EVERSHED, M.R., in *Prince* v. *Prince* (25) commenting on the dicta of TUCKER and SOMERVELL, L.JJ., in *Peek* v. *Peek* (26)). I also agree with LORD MERRIMAN, P., that the point does not help the applicant in this case since she is certainly not basing her whole case on the absence of the letters. She has a contemporaneous appeal to the Court of Appeal on misdirection, and thereby she is in an even more difficult position than was the applicant in *Prince* v. *Prince* (27). I do not find it possible to distinguish the present case from the decision and reasoning of *Prince* v. *Prince* (27). I accordingly agree with the decision of the Divisional Court, and I would dismiss the second appeal.

The first appeal will, therefore, be allowed, the judgment of the learned commissioner and decree on the answer will be set aside, and a re-hearing will be ordered. The second appeal will be dismissed.

WILLMER, L.J.: The appeal from the judgment of the learned commissioner has caused me a good deal of difficulty and doubt, but in the end I have felt driven to agree with the view expressed by HOLROYD PEARCE, L.J., that there must be a new trial. I reach this conclusion with regret, for I recognise that it is no light matter to impose on the parties the burden and worry of further litigation, which may in the end lead to the same result. In view of the importance of the case, and the doubts which I have entertained, it is as well that I should briefly express in my own words the reasons which have led me to my conclusion.

There can be no room for doubt that the learned commissioner was in error in saying that there was absolutely no corroboration of the wife's story. For this was to ignore the effect of the order which she had obtained from the learned magistrate. Since the order contained a non-cohabitation clause, it had the effect in all respects of a decree of judicial separation on the ground of cruelty. Under s. 7 (2) of the Matrimonial Causes Act, 1950, the court may treat such an order as sufficient proof of the cruelty in respect of which it was granted, subject to the requirement that it shall not pronounce a decree of divorce without receiving evidence from the petitioner. The court is not, of course, in any way bound by the order, but it has been said over and over again that the existence of such an order is a matter to which the court should attach great importance. For instance, LORD GREENE, M.R., in *Kara* v. *Kara and Holman* (28), described such an order as " of strong probative value ", and later in his judgment said that it " may be admitted as evidence " of the offence charged. One compelling reason for giving great weight to a magistrate's order lies in the fact that such an order is normally made on evidence given at a time when the recollection of the parties can be supposed to be fresh. The order itself being of evidential value, it was, accordingly, wrong to say that there was no corroboration of the wife's story. Moreover, the judgment of the learned commissioner does not disclose that he attached any great significance to the order. It is true that he referred to it, but only to say that he was not bound by it, and was not quite sure why it was made.

My difficulty has been to satisfy myself that, assuming (as I think we must) that the learned commissioner misdirected himself in disregarding the probative value of the order, such misdirection in the end had any effect on the result of the case. Wrong as it was to say that there was no corroboration of the wife's story, it is easy to see what the commissioner really meant, and, in a sense, it is

(25) [1950] 2 All E.R. at p. 383; [1951] P. at p. 82.
(26) [1948] 2 All E.R. at pp. 302, 303.
(27) [1950] 2 All E.R. 375; [1951] P. 71.
(28) [1948] 2 All E.R. at p. 17; [1948] P. at pp. 288, 289.

A perfectly true. Neither before the magistrate, nor at the trial before the commissioner, did the wife produce any other witness to support any part of her story. On the other hand, on behalf of the husband two other witnesses were called at the trial, each of whom gave evidence to support at least a part of his case. The learned commissioner was well entitled to take this into account, as he did. Moreover, he had the advantage of seeing the parties and their witnesses, and was entitled B to form his own conclusion as to their credibility. The wife told a story which, in some respects at least, was certainly a very remarkable one, and the learned commissioner made it clear that he simply did not believe her evidence. We, who have not had the advantage of hearing the wife's evidence, are bound to pay the utmost respect to the learned commissioner's assessment of her credibility. If the matter rested there—if we were concerned only with the wife's evidence C and the wife's charges of cruelty against the husband—I think that, notwithstanding the learned commissioner's misdirection of himself, it would be difficult, if not impossible, for us to interfere in face of his plain rejection of the wife as a witness. But this is by no means the end of the matter, for we have to consider in addition the evidence given by the husband and his witnesses and the cross-charges of cruelty which the husband brought against the wife, on which he has been D granted relief. It is here that I think the learned commissioner's judgment is most open to attack, and his error in disregarding the importance of the magistrate's order becomes of vital relevance. The husband also had a very remarkable story to tell. Since he pronounced in favour of the cross-prayer, it is to be inferred that the learned commissioner must have accepted at least a considerable part of the husband's evidence as true, though he did not say so in terms. His judgment E does not disclose what view he formed of the husband's credibility; nor, in the very brief part of it which deals with the husband's cross-charges, is there any really critical examination of the allegations he made. At the hearing before the learned magistrate, it appears from the note of his evidence that the husband made a number of significant admissions, particularly in relation to his use of violence against his wife from time to time. These admissions ill accord with his F almost total denial at the trial of the use of any violence against his wife. The note of the evidence given before the learned magistrate was before the commissioner at the trial, who referred to it more than once in the course of criticising the wife's evidence. But, in so far as it assisted her, and was against the husband, he appears to have attached to it no more significance than he attached to the making of the magistrate's order. Yet this note of evidence was highly relevant, G not only to the assessment of the husband's own evidence and to the validity of his cross-charges, but also as part of the material properly to be taken into consideration in evaluating the wife's evidence.

In these circumstances, I am driven to the conclusion that the learned commissioner's decision was arrived at without giving due weight to all the evidential material that was before him. He may or may not in the end prove to have come H to the right conclusion. But the parties are entitled to have a trial in which all the relevant evidence is duly weighed. In the end I have come to the conclusion that this is just what the parties have not had, and I, therefore, agree that the only course we can take is to direct that there be a new trial. The effect of this direction is to solve immediately the problem with regard to the letters which the wife has now produced; for it is clear that, at the new trial, they can be adduced I in evidence, together with any other evidential material that is available. I refrain from expressing any opinion on the submission that these letters put a wholly different complexion on the case. It will be for the judge at the new trial to assess their significance.

In view of our decision on the main appeal, the question debated on the appeal from the Divisional Court becomes of little more than academic interest. But, since the matter has been fully argued, I think it right to say that I agree with HOLROYD PEARCE, L.J., in thinking that the Divisional Court came to a right conclusion. We have very properly been referred to most of the cases in

which the effect of r. 36 and its predecessor has been considered. I do not think it is necessary to mention more than two of them. In my judgment, we are bound, and the Divisional Court rightly held themselves bound, by the decision of this court in *Prince* v. *Prince* (29). I think, moreover, that that case must be regarded as approving the earlier decision of the Divisional Court in *Petty* v. *Petty* (30), the facts of which appear to me to be indistinguishable from those of the present case. There, as here, it was alleged that, in the light of further evidence that had come to light since the trial, there was good reason for thinking that the trial judge had believed the wrong set of witnesses. It is true that there the further evidence obtained consisted of the statements of certain additional witnesses whom it was desired to call, whereas here it consists of certain letters that have been brought to light. But that seems to me to be a distinction without a difference; for further evidence is further evidence, alike whether it is oral or documentary. In *Petty* v. *Petty* (30), LORD MERRIMAN, P., after referring to two earlier cases (31) which, he said, were "clearly on the right side of the line", proceeded (32):

> ". . . equally it seems to me impossible to assert that a case in which a judge having seen both spouses and their respective teams of witnesses and having deliberately attached the credibility to one side and not to the other, and in which this court is asked to say that the production [of further evidence will] induce some other tribunal to say that the judge believed the wrong set of witnesses, is on the same side of the line or that it is possible to assert of such a case that no error of the court at the hearing is alleged."

In *Prince* v. *Prince* SIR RAYMOND EVERSHED, M.R., said much the same thing; that is the passage which HOLROYD PEARCE, L.J., has already read [see p. 951, letters B and C, ante] and I do not, therefore, take up time by repeating it. At the conclusion of his judgment SIR RAYMOND EVERSHED, M.R., summarised the purpose and scope of r. 36 as follows (33):

> ". . . rule 36 was intended, or ought to be treated as having been intended, to give or preserve to a Divisional Court (because of the peculiar public concern in matrimonial matters) the right to order a new trial or a re-hearing in cases in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal. If this view is right, then it appears to us that by the phrase 'no error of the court at the hearing is alleged' it was intended to exclude all cases in which an aggrieved party might seek, on application according to the ordinary general procedure of the Court of Appeal, to challenge as erroneous the conclusion of the judge at the trial or hearing in the court below."

This is in line with the view of LORD MERRIMAN, P., expressed in more than one of the cases referred to, that r. 36 cannot be so invoked so as to involve the Divisional Court trespassing on the exclusive jurisdiction of the Court of Appeal. If the Court of Appeal has jurisdiction, the Divisional Court has not. In a case such as the present, there can be no room for doubt that the Court of Appeal has jurisdiction to entertain an application to admit further evidence. I do not think it is any answer to say, as counsel for the wife sought to say, that, in practice, the Court of Appeal would probably refuse the application in accordance with the principles stated in *Ladd* v. *Marshall* (34). The jurisdiction of the Divisional Court cannot depend on their estimate of whether an application to the Court of Appeal for leave to adduce further evidence would be likely to succeed or not.

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(29) [1950] 2 All E.R. 375; [1951] P. 71.
(30) [1943] 2 All E.R. 511; [1943] P. 101.
(31) *Winter* v. *Winter*, [1942] 2 All E.R. 390; [1942] P. 151; *Harriman* v. *Harriman*, [1909] P. 123.
(32) [1943] 2 All E.R. at p. 514; [1943] P. at p. 104.
(33) [1950] 2 All E.R. at p. 384; [1951] P. at p. 85. (34) [1954] 3 All E.R. 745.

A I would add that, in *Wells-King* v. *Wells-King* (35) it was held by the Divisional Court that in a case where, as here, an appeal to the Court of Appeal was already pending on another aspect of the case, that fact alone furnished a reason for holding that the whole matter should be dealt with by the Court of Appeal, and the application to the Divisional Court under r. 36 should be refused. As at present advised, I see no reason to dissent from the view there expressed. B For these reasons I agree that the main appeal should be allowed, and a new trial ordered, but that the appeal from the Divisional Court should be dismissed.

DAVIES, L.J.: So far as concerns the appeal from Mr. Commissioner REWCASTLE, I agree that the appeal should be allowed, the decree set aside, C and a re-hearing of the suit ordered. As we are differing from the learned commissioner, it may be as well that I should add my reasons, albeit at the risk of repetition. In view of the fact that the court is ordering a re-hearing, it is advisable that I should refrain from saying more about the facts of the case than is absolutely necessary.

As my Lords have said, s. 7 (2) of the Matrimonial Causes Act, 1950, provides, D so far as is applicable to this case, that on a petition for divorce the court may treat a magistrate's order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, as sufficient proof of the cruelty on which it was granted. It is plain from this enactment that the magistrate's order is in subsequent proceedings in the Divorce Division admissible evidence of the facts on which it was made. It is not conclusive evidence: it raises no estoppel E per rem judicatam: *Hudson* v. *Hudson* (36). But to use the words of LORD GREENE, M.R., already cited by HOLROYD PEARCE, L.J., in *Kara* v. *Kara and Holman* (37) it "may be treated as of strong probative value". In the same case, LORD GREENE, M.R., went on to say (38):

> "A finding of a court of summary jurisdiction against one of the parties to a divorce suit who is accused of a matrimonial offence may be admitted F as evidence that he or she has committed the offence charged."

For myself, I should prefer to say that it is admissible in evidence and may be acted on. That is the effect of the observations of DENNING, L.J., in *Thompson* v. *Thompson* (39), where he said:

> "In the subsequent divorce proceedings, the court may treat the prior decree as sufficient proof of the cruelty, but it is not bound to do so. G The court can, if it thinks fit, inquire into the charge of cruelty all over again. It will admit the prior decision as evidence of the cruelty, but not as conclusive."

In the present case, therefore, we have the position that, on May 15, 1958, there was a finding by an experienced metropolitan magistrate, MR. ROBEY, four H months after the separation that the husband had treated the wife with persistent cruelty. And the view which the learned magistrate took of the case was such that he made, in addition to a maintenance order, a separation order. That order was, as I have said, in no way binding on the learned commissioner, but it was plainly entitled to respect and serious consideration. Such an order has, I believe, from time to time been described as amounting, in subsequent I proceedings for divorce on the same grounds, to statutory corroboration of the evidence of the person who obtained it. The expression "statutory corroboration" may not be an exact one. But, as the order is itself by statute evidence of the grounds on which it was obtained, it is obviously quite wrong in subsequent divorce proceedings, where the person who obtained it is the only witness, to

(35) [1955] 1 All E.R. 585. (36) [1948] 1 All E.R. 773; [1948] P. 292.
(37) [1948] 2 All E.R. at p. 17; [1948] P. at p. 288.
(38) [1948] 2 All E.R. at p. 17; [1948] P. at p. 289.
(39) [1957] 1 All E.R. at p. 165; [1957] P. at p. 29.

say, as did the commissioner, that there is absolutely no corroboration at all. The evidential value and weight of the order may vary from case to case. An order obtained in default of defence may be of little weight. The fact that, as in the present case, the wife who obtained the order was represented by solicitor and counsel, while the husband appeared in person, is obviously a matter to be considered. On the other hand, it must always be remembered that, in the majority of cases and in the nature of things, the court of summary jurisdiction adjudicates at a time much closer to the events in dispute, and when those events are much fresher in the recollection of the parties than at the subsequent proceedings in the High Court.

In my judgment, it is essential that the judge or commissioner who hears such a case should give due weight and consideration to the magistrate's order. If, at the end of it all, he comes on the evidence before him to a conclusion different from or opposite to that reached by the court of summary jurisdiction, well and good. He is perfectly entitled so to do. But to brush aside and ignore the order and merely to say "I am not quite sure why it was made" is quite wrong and quite unsatisfactory. The attitude adopted by the learned commissioner in this regard indicates to me that he approached the case without proper regard to s. 7 (2) of the Act of 1950, and the cases decided thereon.

In passing, it is to be noted that the emphasis laid by the commissioner on the fact that the wife's complaint before the magistrate was originally on the ground of desertion only and that the charge of persistent cruelty was a later addition, and that, therefore, the inference should be drawn that there was little or no substance in the charge of cruelty was somewhat dangerous. A wife whose husband has left her may be able to obtain an order on desertion, simple desertion. If, however, the husband offers to resume cohabitation, as this one did, then a charge of simple desertion will avail the wife nothing. It would be equally pertinent to point out, first, that this husband, who at the hearing of the petition alleged and succeeded in establishing that his wife had treated him with cruelty, was before the magistrate reiterating that he was anxious to resume cohabitation with his cruel wife, and, secondly, that, when subsequently she petitioned for divorce on the ground of cruelty, he at first was allowing the petition to go undefended.

There is one other matter to which reference should be made on this part of the case, although it forms no part of the wife's notice of appeal. It is plain from the notes of the evidence given before the magistrate that the husband there admitted that, from time to time, he used violence on his wife, though, summing the matter up, he said that "ninety per cent. of my violence was to restrain her". Clearly those admissions were some corroboration (for what they were worth) of the wife's evidence; and the only trace of any reference to them in the judgment is in the passage where the commissioner says: "I think she did start these fights, at any rate for the most part, by attacking the husband."

In my judgment, by paying insufficient attention and giving insufficient consideration to the evidentiary value of the magistrate's order and by approaching the case on the basis that the wife's evidence was absolutely uncorroborated, the learned commissioner approached his determination of the case in the wrong way, and the trial therefore was unsatisfactory.

Counsel for the husband sought to persuade us that, even if we were to come to the conclusion that the commissioner had, for the reasons stated, erred in law and misdirected himself in his approach to the case, nevertheless the evidence in favour of the husband was so overwhelming and the wife's evidence so demonstrably unsatisfactory, that the judgment ought not to be disturbed. This argument really amounts to a submission that there was no substantial miscarriage of justice. It is, in my view, impossible to give effect to that submission. The case was decided on the basis of a fundamental misconception of the proper approach to the issues to be decided, and, as my Lord has said, a

A case of this kind is pre-eminently one of those which cannot be determined on a transcript. What the result of a re-hearing will be, I have no idea. The result may be the same. The wife may win. There may be decrees for both parties. There may be a decree for neither.

On the appeal from the Divisional Court, I wish to add nothing whatsoever save to express my complete agreement with what has been said by my Lords.

B *Appeal from His Honour Judge Rewcastle, Q.C, allowed; decree for the husband set aside and new trial ordered. Appeal from judgment of Divisional Court dismissed.*

Solicitors: *Evan Davies & Co.* (for the appellant wife); *E. Kleinman* (for the respondent husband.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

C

BREWER *v.* BREWER.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Davies, L.JJ.), October 18, 19, 23, 24, 1961.]

D *Divorce—Desertion—Termination—Conduct of deserted spouse causing deserting spouse to desist from attempting reconciliation—Impact on mind of deserting spouse—Question of fact—Communication of refusal of reconciliation having no effect on mind of deserting spouse—Whether desertion terminated.*

If what a deserted husband has said or done has in fact caused his wife to desist from making any attempt at reconciliation which she would otherwise have made, he cannot thereafter complain that she has persisted without cause in her desertion, and his conduct thus brings her state of desertion to an end (see p. 964, letter A, post); but, where the deserted husband satisfies the court that his declared refusal of reconciliation had or, if communicated to the wife, would have had, no effect at all on her, there is no rule of law that desertion is necessarily ended by it (see p. 968, letters D and E, post).

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F Dictum of LORD MACMILLAN in *Pratt* v. *Pratt* ([1939] 3 All E.R. at p. 438) adopted by LORD ROMER in *Cohen* v. *Cohen* ([1940] 2 All E.R. at p. 335), explained.

The parties were married in 1945, and the husband at all material times was serving in the Royal Air Force. The husband tried to persuade the wife to come and live with him at the various places where he was stationed but the wife never joined him. In July, 1955, the wife wrote a letter to the husband in which she said that she would never come to live with him at his service station. In February, 1956, the husband wrote to the wife saying, in effect, that he had made up his mind that he was never again going to live with her. A week later the wife visited the husband, and at an interview with him was only willing to go on with the marriage on the basis that the matrimonial home remained near her family, regardless of where the husband's service might take him. In 1961 the husband was granted a decree nisi on the ground that the letter from the wife in July, 1955, constituted her a deserting party. On appeal by the wife,

G

H

I **Held:** in order to determine whether a deserted spouse had so acted as to bring to an end the desertion of which he or she complained it was necessary to consider the facts of the case (see p. 965, letter G, post) so as to ascertain what was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse, and the question was peculiarly one for the trial judge who had the advantage of seeing and hearing the parties; in the present case, the evidence justified an inference that the husband's letter of February, 1956, had no effect on the wife's mind, since she already had a fixed intention to desert, and, accordingly, the appeal would be dismissed.

Dictum of SCOTT, L.J., in *Tickler* v. *Tickler* ([1943] 1 All E.R. at p. 59) applied.

Appeal dismissed.

[As to the defence of subsequent termination of desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 263, para. 500; and for cases on the defence, see 27 DIGEST (Repl.) 360, *2978* et seq.

As to the presumption that a state of desertion continues, see 12 HALSBURY'S LAWS (3rd Edn.) 345, para. 457; and for cases on the subject, see 27 DIGEST (Repl.) 358-360, *2965-2977*.]

Cases referred to:

Barnett v. *Barnett*, [1954] 3 All E.R. 689; [1955] P. 21; [1955] 2 W.L.R. 229; 3rd Digest Supp.

Beigan v. *Beigan*, [1956] 2 All E.R. 630; [1956] P. 313; [1956] 3 W.L.R. 281; 3rd Digest Supp.

Bevan v. *Bevan*, [1955] 3 All E.R. 332; 119 J.P. 576; [1955] 1 W.L.R. 1142; 3rd Digest Supp.

Blunt v. *Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 27 Digest (Repl.) 429, *3589*.

Bowron v. *Bowron*, [1925] All E.R. Rep. 148; [1925] P. 187; 94 L.J.P. 33; 132 L.T. 773; 89 J.P. 43; 27 Digest (Repl.) 711, *6788*.

Church v. *Church*, [1952] 2 All E.R. 441; [1952] P. 313; 3rd Digest Supp.

Cohen v. *Cohen*, [1940] 2 All E.R. 331; [1940] A.C. 631; 109 L.J.P. 53; 163 L.T. 183; 27 Digest (Repl.) 362, *2996*.

Fishburn v. *Fishburn*, [1955] 1 All E.R. 230; [1955] P. 29; [1955] 2 W.L.R. 236; 3rd Digest Supp.

Herod v. *Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, *2978*.

Pratt v. *Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest (Repl.) 350, *2895*.

Sifton v. *Sifton*, [1939] 1 All E.R. 109; [1939] P. 221; 108 L.J.P. 131; 27 Digest (Repl.) 324, *2697*.

Tickler v. *Tickler*, [1943] 1 All E.R. 57; 27 Digest (Repl.) 366, *3035*.

Appeal.

Appeal by the wife from a judgment of Mr. Commissioner LATEY, Q.C., given on Feb. 14, 1961, whereby he granted a decree nisi to the husband on the ground of the wife's desertion. The facts are set out in the judgment of WILLMER, L.J.

R. J. A. Temple, Q.C., and *J. G. St. G. Syms* for the appellant wife.

E. D. Sutcliffe, Q.C., and *J. H. Ellison* for the respondent husband.

WILLMER, L.J., at the request of HOLROYD PEARCE, L.J., delivered the first judgment: This is an appeal from a judgment of Mr. Commissioner LATEY, Q.C., given on Feb. 14, 1961, whereby he granted a decree of divorce to a husband on the ground of desertion on the part of the wife. The petition, which is dated Aug. 25, 1958, alleges desertion from July 7, 1955. The learned commissioner exercised his discretion in favour of the husband, who had been guilty of adultery which he disclosed in his discretion statement. He had in fact been living with another woman since about March, 1956. The wife's answer in its original form denied desertion, and alleged that the husband was guilty of desertion, but it contained no cross-prayer for relief. However, by an amendment made on Apr. 2, 1960, a prayer for divorce by the wife was added on the ground, first, of the desertion that she alleged, and secondly, on the ground of the husband's admitted adultery. It should be said that the wife was aware of the fact of the husband's adultery, though it appears that she did not know the full circumstances of it. When it came to the trial, the wife, while adhering to her allegations, once again renounced any claim for relief. The trial, therefore, was concerned only with the question whether the husband was entitled to relief.

A As is not uncommon in these cases, there was considerable dispute as to the facts. The learned commissioner stated quite clearly that he preferred the evidence of the husband to that of the wife. He found that the wife was guilty of desertion commencing on July 7, 1955, and that thereafter she had done nothing to bring her desertion to an end. Further, he held that nothing which the husband afterwards did or said deprived him of the right to allege continuing desertion by B the wife. In particular, he held that the husband's adultery, though known to the wife, did not break the currency of desertion, since the wife herself had said in evidence that she would have taken him back in spite of it, albeit on her own terms. The real rock on which the marriage split was the fact that the wife insisted on continuing to live near the home of her parents, whereas the husband, who was a serving member of the Royal Air Force, wanted her to come and live C with him at or near his station.

The point of difficulty in the case, and the main ground on which this appeal is based, arises from a letter written by the husband on Feb. 28, 1956, in which he said, in effect, that he had by then made up his mind that he was never again going to live with the wife. Counsel for the wife has argued, first, as a matter of law, that, on the basis of the learned commissioner's findings, and D having regard to certain admissions which the husband made in his evidence with regard to his state of mind, the effect of that letter was to terminate the wife's desertion (if she was then in desertion) because it put it out of her power ever to return to the husband. Secondly, he has argued in regard to the facts of the case, that there was no finding by the learned commissioner to the effect that the wife was not in fact influenced by the receipt of that letter; and, in the E absence of such a finding, it has been argued that the husband has not proved that the separation thereafter was without his consent, or without cause. Thirdly, he has argued that, in any case, the learned commissioner's finding that desertion began on July 7, 1955, was against the weight of evidence.

I must state the history of the matter as briefly as possible. The parties were married on July 21, 1945, at a time when they were both aged about twenty-four F years. At that time both of them were on service, the husband being in the Royal Air Force, and the wife being a member of the Women's Royal Air Force. The husband, it should be said, has remained throughout a member of the Royal Air Force. There is one child of the marriage, a daughter named Julia, who was born in March, 1947. I should further state that in August, 1954, the wife gave birth to a still-born child. At the beginning, the parties were only G able to cohabit during their respective leaves, and they made their home with the wife's parents at No. 83, Nelson Road, Gravesend. In September, 1945, the wife was demobilised, and she then took up work as a window dresser in Maidstone, though she continued to live with her parents at Gravesend. About that time the husband was posted to a station in Gloucestershire. Shortly afterwards, some time in 1946, he was sent to Dublin, and he in fact remained in Ireland H until 1949. This meant that the parties were still in a position to cohabit only when the husband had leave and was able to come across to England. It was during that time that Julia was conceived. It was the husband's case that throughout he was always trying to persuade the wife to come and join him and live at or near his station. The wife's case, on the other hand, was that the husband never really made any concrete offer of accommodation for her to go to. I Be that as it may, it is clear that gradually the parties drifted apart, and by 1948 the husband stopped coming home to the wife for his leaves. In August, 1948, he wrote a letter to the wife in which he suggested that the parties should go their separate ways. In the course of that letter he said that there was another woman in whom he was interested. In evidence, however, he told the learned commissioner that this was not in fact so, and that he only said so in the letter for the purpose of provoking the wife's jealousy. So matters drifted on. Though the husband returned to England at the end of his service in Ireland early in 1949, the parties did not meet except on two occasions. One of those occasions

was in January, 1949, immediately after the husband's return, when an abortive meeting arranged through a welfare officer took place. The other occasion was in September, 1951, when a meeting was arranged at the request of the husband. At that meeting, it appears that he invited the wife to divorce him, and went so far as to offer her £100 to assist her in doing so. In fact, however, nothing came of that, and the wife did nothing about it. Matters went on like that until October, 1953, when the husband once again approached the wife and a reconciliation took place. It has not, of course, been suggested that either party could be entitled to relief in respect of anything that happened in the period before 1953. The relevance of what took place during that early period is that the husband says that the wife's conduct during that period did amount in fact to desertion by reason of her persistent refusal to join him in Ireland. He says that her behaviour at that time was all of a piece with what subsequently happened in 1955, and, therefore, helps to support the inference that, when she then refused to join him, she did so animo deserendi. The learned commissioner, however, refused to draw the inference that the wife was in desertion during that earlier period. He was in some difficulty because, although the parties had obviously been corresponding a good deal, very few of the letters written were produced. There had not in fact been any order for discovery, and it appeared that letters were in existence which could have been produced, but which were not. Such letters, if produced, might or might not have supported the husband's story; but, in their absence, as I have said, the learned commissioner refused to draw the inference that the wife was in desertion. The conclusion he came to was that, at that period, the wife had not reached any definite decision to live apart from her husband, but that she was just allowing matters to drift.

As I have said, a reconciliation took place in October, 1953. The husband was then stationed in London. He approached the wife and invited her to have him back, which she did. He then discovered for the first time that, earlier in that same year, the wife had in fact acquired a house of her own at No. 18, Peckham Street, Northfleet, Northfleet being not very far from Gravesend. It was there that the parties resumed cohabitation, and they lived together there subject to the husband's absences in the course of his duties. It is clear that at first after their reconciliation the parties lived happily. The bundle of correspondence contains a certain number of letters written by the husband during that period in most affectionate terms. The wife became pregnant, and the pregnancy resulted, as I have stated, in the birth of the still-born child in August, 1954. The husband, however, said that, even during this period when they were living in their own home, the wife continued to be very much under the influence of her parents and her family, who were still living in Gravesend. As a result of the birth of the still-born child, the wife most unhappily had a breakdown in her mental health. She was in hospital for some weeks afterwards, and it appears that she remained under treatment for her mental condition of some sort or another until about August, 1955. The evidence, however, showed that the wife did slowly make a recovery, and by about May, 1955, she was able to go back to her work as a window dresser. In the meantime, about January, 1955, the husband had again been posted away, this time to Innsworth in Gloucestershire. He said in evidence that about May he started once more trying to persuade the wife to come and join him there and set up house together in that locality. In May, 1955, he wrote the wife a letter which is not without interest. It is a long letter and a curious one in this sense, that, while complaining of the wife's reluctance to come and join him, it couples those complaints with a number of protestations of his love and affection for her. He had evidently heard that the wife had started work, and the letter expressed his disapproval of her having done so. He also said that, in consequence of her doing so, he had stopped her allowance. The letter goes on, and I think it is worth quoting at some length:

A "I will start the money again as soon as we come to some understanding and as soon as you realise you have a husband who loves you and needs you, as I'm fed up with taking a back seat. Why can't we live happy like other couples I just don't know. As for you having an accident, I just can't swallow that. You have your mother and sister to help you. Why tell me, you are always rubbing it into me, that they do more for you than I do. B As soon as you pack up that house and come and live here with me the better. It's entirely up to you Shirley. You never appreciated anything I done for you, even when you were in hospital, and look at the tiffs we have (of course it's all my fault). I don't wish you to give up your family at all. I like your mother and dad and Edna and Harry but Shirley I'm your husband and I am not having my married life run by No. 83, as that is the C impression you give me. I love you darling with all my heart. I miss Julia terribly. I'm terribly lonely and fed up here, but it's no use me coming home to be unhappy for all the rows we have. I'm in love with you and I've been breaking my heart the last two weeks. I only wished you were in love with me. I promise you if we can live together, I shall do everything for you, but I can't stick living apart like this. So what are you D going to do about it? I will be taking some leave soon, and as soon as you pack up that job I will start my money to you again."

It is clear from the correspondence that other letters passed between the parties during this period, although they have not been produced. But eventually the wife wrote what I may call the vital letter of July 7, 1955, which is relied on as constituting her a deserting party, and in which she says:

E "Thanks for lettercard and letter. It seems strange writing to you after such a long time. I wish so much you could be a real husband to me and live this way. I just can't give up everything and come your way feeling as I do. Julia would never be happy (I'm sure). Don't you like living this way? Everyone here used to like you Ted, but nowadays you have made everyone dislike you by the way you act. Don't you like my way F of living? When you came back you were going to be so different. I shall always need my people Ted, but I need you so much too but if Julia and I can't be happy then we must part. What are you going to do? We shall never come there to live dear."

I need not read the rest of the letter, which is not material. In fact there has G been no cohabitation between the parties since the date of that letter.

It was about that time that the husband committed a single act of adultery with a woman—not the woman with whom he has since lived. There is nothing to show that the wife knew of this act of adultery, which, as far as I know, was disclosed for the first time in the husband's discretion statement; and neither at the hearing before the learned commissioner nor before us has any special H significance been attached to it. But between July, 1955, and early 1956 the husband said in evidence that he did make up his mind that he wanted no more to do with his wife. About January, 1956, he met the woman with whom he has since been living. He started committing adultery with her in March, 1956, and he has lived with her ever since. As the result of that union, a child was born in December, 1956. Meanwhile, on Feb. 28, 1956—that is to say, after he had I met this other woman, but before the adulterous association with her started—he wrote the letter that is much relied on by counsel for the wife, who contends that it had the effect of putting an end to desertion, if the wife was then in desertion. That letter I think I had better read in full. It is written from Innsworth, and says:

"Dear Shirley, I thank you for your letters which you have written me. I'm sorry I have not replied before, but I have been thinking over our marriage problem and after careful consideration and much thought the only thing we can do is to end all the unhappiness. So I am applying for a

divorce. The way you have acted and treated me since I've tried to make a go of our marriage has the decision been forced on me. Whatever you do or say can make no difference. My mind is made up. I do feel so sorry for Julia, but the years in front would only make it unhappy for her, and it's best to end it all at last. I did love you, but being alone and not wanted and with the past problems it's the only sensible thing to do. (I have also been warned for overseas service.) Please don't make things harder for me."

That letter was followed about a week later on Mar. 8, 1956, by the wife paying an unexpected and unheralded visit to the husband at his quarters at Innsworth. It was not a very happy interview. The accounts of it given by the two parties differ materially. The wife's account, as summarised by the learned commissioner in his judgment, was:

"She went there bent on a reconciliation and he rudely rebuffed her and smacked her face and said: 'I don't want to see you again'. She said that he wanted her to divorce him so that he could marry the other woman."

The husband's account, as summarised, was:

"The husband said more than once that at that interview she only wanted to go on with the marriage on her own terms, that he should live at Northfleet near her family. As I have said, he rudely rebuffed her when she said that she would never divorce him."

The learned commissioner made it clear that he accepted the husband's evidence of what took place at that interview in preference to the wife's where their accounts differed. We must accept the commissioner's conclusion, and, indeed, the contrary has not been argued. That involved that the wife was willing to go on with the marriage only on her own terms—that is to say, on the basis that the matrimonial home remained in Northfleet regardless of where the husband's service might take him. That interview is really the end of the story. The husband did write further letters to the wife during 1956 similar in terms to the one that I have already read; and later in the year he was in fact posted abroad on foreign service. Since then the parties have had no more to do with each other, and eventually in August, 1958, the husband presented this petition.

The learned commissioner found that the letter from the wife of July 7, 1955, constituted her a deserting party, and, in reaching that conclusion, he rejected a submission which was made to him that the wife at that time was still in an unstable state of mental health; he also rejected a submission that the husband had not been sincere in his invitations to the wife to join him. Having reached that conclusion in regard to the inception of the desertion, he applied what he described as the root principle established by *Bowron* v. *Bowron* (1) and *Sifton* v. *Sifton* (2). After referring to certain of the cases which had been cited to him, he said:

"None of these cases (3), however, appears to dissent from the root principle that once desertion has been established there is no obligation on the deserted spouse to appeal to the deserting spouse to change his or her mind; and as was stated by SCRUTTON, L.J., in *Bowron* v. *Bowron* (4), an intention to desert is presumed to continue unless the deserting party proves genuine repentance and makes reasonable attempts to get the deserted spouse back."

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(1) [1925] All E.R. Rep. 148; [1925] P. 187.
(2) [1939] 1 All E.R. 109; [1939] P. 221.
(3) *Sifton* v. *Sifton*, [1939] 1 All E.R. 109; [1939] P. 221; *Richards* v. *Richards*, [1952] 1 All E.R. 1384; [1952] P. 307; *Church* v. *Church*, [1952] 2 All E.R. 441; [1952] P. 313; *Bevan* v. *Bevan*, [1955] 3 All E.R. 332.
(4) [1925] All E.R. Rep. at p. 152; [1925] P. at p. 195.

A Then, after a reference to *Sifton* v. *Sifton* (5), the learned commissioner went on:

"I take the view that none of the later cases which have been cited dissent from the root principle which I have enunciated. In my view the approach made by the wife unexpectedly coming upon her husband in his mess-room was neither a genuine nor sincere offer to cleave to her husband whole-heartedly and without the conditions which she had always imposed B on him; and counsel for the husband has emphasised that the authorities laid down the principle that the deserter must do something effective to prove her penitence. Here she did nothing but aggravate the situation, and as for the effect on the wife's mind of the husband's admitted adultery in raising a possible barrier to their coming together, it would seem from the wife's evidence that she would have taken him back so long as he was C content to live with her near her parents, and therefore the principle in *Herod* v. *Herod* (6) applies to this case, and it is also in the interests of public decency, as expressed in *Blunt* v. *Blunt* (7) and other cases, that the husband should be enabled to marry the woman with whom he is living and legitimise the child of that union. My finding is that the wife deserted the husband in July, 1955, and has continued to do so thereafter."

D Counsel for the wife has argued that, even on the basis of the learned commissioner's findings of fact—which he contends must be taken in conjunction with the husband's frank admissions—the conclusion is erroneous in point of law. He complains that the learned commissioner never really faced the question of what was the effect in law of the husband's letter of Feb. 28, 1956, in which he made it abundantly clear that he had made up his mind never again to live with E his wife. While accepting that the presumption invoked in *Bowron* v. *Bowron* (8) and *Sifton* v. *Sifton* (5) is applicable in an ordinary case of simple desertion, counsel for the wife contended that there are cases (of which this is one) in which the deserted spouse cannot show that the desertion has continued, not because of any offer to return on the part of the deserting spouse, but because of supervening conduct on his or her own part. If, says counsel, a deserted spouse forms, F and communicates to the other spouse, a fixed intention never in any circumstances to resume cohabitation, that operates as a consent to the existing separation which terminates any desertion without cause, and absolves the deserting spouse from any obligation to return or make amends. The effect of such a communication, it is argued, is to put up a barrier against the possibility of the deserting spouse ever returning, and to remove one of the elements necessary G to constitute desertion. In support of this proposition, reliance is placed on the well-known statement of LORD MACMILLAN in *Pratt* v. *Pratt* (9), where he said:

"In fulfilling its duty of determining whether, on the evidence, a case of desertion without cause has been proved, the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If, on the H facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion."

This passage, although not necessary for the decision of that case, was expressly approved and adopted by LORD ROMER in *Cohen* v. *Cohen* (10), and must, I I think, be accepted as authoritative having regard to the fact that all the other members of the House expressed their concurrence with LORD ROMER.

It remains for consideration, however, exactly what LORD MACMILLAN meant when he spoke of the husband "making it plain" to his deserting wife that he

(5) [1939] 1 All E.R. 109; [1939] P. 221. (6) [1938] 3 All E.R. 722; [1939] P. 11.
(7) [1943] 2 All E.R. 76; [1943] A.C. 517.
(8) [1925] All E.R. Rep. 148; [1925] P. 187.
(9) [1939] 3 All E.R. at p. 438; [1939] A.C. at p. 420.
(10) [1940] 2 All E.R. at p. 335; [1940] A.C. at p. 638.

will not receive her back. He cannot have meant, I apprehend, that a deserting wife is entitled to take advantage of any chance statement that her husband may have made, irrespective of whether it had any effect on her mind. It seems to me that what LORD MACMILLAN must have meant was that a deserted husband cannot complain if what he has said or done has in fact caused his wife to desist from making any attempt at reconciliation which she otherwise would have made. If this view be right, it becomes obvious at once that the question whether the conduct of the husband was such as to bring the wife's desertion to an end cannot be treated, as counsel for the wife (at any rate at one point of his argument) appeared to invite us to treat it, as an abstract question of law. It becomes necessary to consider the facts of the particular case, in order to ascertain what in fact was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse. This seems to me to be fully in accordance with the view expressed by LORD ROMER himself in *Cohen* v. *Cohen* (11), when he said:

> "The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end, and the corresponding question whether desertion without cause has existed for the necessary period, must always be questions of fact, and the determination must depend upon the circumstances of the particular case. I deprecate attempts to lay down any general principle applicable to them all."

Support for the view that the proper test is the effect which the conduct of the deserted spouse has on the mind of the deserter is to be found in the oft-quoted decision of SIR BOYD MERRIMAN, P., in *Herod* v. *Herod* (12), where the issue depended on whether the fact of the deserted spouse having committed adultery made any difference to the deserter. Once it is recognised that the inquiry must always involve a question of fact, it seems to me that all the apparently conflicting decisions which have been called to our attention fall into place. Thus *Church* v. *Church* (13) was a case where it was found on the facts that the deserted husband's behaviour had no effect on the mind of the deserting wife. A similar result was arrived at by the Divisional Court in *Bevan* v. *Bevan* (14), where the test applied by COLLINGWOOD, J., was whether the deserted spouse had "effectively prevented" the return of the deserter. On the other side of the line are *Barnett* v. *Barnett* (15) and *Fishburn* v. *Fishburn* (16), which, if rightly decided, are to be justified on the basis that the conduct complained of on the part of the deserted spouse did in fact effectively prevent the deserter from returning to cohabitation. Those decisions have attracted some degree of adverse criticism, notably from DENNING, L.J., in *Beigan* v. *Beigan* (17). In the course of discussing them, the learned lord justice made some remarks which are highly apposite to this case, and which I think are worth quoting in full. He said (18):

> "I have considerable doubt whether those cases [*Barnett* v. *Barnett* (15) and *Fishburn* v. *Fishburn* (16)] were rightly decided. There has since been a decision of the Divisional Court in *Bevan* v. *Bevan* (14) in which it was held that, even though a wife says in terms that she does not want to see her husband again, she does not thereby automatically terminate his desertion. The Divisional Court applied the reasoning of HENN COLLINS, J., in *Sifton* v. *Sifton* (19) and of WILLMER, J., in *Church* v. *Church* (13). I, too, agree with that reasoning, and I see no distinction in principle between a wife's words and her actions. I should have thought that, if a wife locks

(11) [1940] 2 All E.R. at p. 339; [1940] A.C. at p. 645.
(12) [1938] 3 All E.R. 722; [1939] P. 11.
(13) [1952] 2 All E.R. 441; [1952] P. 313.
(14) [1955] 3 All E.R. 332.
(15) [1954] 3 All E.R. 689; [1955] P. 21.
(16) [1955] 1 All E.R. 230; [1955] P. 29.
(17) [1956] 2 All E.R. 630; [1956] P. 313.
(18) [1956] 2 All E.R. at p. 632; [1956] P. at p. 319.
(19) [1939] 1 All E.R. 109; [1939] P. 221.

A the door against her husband, it does not automatically terminate his desertion any more than her own adultery would do. It all depends on whether it has any effect on the husband by preventing him from seeking a reconciliation. If he would never have returned in any case, then he remains in desertion, notwithstanding the locking of the door."

Finally I would refer to the decision of this court in *Tickler* v. *Tickler* (20), a B case in which the relevant facts were not unlike those of the present case. A husband who had been deserted by his wife wrote letters to her which made it clear that he was unwilling to resume conjugal relations. Yet he was held entitled to succeed on his prayer for divorce because it was found that the letters had no effect on the conduct of the wife, who had never done anything which showed a disposition to resume marital relations. In delivering the judgment C of this court, SCOTT, L.J., after referring to the remarks of LORD ROMER in *Cohen* v. *Cohen* (21) (which I have already quoted) continued (22):

"In order to decide this question, it is necessary to give due weight to any facts which tend to prove, or to negative, the conclusion that the deserted spouse has so acted as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation will be rejected. D Ultimately, the question for the court is whether, in the light of all the circumstances, the language or the conduct of the deserted spouse has been such as to excuse the deserting spouse from making any attempt to put an end to the desertion. Has he 'made it plain to his deserting wife that he will not receive her back?' [There is then a reference to *Cohen* v. *Cohen* (23).] In pursuing this inquiry regard must be had to the intentions and conduct, E not only of the deserted spouse, but also of the spouse who is prima facie guilty of desertion . . ."

A little later, the learned lord justice said (24):

"The importance to be attached to the written word in such a case as this depends partly on the intention of the writer, but partly also (as has F been said) on the disposition and inclination of the person to whom the communication is addressed. Nobody can come to a satisfactory conclusion on such a matter who has not had the advantage of seeing and hearing the parties."

In my view, the conclusions to be drawn from these authorities are twofold. First, the question whether a deserted spouse has so acted as to bring to an G end the desertion of which he seeks to complain cannot be decided as a question of abstract law, but must depend on the actual facts of each particular case. Secondly, the issue of fact which arises is peculiarly one for the determination of the judge who has the advantage of seeing and hearing the parties, and his finding on that issue is one with which this court must necessarily be reluctant to interfere. In this case, the view which the learned commissioner formed of H the parties seems to me of particular importance, not only in relation to their credibility, but also in relation to his assessment of their character. The learned commissioner said:

"The wife is a voluble, vivacious young woman, a spirited and determined character, quick on the uptake in the witness-box, almost too sure that she could never be in the wrong, and with an excessive sense of self-righteous- I ness; and though she persisted right up to the last in her protestations of continuing love for her husband, more than once in various episodes in the married life she manifested, as junior counsel for the husband has pointed out, an almost venomous hostility to her husband. As regards her arrogant attitude to him, that could not be better instanced than by her remark

(20) [1943] 1 All E.R. 57. (21) [1940] 2 All E.R. at p. 339; [1940] A.C. at p. 645.
(22) [1943] 1 All E.R. at p. 59.
(23) [1940] 2 All E.R. at p. 335; [1940] A.C. at p. 638.
(24) [1943] 1 All E.R. at p. 60.

which she made in regard to her meeting with him at West Drayton in December, 1948, that he had come back to England 'by her command'. They were not words put into her mouth; they were words she expressed quite subconsciously herself. In contrast her husband was nowhere near her equal in mentality, but he fully made up for that by his appearance of strong integrity and truthfulness which impressed me throughout; and where their evidence on matters of substance is in conflict, I believe him and not her."

[His Lordship considered the contention of counsel for the wife that the judgment of the commissioner did not contain any finding necessary to resolve the question whether on the facts the expressed intention of the husband prevented him in the circumstances from alleging the continuance of desertion—either on the basis that he was unable to show absence of consent, or on the basis that his conduct afforded the wife just cause for making no further effort to resume cohabitation. There was, His Lordship said, no room for doubt as to the first basis, and it had been correct to follow the doctrine enunciated in *Bowron* v. *Bowron* (25) and *Sifton* v. *Sifton* (26). He intimated that he thought that the commissioner had had the second basis well in mind, and had rejected the contention advanced for the wife on it. His Lordship was, however, of opinion that all facts relevant were before the Court of Appeal and that the only possible inference from the known facts was that neither the letter of Feb. 28, 1956 (see p. 961, letter I, ante), nor the husband's subsequent letters had any effect on the mind of the wife, such as would afford her just cause for not resuming cohabitation. Thus the currency of any desertion by the wife attributable to her letter of July 7, 1955 (see p. 961, letter E, ante) had not been broken, nor was the finding of her desertion on that date against the weight of the evidence. His Lordship continued:] In all the circumstances, I do not think that the learned commissioner's finding of desertion can be disturbed, and I agree with his conclusion that nothing which has happened since has been such as in law to bring that desertion to an end. Accordingly, in my judgment, the learned commissioner reached the right conclusion, and I would dismiss the appeal.

HOLROYD PEARCE, L.J.: I agree. In *Bowron* v. *Bowron* (27), Scrutton, L.J., said that where a deserter was cruel and expressed an intention of deserting his wife by driving her out,

"The intention is presumed to continue unless the husband proved genuine repentance and sincere and reasonable attempts to get his wife back."

In the case of simple desertion, it is usually enough if he shows a change of intention by returning to the home. Henn Collins, J., following that dictum in *Sifton* v. *Sifton* (28), said:

"When a spouse is deserted, he or she is in the position that the presumption is in his or her favour, and against the deserting spouse, and it is not until some offer to return is made by the other side that the question arises whether or not that is an offer which ought, in all the circumstances, to be accepted . . . if it were true to say that the deserting spouse must at all times be ready and willing to receive back the husband or wife, as the case may be, *Herod* v. *Herod* (29) could not have been decided as it was, because no court would hold that, when a man was living in adultery, as in the case of *Herod* v. *Herod* (29), he was ready and willing that his wife should return."

(25) [1925] All E.R. Rep. 148; [1925] P. 187.
(26) [1939] 1 All E.R. 109; [1939] P. 221.
(27) [1925] All E.R. Rep. at p. 152; [1925] P. at p. 195.
(28) [1939] 1 All E.R. at p. 113; [1939] P. at p. 226.
(29) [1938] 3 All E.R. 722; [1939] P. 11.

A *Herod* v. *Herod* (30) and *Sifton* v. *Sifton* (31) were, in my respectful view, wise and correct decisions, and avoided the difficulties of the doctrine that requires proof of willingness to adhere. They did not, therefore, coincide with Scots law. To that extent the latter part of the opinion of LORD MACMILLAN in *Pratt* v. *Pratt* (32) in which occur dicta based on Scots law was not helpful in English cases; see the judgment of the court in *Tickler* v. *Tickler* (33). An earlier passage in the B opinion, however, was accepted as the law of this country in *Cohen* v. *Cohen* (34); see per LORD ROMER. And in this appeal reliance has been placed on those words (35) which have already been cited by WILLMER, L.J. But in that particular passage, the noble and learned Lord was, I think, directing his mind to the effect which the attitude of mind of the deserted spouse has on the deserter. If the deserted spouse has affected the conduct of the deserter by communicating or C revealing an intention not to have the deserter back, then the deserter can no longer claim that desertion continues. That is clearly right. I do not accept, however, that that passage was (either originally, or when cited by LORD ROMER), intended to lay down a universal proposition that, where the deserter is determined to desert in any event, and is not affected by any subsequent pre-emptive refusal by the deserted spouse, such a refusal must necessarily terminate desertion. D If LORD ROMER had so intended, he must have said something to qualify or question the judgment in *Herod* v. *Herod* (30), and also that in *Sifton* v. *Sifton* (31), which was expressly cited to the House, since neither of those cases is consistent with such a proposition. For that reason, I do not regard the words of LORD MACMILLAN as directed to this particular point.

A declaration by the deserted that he or she will have nothing more to do with E the alleged deserter may, in the circumstances, tend strongly against the existence of desertion, especially if such a declaration is communicated to the alleged deserter. The question is one of degree depending on the particular facts. Where the refusal by the deserted to consider any reconciliation (even where the other party is uninfluenced by it) occurs at or near the beginning of the alleged desertion, it is obviously a powerful argument against there being any desertion, and tells F in favour of a parting by mutual consent, or at least of a temporary desertion that has been turned into a parting by mutual consent. An example of such a situation is provided by *Barnett* v. *Barnett* (36) where SACHS, J., refused a decree. The parties were seriously out of accord before the parting; immediately after it they were glad to be rid of one another, and so expressed themselves. So, too, in *Fishburn* v. *Fishburn* (37) where WILLMER, J., refused a decree, observing in G his judgment:

> ". . . the wife's act in locking her door against the husband followed so swiftly after his act of desertion as not to afford him any reasonable locus poenitentiae."

In *Beigan* v. *Beigan* (38), DENNING, L.J., described the situation in *Fishburn's* H case (39) thus:

> "It was abundantly clear that neither party at any time within the three years before suit ever had the slightest desire or intention of resuming cohabitation with the other . . ."

He doubted the correctness of those two cases, and referred to *Bevan* v. *Bevan* (40), where it was decided that, even though a wife says in terms that she does not

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(30) [1938] 3 All E.R. 722; [1939] P. 11.
(31) [1939] 1 All E.R. 109; [1939] P. 221.
(32) [1939] 3 All E.R. 437; [1939] A.C. 417. (33) [1943] 1 All E.R. at p. 60.
(34) [1940] 2 All E.R. at p. 335; [1940] A.C. at p. 638.
(35) See p. 963, letter G, ante.
(36) [1954] 3 All E.R. 689; [1955] P. 21.
(37) [1955] 1 All E.R. at p. 235; [1955] P. at p. 40.
(38) [1956] 2 All E.R. at p. 632; [1956] P. at p. 318.
(39) [1955] 1 All E.R. 230; [1955] P. 29. (40) [1955] 3 All E.R. 332.

want to see her husband again, she does not thereby automatically terminate his desertion. In the latter case, COLLINGWOOD, J., said (41) of *Fishburn* v. *Fishburn* (42) and *Barnett* v. *Barnett* (43) (and LORD MERRIMAN, P., agreed with him):

> "They were not cases merely of words indicating that the wife had no desire to see her husband again. In both those cases the deserted spouse *effectively prevented* the other spouse from approaching her by bolting the door against any advances towards reconciliation, not merely metaphorically, but actually and physically."

I would not myself doubt the correctness of *Fishburn* v. *Fishburn* (42) and *Barnett* v. *Barnett* (43) on their particular facts since the pre-emptive refusal of the deserted spouse occurred at so early a stage in the desertion.

Where, however, the desertion has become a settled and accomplished fact, it is a not unusual feature for the deserted spouse to develop an aversion from the deserter who has scorned him or her, and to form, perhaps, another attachment. In my view, such aversion or other attachment does not bar relief unless it has the effect of preventing a reconciliation and driving away a spouse who is, or may reasonably be, willing to return. It is conceded that an uncommunicated intention by the deserted spouse to have nothing more to do with the deserter need not prevent desertion running. If, however, it is communicated to the deserter, it may do so. The reason why it may do so is that it may deter him or her from reconciliation. If, then, it is clear that, though communicated to the deserter, it will have no effect at all on his or her conduct, there is no reason why it should automatically prevent desertion running; see the reasoning in *Herod* v. *Herod* (44). *Church* v. *Church* (45) is an example of such a situation; and there WILLMER, J., correctly as I respectfully think, held that desertion had been made out. Where, therefore, the deserted spouse satisfies the court that his or her declared refusal of reconciliation has had no effect at all on the deserter, there is no rule of law that desertion is necessarily terminated by it. Accordingly the learned commissioner was in law entitled, if the facts justified it, to hold that, in spite of the husband's refusal in the spring of 1956, which he communicated to his wife, she was unaffected by it since she already had a fixed intention to desert, and that, therefore, the desertion continued in spite of it.

For the reasons given by WILLMER, L.J., I also, in spite of counsel for the wife's forceful argument, take the view that the evidence in this case entitled him so to hold. I would, therefore, dismiss the appeal.

DAVIES, L.J.: I entirely agree with both judgments, and cannot usefully add anything.

Appeal dismissed.

Solicitors: *Cunliffe & Mossman*, agents for *Martin, Son & Allen*, Gravesend (for the appellant wife); *Devonshire & Co.*, agents for *Bretherton & Sons*, Gloucester (for the respondent husband).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(41) [1955] 3 All E.R. at p. 336.
(42) [1955] 1 All E.R. 230; [1955] P. 29.
(43) [1954] 3 All E.R. 689; [1955] P. 21.
(44) [1938] 3 All E.R. 722; [1939] P. 11.
(45) [1952] 2 All E.R. 441; [1952] P. 313.

A

R. v. JOHNSON.

[COURT OF CRIMINAL APPEAL (Ashworth, Elwes and Veale, JJ.), November 2, 1961.]

Criminal Law—Burden of proof—Alibi.

B *Criminal Law—Appeal—Misdirection—Re-trial—Disagreement of jury at first trial—Whether there should be, in relation to second trial, an application of the proviso to Criminal Appeal Act,* 1907 (7 *Edw.* 7 *c.* 23), *s.* 4 (1).

If an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving the defence, but the burden of proving his guilt remains throughout on the prosecution (see p. 970, letter E, and p. 971, letter B, post).

C

The appellant was charged with robbery with violence. He put forward the defence of an alibi. The jury disagreed and, at the re-trial, the judge in his summing-up directed the jury that when the defence of an alibi was put forward, there was a burden of proof on the accused person to satisfy the jury that the defence which he had set up had, on the whole, been established. On appeal against conviction,

D

Held: the conviction must be quashed for misdirection, and the proviso to s. 4 (1) of the Criminal Appeal Act, 1907*, would not be applied, because this was a re-trial and at the first trial the jury had disagreed (see p. 971, letters F and G, post).

Appeal allowed.

E [As to the burden of proof in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 436, 437, para. 809; and for cases on the subject, see 14 DIGEST (Repl.) 493-495, *4764-4791.*

As to the application of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, see 10 HALSBURY'S LAWS (3rd Edn.) 535, para. 985; and for cases on the subject, see 14 DIGEST (Repl.) 667, 668, *6742-6753.*

F For the Criminal Appeal Act, 1907, s. 4, see 5 HALSBURY'S STATUTES (2nd Edn.) 929.]

Cases referred to:

R. v. *Lobell,* [1957] 1 All E.R. 734; [1957] 1 Q.B. 547; 121 J.P. 282; 41 Cr. App. Rep. 100; [1957] 2 W.L.R. 524; 3rd Digest Supp.

R. v. *Manning,* [1961] Crim. L.R. 561.

G *Woolmington* v. *Director of Public Prosecutions,* [1935] All E.R. Rep. 1; [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232; 25 Cr. App. Rep. 72; 14 Digest (Repl.) 493, *4768.*

Appeal.

This was an appeal by Anthony Hugh Johnson against his conviction at Winchester Assizes on July 24, 1961, before HILBERY, J., and a jury, of robbery with violence, for which he was sentenced to three years' imprisonment. On July 12, 1961, the appellant and one Brown were tried before STEVENSON, J., and a jury, the appellant being charged with robbery with violence, and Brown with robbery with aggravation. Brown pleaded guilty, but, in respect of the appellant, the jury disagreed and were discharged from giving a verdict. On July 19, 1961, the appellant was re-tried before HILBERY, J., and a jury and was convicted on July 24, 1961.

H

I

The facts are set out in the judgment of the court.

N. J. Skelhorn, Q.C., and *J. R. Whitley* (*N. R. Blaker* with him) for the appellant.

P. Back for the Crown.

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* The proviso to s. 4 (1) reads: "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

ASHWORTH, J., delivered the following judgment of the court: The appellant, Anthony Hugh Johnson, was convicted with a man named Ian Leslie Brown at Winchester Assizes, the appellant of robbery with violence and Brown of robbery with aggravation. It was, which is a matter of moment as will appear hereafter, a re-trial; on the first trial, the jury disagreed. The circumstances out of which the charge arose can be very shortly stated. A man named Reeves was taking home by car the day's takings amounting to some £59, and, shortly before midnight, close by his house, he was assaulted by two men, knocked on the head with coshes and robbed of the money. It was said that one of the men involved in the attack was the appellant, and it is right to say that the prosecution case against him was supported by witnesses who testified as to certain matters which undoubtedly presented a formidable picture against him, in particular, his own conduct when the police were investigating the crime. From the start, the appellant had denied any part in the attack on Mr. Reeves, and he had said throughout that, on the night in question, he was with his girl friend in Farnborough, some distance from the scene of the robbery, that he left her, caught a train and went home, and he called witnesses to support that alibi.

The main ground of appeal is based on what is said to be a misdirection by the learned judge in regard to the answer which the appellant put forward in the shape of the alibi. As counsel for the appellant submits, an alibi is commonly called a defence, but it is to be distinguished from some of the statutory defences, such as the defence of diminished responsibility under the Homicide Act, 1957, where Parliament has specifically provided for a defence and has further indicated that the burden of establishing such a defence rests on the accused (1). It may be that the true view of an alibi is the same as that of self-defence or provocation. It is the answer which the accused puts forward, and the burden of proof, as will appear in a moment, in the sense of establishing the guilt of the accused, rests throughout on the prosecution. If a man puts forward an answer in the shape of an alibi or in the shape of self-defence, he does not in law thereby assume any burden of proving that answer. So much, in the opinion of this court, is plain on the authorities. Unhappily, in the course of summing-up in the present case, there were references, not once but several times, to a burden of proof which the learned judge directed the jury had been assumed by the appellant when he put forward his defence of alibi. In the first place, he said this:

> "Now, when I said that the defendant has no task to prove his innocence that is quite true but of course he may take on himself to prove something which would necessarily mean that he must be innocent and that is the situation here."

A little lower down he said:

> "Of course, if his evidence about it and that of his witnesses support his alibi, convincing you of the accuracy of the alibi, that it is established, of course he has proved his innocence but short of that, what is the situation as far as he is concerned with regard to the burden of proof that is on him in such circumstances?"

Perhaps the most damaging passage occurred on the following page, where the learned judge said this:

> "In setting up his positive defence, the burden which is on the defendant is no more than this: he has only to leave you satisfied that his defence, the defence he has set up has, on the whole, been established. That is to say, it has been established to this extent, that on consideration of all the evidence and the probabilities you feel that the scale goes down in favour of the defence that he has set up. Goes down on balance in favour of him.

(1) See s. 2 (2) of the Homicide Act, 1957.

A That is much less a burden of proof than the burden of proof on the prosecution and, members of the jury, when an alibi is set up, it is of course a defence which is, if it is established, a cast-iron defence."

It is unnecessary to cite further passages from this summing-up because, although counsel for the Crown submitted that, viewed as a whole, the summing-up did not constitute a misdirection to the jury, he was constrained at the end of his B argument to concede, and rightly concede, that there is in law no burden of proof on an accused man who puts forward as his defence an alibi. He was constrained, and rightly constrained, to concede that, in these circumstances, the summing-up contains not in one but in several places a misdirection in law. In the view of this court, it was a misdirection in law which was absolutely fundamental. There is no need to cite from the well-known decision of *Woolmington* C v. *Director of Public Prosecutions* (2), or the more recent case of *R.* v. *Lobell* (3), where LORD GODDARD, C.J., giving judgment, said (4):

"Had the learned judge in the present case gone on to say that it was not for the appellant to establish his plea with the same degree of certainty as is necessary to establish a case for the prosecution it might have been D that we should have had to consider whether this was a case for the application of the proviso."

It is implicit in that sentence that, notwithstanding the addition to the summing-up of some reference to a lower standard of proof, there would still be misdirection because there is no burden of proof and the only circumstances in which the application of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, comes E into consideration are when there has been a misdirection or some other fault with the trial.

Counsel for the Crown suggested to us that we might, in the circumstances, apply the proviso but, as already mentioned, this was a re-trial. In *R.* v. *Manning* (5) the court said this:

F "... the court has come to the conclusion that it would be unsafe in this case to allow the conviction to stand. There can, as it seems to this court, be no question of applying the proviso to s. 4 (1) because this was the second trial. At the first trial, when given proper directions and with no interjections of this sort, the jury disagreed."

Accordingly, the conviction was quashed. This court has no reason in the G world to suppose that the first trial was not properly conducted or that the summing-up was not free from criticism and yet the jury disagreed. It would be quite wrong to apply the proviso in this case and, accordingly, the court has no other course open to it than to quash the conviction and thereby allow the appeal.

Appeal allowed.

Solicitors: *Clifford Cowling*, Aldershot (for the appellant); *Foster, Wells & Coggins*, Aldershot (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(2) [1935] All E.R. Rep. 1; [1935] A.C. 462.
(3) [1957] 1 All E.R. 734; [1957] 1 Q.B. 547.
(4) [1957] 1 All E.R. at p. 736; [1957] 1 Q.B. at p. 551.
(5) Noted [1961] Crim. L.R. 561.

A

R. v. SMITH.

[COURT OF CRIMINAL APPEAL (Ashworth, Elwes and Veale, JJ.), October 31, 1961.]

Criminal Law—Evidence—Admissibility—Admission to police officer while in custody, obtained in conversation without caution—Discretion of court to admit such evidence—Judges' Rules, r. 3.

B

The appellant was arrested for suspected factory-breaking and larceny. On his arrest, he was cautioned and taken into custody. He was taken to a police station, where without further caution he had conversation with a police officer. The officer told him that the property stolen had been found at the house of a co-accused and he further told him that clothing belonging to him was also found there. He showed the appellant the clothing. The appellant admitted that the clothing was his, confessed to the theft, and was formally charged and cautioned, and again confessed to the theft but declined to make a statement. At his trial, objection was taken to the admission of that evidence on the ground that it contravened r. 3 of the Judges' Rules*. The evidence was admitted and the appellant was convicted. On appeal,

C

D

Held: even assuming that the evidence could be challenged on the ground that it was cross-examination, the court had a discretion notwithstanding that the Judges' Rules might have been contravened, whether to admit the evidence or not; the appeal, therefore, would be dismissed.

R. v. *May* ((1952), 36 Cr. App. Rep. 91) applied.

R. v. *Winkel* ((1911), 76 J.P. 191) doubted.

E

Appeal dismissed.

[As to the Judges' Rules, see 10 HALSBURY'S LAWS (3rd Edn.) 470-473, para. 865; and for cases on the subject, see 14 DIGEST (Repl.) 474-479, *4528-4577*.]

Cases referred to:

R. v. *Bass*, [1953] 1 All E.R. 1064; [1953] 1 Q.B. 680; 117 J.P. 246; 37 Cr. App. Rep. 51; [1953] 2 W.L.R. 825; 14 Digest (Repl.) 476, *4568*.

F

R. v. *Brown and Bruce*, (1931), 23 Cr. App. Rep. 56; 14 Digest (Repl.) 277, *2452*.

R. v. *May*, (1952), 36 Cr. App. Rep. 91; 14 Digest (Repl.) 477, *4577*.

R. v. *Winkel*, (1911), 76 J.P. 191; 14 Digest (Repl.) 476, *4559*.

Appeal.

This was an appeal by John Ernest Smith against his conviction at Birmingham City Quarter Sessions on June 16, 1961, before the assistant recorder and a jury of factory-breaking and larceny contrary to s. 26 (1) of the Larceny Act, 1916, when he was sentenced to three years' imprisonment.

G

The facts are set out in the judgment of the court.

B. D. Bush for the appellant.

The Crown was not represented.

H

ASHWORTH, J., delivered the following judgment of the court: After the appellant had been taken into custody by the police officer, he was conveyed to a police station, and, although he had been cautioned on his arrest, he was not further cautioned before a conversation took place. That conversation, shortly summarised, was as follows. The police officer told the appellant that ten nickel anodes which were stolen from the factory had been recovered from his co-defendant's house. He went on: "I also recovered a mackintosh and jacket from there which I believe are your property" (1). The appellant answered: "Yes, They are mine. I wore them when I did the job". The police officer then said, "Do you want to make any statement about this?", and cautioned him.

I

* Rule 3 is set out at p. 973, letter B, post.

(1) The officer, according to his evidence, showed the mackintosh and jacket to the appellant before the appellant answered, and there was no dispute as regards this fact.

A The appellant replied, " No. I won't make a statement. I'm guilty. That's it ", and he repeated that confession when he was formally charged with the offence.

At the trial before the learned assistant recorder, objection to that part of the evidence was taken by counsel for the appellant, and argument was heard and, indeed, evidence was given before the learned assistant recorder reached his decision. In the course of that argument, as indeed has occurred before this court B today, reference was made to a number of cases bearing on the subject (2) and, in particular, as to the extent of r. 3 of the Judges' Rules, which is in the following form: " Persons in custody should not be questioned without the usual caution being first administered ". It would seem that there have been in the course of the last fifty years decisions which are not wholly easy to reconcile. On the one hand, in *R.* v. *Winkel* (3) AVORY, J., pointed out that, although a remark C made by a police officer may not be in the form of a question, it may amount to what he described as a subtle form of cross-examination, and he administered a rebuke to the officer in that case for having indulged in what he termed an improper question. That case was cited in *R.* v. *Brown and Bruce* (4), if not with approval certainly with assent, and counsel for the appellant submitted to this court that it does not matter how often a man is cautioned, the mischief may D remain if one proceeds by statement or question to cross-examine. On the other hand, in *R.* v. *May* (5), this court had to consider the conduct of a police officer who had shown to the appellant a piece of paper which had been taken from the pocket of the appellant, and added the words:

> " I saw you throw this jemmy away, which was wrapped in this newspaper, and, as you have seen, the piece of paper from your pocket fits it exactly."

E The appellant made a somewhat contemptuous reply, and the question arose whether the officer's statement and the reply were admissible. This court said in giving judgment (6):

> " The court cannot see that this is a case of cross-examination of a prisoner after he was in custody. It may be a very proper thing for a police officer F to show a prisoner what is going to be an exhibit in the case and say: ' There you are '. If the appellant had been found with the jemmy on him, there would have been no need to show it to him except that it would have been put on the table when he was being charged."

And if the prosecution had been represented at the hearing of this appeal, no doubt this court would have been urged to follow the principle underlying the G decision in *R.* v. *May* (5). The matter was further considered in *R.* v. *Bass* (7), but that case raises a somewhat different issue, and it is not necessary to refer to it in detail.

All those cases were before the learned assistant recorder and, in the view of this court, he pursued what in the circumstances was a very prudent course. He gave to the appellant the benefit, so to speak, of the doubt which of the two H lines of authority was to be preferred, and he took the view that it would be safer to proceed on the footing that the remark made by the police officer was indeed cross-examination after the appellant was in custody. But it is quite clear on many authorities that that is not an end of the matter. The court still has a discretion, notwithstanding that the Judges' Rules may have been contravened, to admit the evidence. The learned assistant recorder undoubtedly considered the I matter with care and in plain terms expressed his view as a matter of discretion in favour of the admissibility of the evidence. Counsel for the appellant, to whom the court is indebted for a most careful and persuasive argument, has

(2) The court was referred to *R.* v. *Best*, [1909] 1 K.B. 692; *R.* v. *Taylor*, (1923), 17 Cr. App. Rep. 109; *R.* v. *Turner*, (1926), 19 Cr. App. Rep. 171; *R.* v. *Wattam*, (1952), 36 Cr. App. Rep. 72, in addition to those cited in the judgment.

(3) (1911), 76 J.P. at p. 192.

(4) (1931), 23 Cr. App. Rep. 56.

(5) (1952), 36 Cr. App. Rep. 91.

(6) (1952), 36 Cr. App. Rep. at p. 93.

(7) [1953] 1 All E.R. 1064; 37 Cr. App. Rep. 51.

submitted that this court should not treat this as a matter of discretion but should go back to the principle which, in his submission, underlies the decision in *R.* v. *Winkel* (8), and should hold that, where there has been cross-examination after a man has been taken into custody, as a matter of law the resulting evidence should be excluded. This court is not prepared to take that course in the light of the more recent authorities. It seems to this court that there is grave room for doubt here whether this evidence could be challenged at all on the ground that it was cross-examination, but, assuming that point in the appellant's favour, the matter still remains one of discretion and, as counsel for the appellant very fairly admitted, once one reaches the conclusion that it is a matter of discretion, that is an end of this appeal. Accordingly, this appeal fails.

Appeal dismissed.

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

CLIFFORD-TURNER *v.* WATERMAN.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Veale, JJ.), October 24, 1961.]

Road Traffic—London—Waiting and loading restrictions—Prohibition of waiting longer than necessary to enable any person to "board" or "alight"—London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960 (*S.I.* 1960 *No.* 594), *reg.* 4 (*a*).

The appellant, who lived in a first floor flat in a restricted street*, parked his car outside his home, got out, took a parcel from the car to his flat, and fetched his wife and two parcels from the flat to take them away with him in his car. The time taken by the appellant to do this was about five minutes. On appeal by the appellant against a conviction for causing the car to wait in a restricted street, during the prescribed hours,

Held: the appellant was guilty of the offence charged, because the exception in reg. 4 (a)† of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960, allowed a car to be stopped for so long only as might be necessary to allow someone to get in or out, and when the appellant had got out of the car and had taken his parcel out of the car he had alighted, but when he was going on to his flat he was no longer alighting and his wife was not boarding the car at any time until she was about to get into it.

Appeal dismissed.

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(8) (1911), 76 J.P. 191.

* I.e., a street in which, subject to certain qualifications, it was forbidden to cause a vehicle to wait by virtue of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960 (S.I. 1960 No. 594). The street in question was also within the area of an experimental traffic scheme, involving restriction on loading and unloading, for the purpose of which regulations had been made by the Commissioner of Police with the consent of the Minister of Transport under s. 35 of the Road Traffic Act, 1960. The charge against the appellant was preferred under reg. 3 and reg. 6 of S.I. 1960 No. 594 and reg. 1 of the police regulations, to which S.I. 1960 No. 594 were subject. Regulation 1 of the police regulations read, so far as is material: "Subject to the provisions of reg. 4 of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960 . . . no person . . . shall cause or permit any vehicle to wait in any restricted street during the prescribed hours, except a goods vehicle waiting for the purpose of delivering or collecting goods or merchandise or loading or unloading the vehicle at premises situate within the street: Provided that:—(a) . . . no vehicle engaged in delivering or collecting goods or merchandise or being loaded or unloaded shall wait during the prescribed hours . . . in any restricted street for more than twenty minutes outside the same premises or such longer period as a police constable in uniform may authorise . . ."

† The relevant part of reg. 4 is printed at p. 976, letter G, post.

A [**Editorial Note.** The London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960, as amended, have been revoked and replaced by the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1961 (S.I. 1961 No. 2004), see now reg. 6 (1) (a)*.

As to regulation of waiting and loading in the London traffic area, see 33 HALSBURY'S LAWS (3rd Edn.) 509, 510, para. 872.]

B Cases referred to:

London & North Eastern Ry. Co. v. *Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 38 Digest (Repl.) 297, *69*.

Magor and St. Mellons Rural District Council v. *Newport Corpn.*, [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 3rd Digest Supp.

C

Case Stated.

This was a Case Stated by a metropolitan stipendiary magistrate in respect of his adjudication as a magistrates' court sitting at Marlborough street on Dec. 15, 1960. On Nov. 22, 1960, the respondent, Frederick J. Watson, a traffic warden, laid an information against the appellant, Edward Clifford-Turner, D charging that on Sept. 24, 1960, at Upper Brook Street, London, W.1, in the Metropolitan Police District, he unlawfully caused a vehicle to wait in a restricted street during the prescribed hours, contrary to reg. 3 and reg. 6 of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960, and reg. 1 of the Regulations made by the Commissioner of Police of the Metropolis on Sept. 16, 1960, under s. 35 of the Road Traffic Act, 1960. The following facts E were found. On Sept. 24, 1960, from 10.35 a.m. to 10.40 a.m., the respondent saw the appellant's car parked outside 42, Upper Brook Street. Upper Brook Street was a street specified in Sch. 1 to the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960, as a restricted street. The side of Upper Brook Street opposite to that on which the appellant's car waited was a specified parking place at which parking meters were installed, but throughout F the time that the appellant's car waited, all the parking spaces in the parking place were occupied. The appellant was a tenant of, and lived at, a flat on the first floor of 42, Upper Brook Street. At some time prior to 10.35 a.m. the appellant fetched his car from a garage, and at 10.35 a.m. parked it where it was found by the respondent in order to take a parcel from his car to his home and to fetch his wife and two parcels from his home and then to drive off. At G 10.40 a.m. the appellant returned to his car with the two parcels and his wife. When the respondent pointed out the alleged offence, the appellant accepted responsibility for his car. He knew Upper Brook Street was a restricted street. He was a slow walker and only had one lung, but the minimum period, i.e., for some time more than five minutes, that the appellant left his car was no longer than was necessary to enable his wife or himself to board or alight from the car. H The appellant's car was not a goods vehicle parked either to deliver, collect, load or unload goods.

It was contended by the appellant that (i) on the true construction of reg. 4 (a) of the London Parking Zone Regulations and reg. 1 and proviso (a) of the Regulations made by the Commissioner of Police of the Metropolis, he was not

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I * Regulation 6 (1) of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1961 (S.I. 1961 No. 2004), provides: "6.—(1) No person shall cause or permit any vehicle to wait during the prescribed hours in any of the restricted streets except—(a) for so long as may be necessary for the purpose of enabling any person to board or alight from the vehicle or to load thereon or unload therefrom his personal luggage; or (b) subject to the provisions of this and the next regulation, for so long as may be necessary for the purpose of delivering or collecting goods or loading or unloading the vehicle at premises adjacent to the street." Regulation 6 (2) contains a prohibition on waiting for the purpose of delivering or collecting goods or loading or unloading the vehicle in any of certain restricted streets, of which Brook Street, or part thereof, is one. Regulation 7 contains a time limit on loading and unloading.

prohibited from causing his car to wait for not more than twenty minutes while it was engaged in delivery and collecting goods; alternatively, on the true construction of reg. 4 (a), the appellant might lawfully cause or permit his car to wait for so long as was reasonably necessary to permit him to alight therefrom, take his parcel to his flat, return with his wife and parcels, load his parcels and permit himself and his wife to board his car. (ii) Alternatively, reg. 3 of the London Parking Zones Regulations did not prohibit the appellant from causing or permitting his car to wait for the purposes aforesaid; s. 35 of the Road Traffic Act, 1960, was permissive and not mandatory, and made no provision for compensation and so did not authorise the Commissioner of Police to take away or interfere with the appellant's common law rights of reasonable access with his car to his flat and from his flat to his car. If and in so far as reg. 1 of the Regulations made by the Commissioner of Police of the Metropolis purported to prohibit the appellant from causing his car to wait as aforesaid, it took away and interfered with his common law rights and so was ultra vires the power conferred by s. 35 of the Road Traffic Act, 1960, and was void. It was contended by the respondent that only goods vehicles might wait while engaged in loading and unloading; that the occupier's common law right of access by and to his car did not include the right to leave his car outside his premises and so was not taken away or interfered with by reg. 1; and that the words " so long as may be necessary to enable any person to board the vehicle " in reg. 4 (a) of the London Parking Zones Regulations referred only to a person present on the pavement and ready to board the vehicle as soon as it stopped.

The magistrate found the charge proved and discharged the appellant absolutely, ordering him to pay £2 2s. costs. The appellant now appealed.

A. J. Irvine, Q.C., and *Henry Summerfield* for the appellant.
Paul Wrightson for the respondent.

LORD PARKER, C.J., stated the facts and continued: Regulation 3 of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960, laid down an absolute prohibition:

> ". . . no person . . . shall cause or permit any vehicle to wait in any restricted street during the prescribed hours . . .",

subject to certain exceptions, and Upper Brook Street is a restricted street. Regulation 4, however, provided, so far as it is material:

> " Nothing in reg. 3 of these regulations shall apply—(a) so as to prevent any person from causing or permitting a vehicle to wait for so long as may be necessary to enable any person to board or alight from the vehicle . . ."

The appellant's contention before the magistrate on that was this:

> " That on the true construction of reg. 4 (a) the appellant might lawfully cause or permit his car to wait for so long as was reasonably necessary to permit him to alight therefrom, take his parcel to his flat, return with his wife and parcels, load his parcels and permit himself and his wife to board his car."

For myself, I think that that is an utterly impossible interpretation of reg. 4 (a). Looked at purely as a matter of common sense, when the appellant had got out of the car and had taken the parcel out of the car he had alighted. When he was going up to his flat one might ask oneself: was he alighting or doing something else? In the same way, when his wife was coming down the stairs or in the lift, can one say she was boarding the vehicle then or at any time until she was on the pavement and about to get into the vehicle? The contention of the respondent was that reg. 4 (a) " refers only to a person present on the pavement and ready to board the vehicle as soon as it stops ", and that was the interpretation accepted by the learned magistrate. I do not find it necessary in the

A present case to define exactly what is meant by "a person present on the pavement", whether such a person must be one yard from the vehicle, or five yards from the vehicle, or standing on the steps of the house. It is quite clear, however, that the scope of the regulation is only in regard to the time when the person is about to board.

We have been referred to the speech of LORD SIMONDS in *Magor and St. Mellons* B *Rural District Council* v. *Newport Corpn.* (1), and also to what the same learned Lord said in *London & North Eastern Ry. Co.* v. *Berriman* (2) as to the construction of a penal statute. I am, however, not conscious of offending in any way the principles there laid down (3). It seems to me in this case that there is no conceivable ambiguity, that the construction is perfectly plain, and that the learned magistrate was right.

C We have been referred more than once to para. 2 (h) of the Case, which says this:

> "The appellant is a slow walker and only had one lung; but the minimum period (that is for some time more than five minutes) that the appellant left his said car was no longer than was necessary to enable his wife or himself to board or alight from the said car."

D

I do not find it easy to understand exactly what that paragraph means, but it seems to me that it was a finding of fact intended to apply if the appellant's construction of reg. 4 (a) was right; in other words, the time waiting was no longer than was necessary to enable his wife or himself to board or alight if that is read as meaning taking the parcel up to the flat and returning with two E parcels and his wife. The learned magistrate, in my judgment, was quite correct and this appeal must be dismissed.

ASHWORTH, J.: I agree. I would only like to add one word on reg. 4 (a) of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960. It is important to keep in mind that this was dealing with waiting motor cars. Regulation 4 (a) could be paraphrased in the form of the questions: F how long does it take someone to get into the car? how long does it take someone to get out? The words are "to enable any person to board or alight from the vehicle". In other words, what was intended by this regulation was the sensible release from the strict limitation imposed by reg. 3 in order to permit a car to be stopped to allow somebody to get in or get out. In my view, the regulation did not permit anything further.

G

VEALE, J.: I agree.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(1) [1951] 2 All E.R. at p. 841; [1952] A.C. at p. 191.
(2) [1946] 1 All E.R. at p. 270; [1946] A.C. at p. 313.
(3) Viz., that the court having discovered gaps in a statute must not proceed to "fill in the gaps" (see [1951] 2 All E.R. at p. 841), and the further principle that "A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court" (see [1946] 1 All E.R. at p. 270, letter G).

VESTEY *v.* INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS *v.* VESTEY.

[CHANCERY DIVISION (Cross, J.), October 10, 11, 12, 23, 1961.]

Surtax—Annual payment—Capital or income—Purchase price payable by instalments—Total price exceeding current value of property sold—Price computed having regard to interest factor—Dissection of annual payment into capital and interest for tax purposes.

The value of certain shares of the taxpayer was estimated by an accountant at £2 million and an appropriate price in annual payments over 125 years at £44,000 yearly. In computing the annual payment he allowed for an interest factor, allowing approximately two per cent. as a net rate. The total of these annual payments would be £5½ million. The taxpayer, to whom the accountant's computation was not proved to have been communicated, sold the shares to trustees of a settlement at a price of £5½ million payable in 125 annual instalments of £44,000. The second instalment* of £44,000 was included in his total income as computed for the purpose of assessment to surtax.

Held: the purchase price included an interest element and for income tax purposes should be dissected into capital and interest; and the part representing interest, but not the part representing the capital payment for the shares, should be included in the taxpayer's total income for surtax.

Secretary of State in Council of India v. *Scoble* ([1903] A.C. 299) and dictum of SIR WILFRID GREENE, M.R., in *Sothern-Smith* v. *Clancy* ([1941] 1 All E.R. at p. 116) applied.

Dicta of ROMER, L.J., in *Inland Revenue Comrs.* v. *Ramsay* ([1935] All E.R. Rep. at p. 854), of LORD GREENE, M.R., in *Inland Revenue Comrs.* v. *Wesleyan and General Assurance Society* ([1946] 2 All E.R. at p. 751), and of POLLOCK, C.B., and BRAMWELL, B., in *Lady Foley* v. *Fletcher* ((1858), 28 L.J.Ex. 100) not followed.

Appeal and cross-appeal dismissed.

[As to annual payments chargeable to income tax and surtax, see 20 HALSBURY'S LAWS (3rd Edn.) 247-252, paras. 453-462; and for cases on the subject, see 28 DIGEST (Repl.) 167-177, *664-709*.

For the Income Tax Act, 1952, s. 123 (1), Sch. D, Case III, see 31 HALSBURY'S STATUTES (2nd Edn.) 116.]

Cases referred to:

Foley (Lady) v. *Fletcher*, (1858), 3 H. & N. 769; 28 L.J.Ex. 100; 33 L.T.O.S. 11; 22 J.P. 819; 157 E.R. 678; 28 Digest (Repl.) 167, *671*.

Howard de Walden (Lord) v. *Beck*, (1940), 23 Tax Cas. 384; 28 Digest (Repl.) 214, *908*.

Inland Revenue Comrs. v. *Ramsay*, [1935] All E.R. Rep. 847; 154 L.T. 141; 20 Tax Cas. 79; 28 Digest (Repl.) 347, *1534*.

Inland Revenue Comrs. v. *Wesleyan and General Assurance Society*, [1946] 2 All E.R. 749; 176 L.T. 84; *affd.* H.L., [1948] 1 All E.R. 555; [1948] L.J.R. 948; 30 Tax Cas. 11; 28 Digest (Repl.) 175, *706*.

Perrin v. *Dickson*, [1929] All E.R. Rep. 685; [1930] 1 K.B. 107; 98 L.J.K.B. 683; 142 L.T. 29; 14 Tax Cas. 608; 28 Digest (Repl.) 170, *685*.

Protector Loan Co. v. *Grice*, (1880), 5 Q.B.D. 592; 49 L.J.Q.B. 812; 43 L.T. 564; 45 J.P. 172; 20 Digest 515, *2428*.

Sothern-Smith v. *Clancy*, [1941] 1 All E.R. 111; [1941] 1 K.B. 276; 110 L.J.K.B. 189; 164 L.T. 210; 24 Tax Cas. 1; 28 Digest (Repl.) 170, *687*.

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* The Crown did not pursue the claim regarding the first instalment on the basis that it could be divided between interest and capital for tax purposes, and, in the result, the claim as to the second instalment alone is relevant to the report (see p. 979, letter F, post).

A *Secretary of State in Council of India* v. *Scoble*, [1902] 2 K.B. 413; 4 Tax Cas. 478; *revsd.* C.A., [1903] 1 K.B. 494; *affd.* H.L., [1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1; sub nom. *Scoble* v. *Secretary of State for India*, 4 Tax Cas. 618; 28 Digest (Repl.) 167, *672*.

Case Stated.

B The taxpayer appealed to the Special Commissioners of Income Tax against assessments to surtax made on him for 1956-57 and 1957-58 in the sums of £9,000 and £56,000 respectively. The question for decision was whether any and if so what sum was to be included in the computation of the taxpayer's total income in respect of sums received by him under an agreement made on May 9, 1956. Under the agreement the taxpayer sold 29,800 ordinary shares C of £10 each and 35,058 five per cent. cumulative second preference shares of £10 each in Frederick Leyland & Co., Ltd., to Western United Investment Co., Ltd., who were nominees of the trustees of a settlement, for £5½ million. The agreement provided that the purchase money should be paid without interest by 125 yearly instalments of £44,000 each. If default were made in paying any part of the instalments for ninety days after becoming due, the whole of the D unpaid instalments should become immediately payable and would carry interest at £4 per centum per annum. The first two instalments of £44,000 were paid on June 1, 1956 and 1957, and were included in the taxpayer's total income for tax purposes. The taxpayer contended that the sums were capital sums, being instalments of the price payable for the shares, and that no part of any such sum was to be included in computing his income. The Crown contended that E the whole of each annual sum of £44,000 was to be included, since the agreement provided for an annuity of that amount, and alternatively that the payments should be dissected into principal and interest and that such part of each payment as on actuarial principles constituted interest on a purchase price of £2 million (the estimated current value of the shares) properly fell to be included. The Crown did not pursue the claim to tax in this alternative on any interest content in the first payment. The commissioners held that the annual payments F of £44,000 (other than the first) contained an interest element requiring to be assessed. The taxpayer appealed by way of Case Stated and the Crown cross-appealed.

Sir Andrew Clark, Q.C., and *P. Shelbourne* for the taxpayer.
R. E. Borneman, Q.C., *E. Blanshard Stamp* and *A. S. Orr* for the Crown.

G *Cur. adv. vult.*

Oct. 23. **CROSS, J.**, read the following judgment: In the early part of 1956 Mr. Edmund Hoyle Vestey, the taxpayer, and the trustees of a settlement which had been executed on Mar. 25, 1942, by his grandfather and Lord Vestey, who was a cousin of his father, were considering the sale by the taxpayer to the H trust of some valuable shares, to which the taxpayer was entitled, on the terms that he should receive as consideration an annual sum for a long period of years. In connexion with this proposed sale Mr. Ronald Arthur Vestey, the father of the taxpayer, who was one of the joint managers who controlled the investment of the trust funds comprised in the settlement, put the following question to Messrs. Price Waterhouse & Co., the accountants to the trust:

I "What would be a fair value to place on the shares in Frederick Leyland & Co., Ltd., owned by [the taxpayer] for the purpose of a sale to the trustees of a settlement on the basis that the purchase money should be payable over a long period, say, 125 years?"

On May 4, 1956, Mr. C. R. Culling, of Messrs. Price Waterhouse & Co., wrote a letter to Mr. R. A. Vestey in answer to this question. The first part of it consists of a valuation of the shares on the basis of a sale under which the purchase price would be immediately payable. This part of the letter ends as follows:

"Taking all these factors into account I think that the value of Mr. E. H. Vestey's shareholding could be fairly assessed at £2 million." A

The letter goes on:

"This price would assume an immediate payment in full by the purchaser. It is proposed however that payments be spread over a protracted period. This of itself is an unusual arrangement and allowance must be made for the interest factor. It is assumed that [the taxpayer] has satisfied himself, so far as this is possible, that the purchaser can and will carry out his undertaking and it is not proposed to make any allowance for the possible failure of the purchaser. Nor will any allowance be made for the fact that the vendor is exchanging in part equity shares for a debt payable in money, with the risk that the purchasing power of money may decline during the period of payment. B C

"More than one view could be held about what would be the right rate of interest to assume. Probably the best guide would be an estimate of the long term yield on government securities after making an allowance for the estimated burden of income tax. In the circumstances I think it would be reasonable to assume a net interest rate of two per cent. At this rate of interest the annual payment for 125 years equivalent to a present value of £2,000,000 is £44,278. D

"On this basis I think it would be fair and reasonable for the shares to be sold in return for an annual payment of £44,000 extending over 125 years."

It will be observed that Mr. Culling does not in terms answer the question put to him, viz., the amount of the purchase price for the shares, but that figure can easily be obtained by multiplying the annual sum of £44,000 by 125. It is in fact £5½ million. E

On receipt of Mr. Culling's letter an agreement and a transfer were prepared each between the taxpayer and a company known as Western United Investment Co., Ltd., which was to act as nominee for the trustees of the settlement. These documents were sent to the taxpayer in Australia, where he then was, and both were executed by him on May 9, although it was not in fact contemplated by the agreement that the transfer should be executed until the first instalment was paid. The material part of the agreement is as follows: F

"(1) The vendor shall sell and the company shall purchase for the sum of £5½ million 29,800 ordinary shares of £10 each and 35,058 five per cent. cumulative second preference shares of £10 each (all fully paid up) in the capital of Frederick Leyland & Co., Ltd." G

Then follow the numbers of the various shares.

"(2) The purchase money shall be paid without interest by 125 yearly instalments namely an instalment of £44,000 on June 1 next and 124 equal instalments of £44,000 on the same day in each of the 124 years next following. H

"(3) If the company shall make default in payment of any of the said instalments or any part thereof for ninety days after the same shall become due the whole of the unpaid instalments shall become immediately payable and shall carry interest at four per cent. per annum from the expiration of such ninety days until payment.

"(4) Upon payment of the first of the said instalments the vendor shall execute and the company shall accept a transfer of all the said shares and the vendor shall not be entitled to any charge or lien on the said shares or any of them for securing the unpaid instalments or any part thereof." I

The transfer so far as material ran as follows:

"I, Edmund Hoyle Vestey, in consideration of the sum of £5·5 millions payable by instalments of £44,000 per annum over 125 years in accordance with the agreement dated May 9, 1956, by Western United Investment

A Co., Ltd., hereinafter called 'the transferee', do hereby transfer to the said transferee [then follows a description of the shares transferred] to hold unto the transferee subject to the conditions upon which I hold them."

There is no finding in the Case that the terms of Mr. Culling's letter were communicated to the taxpayer, or that he knew the basis on which the consideration had been fixed. Having regard to the relationship between the parties, B it is possible that in fact all that he was told was that the trustees had been advised that the proposed terms of sale were fair as between the parties. The agreement and transfer sent out to the taxpayer constituted an offer by the trustees to purchase his shares on those terms, which he accepted by signing and dating the documents and returning them. The first sum of £44,000 payable under the agreement was duly paid on June 1, 1956, and a further instalment of £44,000 C was paid on June 1, 1957.

In assessing the taxpayer to surtax for the years 1956-57 and 1957-58 the assessing commissioners included in his total income these two sums. The taxpayer appealed against their assessments on the ground that the two sums were capital sums, being instalments of the price payable for the shares, and that no part of them should go into the computation of his total income. The Com- D missioners of Inland Revenue on the other hand contended, first, that the whole of each annual sum was properly to be included in computing the taxpayer's total income, since the agreement provided for an annuity of £44,000; and, secondly, in the alternative, that the annual payments of £44,000 should be dissected into principal and interest, and that such part of each payment as on actuarial principles constituted interest on a purchase price of £2 million should E be included in the computation of the taxpayer's total income. They did not, however, pursue their claim to tax in this alternative on any interest content in the first payment made on June 1, 1956.

The commissioners who heard the appeal decided that, in accordance with the second alternative advanced by the Commissioners of Inland Revenue, the annual payments in question should be dissected, and adjusted the assessments F in accordance with figures agreed between the parties. Neither side was satisfied with this determination, and I have before me an appeal by the taxpayer and a cross-appeal by the Commissioners of Inland Revenue.

I have quite properly been referred to a number of authorities. The case which is nearest on its facts to this is *Lady Foley* v. *Fletcher* (1), decided by the Court of Exchequer as long ago as 1858. The facts there were that by an inden- G ture of Aug. 26, 1854, between Sir F. E. Scott of the first part, Lady Emily Foley of the second part, the defendants of the third part, and certain trustees of the fourth part, after recitals to the effect that Sir F. E. Scott and Lady Emily Foley were tenants-in-common of certain lands and had agreed to sell them to the defendants for £99,000, it was witnessed that, in consideration of a sum of £6,770 already paid by the defendants to the vendors in equal shares, and of £92,230 H being the balance of the £99,000 to be paid by the defendants to the vendors in equal moieties of £46,115 by the several instalments thereinafter mentioned, the vendors conveyed the lands in question to the parties of the fourth part as trustees on certain trusts therein mentioned, and the defendants covenanted separately with each of the vendors that they would pay him or her the said sum of £46,115 by equal half-yearly instalments of £768 11s. 8d. on every June 24 I and Dec. 24 in every year after 1854 down to and including Dec. 24, 1884. The indenture further provided that, if any instalment were not paid by the defendants or one of them on the day appointed for payment or within one calendar month thereafter, the defendants would pay interest thereon at four per cent. until payment. The defendants deducted income tax on the six instalments payable to Lady Emily Foley in 1855, 1856 and 1857, and she brought an action against the defendants claiming payment of the sums deducted with interest.

(1) (1858), 28 L.J.Ex. 100.

To this claim the defendants pleaded that the instalments were annual payments taxable under s. 102 of the Income Tax Act, 1842, from which the payers were given a right to deduct tax by s. 40 of the Income Tax Act, 1853, which corresponds to s. 169 of the Income Tax Act, 1952. In support of this plea, counsel for the defendants argued that the value of the plaintiff's half share of the land at the date of the sale was obviously far less than £46,000, that a considerable part of each instalment really represented interest in respect of the long deferment of payment of the price, and that, although part of each instalment represented a payment of capital purchase price, the instalments could not be dissected and that the whole was chargeable to tax.

The case was tried on demurrer and the court held that the plaintiff was entitled to judgment. Each member of the court gave his reasons separately. POLLOCK, C.B., pointed out that there was nothing in the record to show that in fact the land was worth less than £99,000, but he went on to say that, even if the land was worth less than £99,000, it would make no difference since the Act only taxed profits not capital repayments; that capital could not be taxed because it might be mixed up with profits; and that there was no provision in the Act for splitting payments of this sort. He went on to draw a distinction between the repayment of a debt or the payment of a purchase price by instalments and the purchase of an annuity. In the first case, even though the instalments might contain an interest element, they were not taxable. If Lady Foley had sold her estate for an annuity—so calling it—the whole of it would have been taxable, but she had not done so. She had sold it for a sum of money to be payable by instalments.

BRAMWELL, B., found the case a difficult one. He considered that it was reasonably plain that the land must have been worth much less than £99,000 and that in fairness each instalment should be split into a capital and interest element, but he could find nothing in the Act to justify that course. He thought it was in a sense a question of words. If the parties had called the payments an annuity income tax would have been payable, but as the transaction took the form of a sale for a purchase price payable by instalments no tax was payable.

WATSON, B., considered that the case was a clear case of the payment of a debt by instalments, which was quite a different thing from the case of the purchase of an annuity for cash. He went on to point out that, if there was in fact any interest element in each instalment, the court had no means of calculating it and that the defendants had not themselves attempted to calculate it but had deducted tax from the whole of each instalment.

If the decision in *Foley* v. *Fletcher* (2) still stands and if this case cannot be distinguished from it on the ground that the period over which the payments are spread is 124 years as against thirty years, then in a court of first instance at any rate the claim of the Revenue to tax the whole of each instalment must fail. Now I will say at once that so far as I can see nothing said in any subsequent case has cast any doubt on *Foley* v. *Fletcher* (2) as a decision on the point before the court, viz., the defendants' claim that the whole of each instalment was subject to tax. Further, I do not think that the fact that the period here is far longer than that in *Foley* v. *Fletcher* (2) is a good ground of distinction between the cases. The question, as I see it, is one of principle not of degree. It does not, however, follow that, because the decision in *Foley* v. *Fletcher* (2) was right, POLLOCK, C.B., and BRAMWELL, B., were right in saying that, even if it had been proved or admitted that the plaintiff's half share of the land sold had been worth far less than £46,000 at the date of sale and the defendant had deducted tax on the part of each instalment which was shown actuarially to be the interest element in it, the plaintiff would still have succeeded.

So far as this branch of the case is concerned, the authorities are in a somewhat confused state. The first to which I must refer is *Secretary of State in Council*

(2) (1858), 28 L.J.Ex. 100.

A *of India* v. *Scoble* (3), in the Court of Appeal and the House of Lords. The facts of the case in the House of Lords report read:

"By a contract made in 1849 between the East India Co. and the Great Indian Peninsula Railway Co. it was agreed that the railway company should construct a railway, and the East India Co. should provide the land and grant a lease for ninety-nine years; that after a certain period the East B India Co. might give notice of their intention to purchase the railway and works, and thereupon the land with the railway and works should become the property of the East India Co. as the owners by purchase on account of the Government of India, and the East India Co. should be bound to pay for the purchase the full amount of the value of all the shares or capital stock in the railway company. By cl. 26 the East India Co. might instead C of paying a gross sum for the purchase declare by notice to the railway company their option to pay 'an annuity' from the time when the gross amount would be payable and to continue during the residue of the term of ninety-nine years, the annuity to be payable on two half-yearly days, the interest to be used in calculating the annuity being determined by the average rate of interest during the preceding two years received in London D upon public obligations of the East India Co., and to be ascertained by reference to the governor or deputy governor of the Bank of England.

"The railway was constructed, and in 1899 the Secretary of State for India (in whom the powers of the East India Co. were vested by the Act of 1858, c. 106, for the better government of India) gave notice to the railway company of his intention to purchase the railway and works. The purchase- E money was determined at £34,850,000 odd, and the Secretary of State declared his option instead of paying the gross amount to pay an annuity. The rate of interest was ascertained to be £2 17s. per cent., and the annuity was fixed at £1,300,000 odd, payable in equal moieties half-yearly. By s. 11 and s. 12 of the Great Indian Peninsula Railway Purchase Act, 1900 (c. cxxxviii), the annuity was charged on the revenues of India, the first F payment to be made Jan. 1, 1901, and the subsequent payments half-yearly till 1948.

"The Secretary of State having deducted income tax upon the whole of the first two half-yearly payments, the respondents, as the annuity trustees under the Act of 1900, brought an action against the Secretary of State to recover so much of the tax as was a tax on payment of the instalments of the G purchase-money, contending that so much of each payment as represented capital was not liable to income tax; income tax being chargeable only upon interest."

It is to be observed that the plaintiffs did not claim—indeed on the form of the documents it would have been hard for them to claim—that the case was like H *Foley* v. *Fletcher* (4), viz., a purchase for a sum equal to the aggregate of all the annual payments payable by instalments from 1901 to 1948, and that no tax at all was payable. They conceded that tax was payable on the interest element, and only disputed the claim to tax on the capital element as well. The Court of Appeal, reversing PHILLIMORE, J. (5), held that the plaintiffs were right, and their decision was upheld by the House of Lords. The basis of the decision was that, I though the annual payments to be made by the defendants were described as "an annuity", it was not in its entirety "an annuity" within the meaning of the Income Tax Acts since in fact an ascertained purchase price of £34,850,000 was being discharged over a period of forty-seven years by equal instalments, each consisting partly of a sum in discharge of capital and partly of a sum in the nature of interest. None of the judges saw any difficulty on the wording of the

(3) [1903] 1 K.B. 494; *affd.* H.L., [1903] A.C. 299; 4 Tax Cas. 618.
(4) (1858), 28 L.J.Ex. 100.
(5) [1902] 2 K.B. 413; *revsd.* C.A., [1903] 1 K.B. 494.

Income Tax Acts in dissecting the payments and treating only the interest element as a taxable annuity. A

It follows from that case that, if the agreement here had recited that the shares were worth £2 million and that the taxpayer had agreed to sell them in consideration of an annuity of £44,000 a year for 125 years, he could not have resisted a claim to tax on the interest element in each payment. But the agreement takes the form of a sale for a purchase price equal to the aggregate of all the instalments, and that, says counsel for the taxpayer, differentiates this case from the *Scoble* case (6). He says that the provision for payment of the whole balance of the purchase price on default of payment of an instalment (which he submits is not a penalty—see *Protector Loan Co.* v. *Grice* (7)), shows, if the point is material, that the figure of £5½ million is a real figure. He says further, and says truly, that no case can be found in which the courts have dissected sums which were expressed to be instalments of a purchase price into capital and interest elements. Finally, he relies strongly on a statement of the law by ROMER, L.J., in *Inland Revenue Comrs.* v. *Ramsay* (8) and by LORD GREENE, M.R., in *Inland Revenue Comrs.* v. *Wesleyan and General Assurance Society* (9). B C

ROMER, L.J., in the *Ramsay* case (8) said: D

> "If a man has some property which he wishes to sell on terms which will result in his receiving for the next twenty years an annual sum of £500, he can do it in either of two methods. He can either sell his property in consideration of a payment by the purchaser to him of an annuity of £500 for the next twenty years, or he can sell his property to the purchaser for £10,000, the £10,000 to be paid by equal instalments of £500 over the next twenty years. If he adopts the former of the two methods, then the sums of £500 received by him each year are liable to income tax. If he adopts the second method, then the sums of £500 received by him in each year are not liable to income tax, and they do not become liable to income tax by it being said that in substance the transaction is the same as though he had sold for an annuity. The vendor has the power of choosing which of the two methods he will adopt, and he can adopt the second method if he thinks fit, for the purpose of avoiding having to pay income tax on the £500 a year. The question which method has been adopted must be a question of the proper construction to be placed on the documents by which the transaction is carried out." E F

LORD GREENE, M.R., in *Inland Revenue Comrs.* v. *Wesleyan and General Assurance Society* (9) said: G

> "In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable. It is sufficient to refer to the common case where property is sold for a lump sum payable by instalments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten instalments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result, from the financial point of view, is precisely the same in each case, but one method of achieving it attracts tax and the other method does not." H I

In this case counsel submitted that the parties have clearly chosen the second of the two methods to which ROMER, L.J., referred. However, it was suggested that LORD GREENE's statement was expressly approved by VISCOUNT SIMON

(6) [1903] A.C. 299; 4 Tax Cas. 618.
(7) (1880), 5 Q.B.D. 592.
(8) [1935] All E.R. Rep. at p. 854; 20 Tax Cas. at p. 98.
(9) [1946] 2 All E.R. at p. 751; 30 Tax Cas. at p. 16.

A when the *Wesleyan* case (10) came before the House of Lords, but I do not think that this is so. LORD SIMON (11) undoubtedly agreed that a transaction which on its true construction is of a kind that would escape tax is not taxable on the ground that the same result would be brought about by a transaction in another form which would attract tax, but I do not read him as accepting the particular example of this position which LORD GREENE gave, though he certainly said B nothing to cast any doubt on its correctness.

Counsel for the Crown first submitted that this was a sale in consideration of an annuity and not a sale for a purchase price payable by instalments at all. The sum of £5½ million, they said, is simply the aggregate of the instalments and cannot properly be described as the purchase price. If there was any purchase price it was £2 million. Further, even if periodic payments of sums without C interest, the aggregate of which exceeds the present value of the property sold, can be properly described as instalments of purchase price if the period is relatively short, they cannot be so described if the period is as long as this. Finally, on this branch of the argument they submitted that the wording of the agreement was more consistent with a sale for an annuity than a sale for a purchase price payable by instalments. In my judgment this last point has no substance in it. D The agreement follows closely the wording of familiar precedents for a sale in consideration of a purchase price payable by instalments (see KEY AND ELPHINSTONE PRECEDENTS IN CONVEYANCING (15th Edn.), p. 507) with, of course, the difference that the precedents envisage that the purchase price will be the value of the property at the date of sale and provide for payment of interest from time to time on the outstanding balance, whereas here no interest is payable but the E purchase price is far more than the value of the property sold at the date of sale. Again, if ROMER, L.J., is right, it seems to me to follow that the £5½ million can properly be regarded as the purchase price of these shares. The £10,000 in his example must clearly have been far more than the value of the property at the date of the supposed sale. If it had been worth £10,000, the annuity would have been far more than £500 a year. He is, I think, saying quite clearly F and unmistakably that a man who wishes to exchange a capital asset for a right to receive annual sums over a period of years can avoid paying any tax on the annual sums by selling the asset for a sum in excess of its then value to be paid by instalments over a period without interest. That is precisely what the taxpayer has done here. It is true, of course, that the period chosen is longer than the twenty years given by ROMER, L.J., but, as I have already said, I G cannot see how the length of the period can make a difference. I asked counsel where he would draw the line. He suggested that a proper limit to take might be the expectation of life of the vendor; but this would mean that a transaction which would have one result for tax purposes if the vendor was twenty-five would have another if he was seventy-five. The question cannot be one of degree. It is a point of principle, and if ROMER, L.J., was right I think that the taxpayer H is entitled to succeed.

Then was ROMER, L.J., right? I am conscious that it must appear presumptuous in me to question the correctness of a clear and positive statement of the law made by ROMER, L.J., and repeated by LORD GREENE. But, try as I will, I cannot see how the second branch of the proposition can be reconciled with the decision of the House of Lords in *Secretary of State in Council of India* v. *Scoble* (12). I The supposed distinction for tax purposes between a sale of property in consideration of a purchase price payable by instalments and a sale of property in consideration of an annuity was first drawn by POLLOCK, C.B., in *Foley* v. *Fletcher* (13), but in *Scoble's* case (14) where property was sold for an annuity payable for a

(10) [1948] 1 All E.R. 555; 30 Tax Cas. 11.
(11) [1948] 1 All E.R. at p. 557; 30 Tax Cas. at p. 25.
(12) [1903] A.C. 299; 4 Tax Cas. 618.
(13) (1858), 28 L.J.Ex. 100.
(14) [1903] 1 K.B. 494; [1903] A.C. 299; 4 Tax Cas. 618.

period of years, it was held that tax is not payable on the capital element. STIRLING, L.J., in the Court of Appeal (15) said in terms that the chief baron was wrong when he said that, if Lady Emily Foley had sold her estate for an annuity, so calling it, tax would have been payable on the whole of it, and the House of Lords must have taken the same view. It is, of course, true, that in *Scoble's* case (16) the value of the property sold and the rate of interest taken for the purpose of fixing the amount of the annuity appeared on the face of documents, whereas in this case these facts have been established by outside evidence. But I think that later cases, such as *Perrin* v. *Dickson* (17), make it clear that this makes no difference. Then, if it is not the law that by selling property for an annuity for a fixed period one subjects the whole annuity to tax, why should it be the law that by selling property for a purchase price greater than its present value payable by annual instalments, one frees the whole of each instalment from tax? If the Crown cannot say that there is any magic in the use of the word "annuity", why should the taxpayer be able to say that there is any magic in the use of the words "purchase price"? I can see no reason; but there is admittedly no decision on the point and the respect which I feel for the opinions of ROMER, L.J., and LORD GREENE, M.R., is such that I might well not have thought it right to set my opinion against theirs if I had found no support for it in any of the cases. I do, however, find some support for it in two passages in cases to which I have been referred.

The first is in the judgment of SIR WILFRID GREENE, M.R., himself in *Sothern-Smith* v. *Clancy* (18). It reads as follows (19):

> "It is clear that an annuity or other annual payment falls to be charged with tax as being an 'annual profit or gain', and this is the reason why it becomes necessary to examine the nature of an annual payment in order to see whether it is in truth an income or a capital payment—a question which cannot be answered merely by pointing to the fact that it is annual. Questions of this kind are notoriously difficult, and give rise to distinctions of a highly artificial character. The present case is no exception. It is no doubt true to say that, in order to answer the question, the real nature of the transaction must be ascertained. This proposition has an engaging appearance of simplicity, but it is not so simple as it sounds, for the expression 'the real nature of the transaction' is ambiguous. It may mean the real nature of the legal relationship of the parties which results from the transaction, a matter which may not be in doubt, or it may include as well the real nature of the transaction from a financial point of view, a matter which at once raises a number of difficulties. If the transaction be one under which A, being or becoming indebted to B for a sum of £1,000, agrees with B to repay this sum by ten yearly instalments, or if A, being the purchaser of property from B for £1,000, agrees to pay the purchase price by ten yearly instalments, the real nature of the transaction from the legal point of view is that A is contracting to pay by instalments, in the one case, a debt, and, in the other, a purchase price. In such cases, the very nature of the legal relationship constituted by the contract prevents the annual payments from being anything but payments of capital."

Then follow these words which are relevant (20):

> "If to the instalments there is added an element of interest, that element

(15) [1903] 1 K.B. at p. 503; 4 Tax Cas. at p. 621.
(16) [1903] 1 K.B. 494; [1903] A.C. 299; 4 Tax Cas. 618.
(17) [1929] All E.R. Rep. 685; 14 Tax Cas. 608.
(18) [1941] 1 All E.R. 111; 24 Tax Cas. 1.
(19) [1941] 1 All E.R. at p. 115; 24 Tax Cas. at p. 6.
(20) [1941] 1 All E.R. at p. 116; 24 Tax Cas. at p. 6.

A would presumably attract tax as being an annual profit or gain. This would appear to be the result of *Secretary of State in Council of India* v. *Scoble* (21) and *Perrin* v. *Dickson* (22), although in *Foley* v. *Fletcher* (23) the opposite view was expressed."

Counsel for the taxpayer fastened on the word "added" and submitted that B SIR WILFRID GREENE, M.R., had in mind the ordinary case where with each instalment the purchaser pays interest on the outstanding balance of the purchase price, but the reference to *Foley* v. *Fletcher* (23) seems to me to show clearly that SIR WILFRID GREENE was thinking of a case where the property was worth less than the purchase price and was expressing the view that, in so far as *Foley* v. *Fletcher* (23) decided that in such a case tax was not payable on the interest C element in each instalment, it might be wrong. It may be, of course, that SIR WILFRID GREENE had changed his mind on this point by the time that he came to give his judgment in *Inland Revenue Comrs.* v. *Wesleyan and General Assurance Society* (24) but it is also possible that he had by then forgotten his doubts as to the correctness of this aspect of *Foley* v. *Fletcher* (23).

The second passage is in the judgment of WROTTESLEY, J., in *Lord Howard de* D *Walden* v. *Beck* (25). Lord Howard de Walden had purchased from a company for £259,380 a series of 120 promissory notes for £3,750 each payable at three-monthly intervals. The series of notes was held to be equivalent to an annuity. The Crown did not claim tax on the whole of each payment but only on the interest element. The taxpayer, however, contended that no tax was payable and relied on *Foley* v. *Fletcher* (23) and *Inland Revenue Comrs.* v. *Ramsay* (26). In E reference to that argument WROTTESLEY, J., said (27):

> "Mr. Needham, however, uses these cases, or some of them, to base an argument against any such analysis or disintegration. He points out that in the case of *Foley* v. *Fletcher* (23), and again in *Ramsay's* case (26), where the price of a business is fixed, and the payment of the price delayed and made F payable by instalments, there is at any rate notionally in such delayed payments an element of interest. If a man is given ten years to pay £1,000, viz., at the rate of £100 per annum, he is really paying in the instalments something by way of interest for the accommodation. Yet, it is said, never until today has the Crown put forward any such claim, though it might have been put forward anyhow in the case of *Foley* v. *Fletcher* (23) and G *Ramsay's* case (26), and in many other cases.
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> "The answer to this argument is that while notionally it is no doubt correct, I am by no means certain that it is factually true. A dentist desirous of selling his practice may know that purchasers for cash down are not to be found at all, and may arrive at the terms at which he will sell, not H along the lines of cash down at all, knowing that his only chance of obtaining a good price is by accepting it in instalments. This view of the matter was very present to the mind of POLLOCK, C.B., in *Foley* v. *Fletcher* (23). The difficulty of assessment may well account for the fact that hitherto no claim has been made in respect of that part of a purchase price which takes care of the delay attending its payment. I am not going to say that such a sum, I if ascertainable, is not interest. It would depend on the facts of the case."

There, as I see it, the learned judge was expressly leaving open the point which arises in this case, though it is true to say that earlier in his judgment he had

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(21) [1903] 1 K.B. 494; [1903] A.C. 299; 4 Tax Cas. 618.
(22) [1929] All E.R. Rep. 685; 14 Tax Cas. 608.
(23) (1858), 28 L.J.Ex. 100.
(24) [1946] 2 All E.R. 749; 30 Tax Cas. 11.
(25) 23 Tax Cas. 384.
(26) [1935] All E.R. Rep. 847; 20 Tax Cas. 79.
(27) 23 Tax Cas. at p. 398.

quoted the words of ROMER, L.J., in *Ramsay's* case (28)—on which the taxpayer relies so strongly—with apparent approval. A

The matter, then, stands in this way. There is no case which decides that the taxpayer is wrong and no case which decides that he is right. In his favour he has the opinion of POLLOCK, C.B., and, I think, also of BRAMWELL, B., in *Foley* v. *Fletcher* (29), and the very positive statements of ROMER, L.J., and LORD GREENE, M.R., in the *Ramsay* (30) and *Wesleyan* (31) cases, and what was said by SIR WILFRID GREENE, M.R., in *Sothern-Smith* v. *Clancy* (32) and by WROTTESLEY, J., in the *Howard de Walden* case (33). Last, but by no means least, as BRAMWELL, B., remarked in 1858 (34), common sense demands that in a case like this there should be an apportionment. It is not a case like that envisaged by WROTTESLEY, J. (35), where the only possible purchasers are not in a position to pay a capital sum down and the only way to obtain a good price is to accept payment of an agreed capital sum by instalments over a fairly short period. This is a case where what is called the purchase price clearly contains an interest element. In the result, therefore, I hold that the commissioners were right in their decision, and I dismiss both the appeal and the cross-appeal. B C

Appeal and cross-appeal dismissed. D

Solicitors: *Charles H. Wright & Brown* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

E

NOTE.

BRASSINGTON *v.* BRASSINGTON.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Davies, L.JJ.), October 16, 17, 1961.] F

Court of Appeal—New trial—Apprehension of prejudgment of issues—Respondent in divorce suit alleging that judge had made up his mind after hearing petitioner's evidence—Withdrawal of respondent from trial before giving evidence—Burden of justifying withdrawal when applying to Court of Appeal for new trial.

[As to new trial on the ground of some course taken by the judge at the trial, see 30 HALSBURY'S LAWS (3rd Edn.) 473, 474, para. 889; and for cases on the subject, see DIGEST (Practice) 593-598, *2347-2385.*] G

Case referred to:

Badcock v. *Middlesex County Council*, (Mar. 15, 1960), "The Times", Mar. 16, 1960. H

Appeal.

This was an appeal by the wife from an order of Mr. Commissioner GALLOP, Q.C., made on Apr. 8, 1960, at Caernarvon, granting a decree nisi to the petitioning husband on the ground of the wife's cruelty.

The parties were married in 1942 and had a daughter who was eighteen years of age and two boys of twelve and ten. The wife was a voluntary mental patient on two unspecified occasions during the marriage and also on two further occasions for a few weeks in 1957 and 1958. The marriage broke up in January, 1959, I

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(28) [1935] All E.R. Rep. at p. 854; 20 Tax Cas. at p. 98.
(29) (1858), 28 L.J.Ex. 100. (30) [1935] All E.R. Rep. 847; 20 Tax Cas. 79.
(31) [1946] 2 All E.R. 749; 30 Tax Cas. 11.
(32) [1941] 1 All E.R. 111; 24 Tax Cas. 1. (33) 23 Tax Cas. 384.
(34) (1858), 28 L.J.Ex. at p. 107. (35) 23 Tax Cas. at p. 398.

A when the husband locked the wife out of the home on the ground that she had treated him with cruelty. Thereafter the husband lived with the children in the matrimonial home and the wife lived with her parents. The husband filed a petition for divorce on the ground of cruelty and asked for custody of the boys. The wife's answer denied cruelty and, in respect of some incidents, pleaded self-defence and provocation. She alleged that, from January, 1959, the husband B had constructively deserted her. She asked, too, for custody of the boys.

The first ground of appeal was that the learned commissioner

> "misdirected himself and was wrong in law in expressing himself in open court unequivocally in favour of the [husband] without having heard the [wife's] case."

C Secondly, it was contended that he wrongly exercised his discretion in that he

> "refused to order a re-hearing although he had of his own motion offered to the [wife] to make such an order and his offer had been accepted by the [wife]."

D The facts in relation to the hearing appear in the judgment.

Phillip Wien, Q.C., and *D. W. Powell* for the appellant wife.
Elwyn Jones, Q.C., and *W. T. Williams* for the respondent husband.

HOLROYD PEARCE, L.J., delivering the judgment of the court, referred to the nature and grounds of appeal and the facts of, and issues in, the case, E and continued: The suit was heard for four days. By 5 p.m. on the third day, a Thursday, the evidence of the husband and his six witnesses had been concluded. We have the commissioner's notes of that evidence. In spite of a forceful cross-examination, that evidence appears, on the unreliable guide of the written word, to present a formidable case. Apparently it thus impressed the learned commissioner who saw and heard the witnesses. It is contended that certain obser- F vations by him on the Thursday afternoon justified the wife and her counsel in concluding that he had completely made up his mind in favour of the husband, and that it was useless for the wife to present her case. Accordingly, her counsel on the Friday morning informed the court that his client had instructed him not to take any further part in the case or call evidence. The learned commissioner then had perforce to order a new trial or to conclude the trial without hearing G the wife's case. He took the latter course. At one stage of the argument, it appears that he was of a mind to order a new trial on the ground that the attitude taken without any adequate reason by counsel made it impossible for the case to be properly heard. However, he did not do so but proceeded to hear argument from the husband's counsel in respect of certain difficulties which the commissioner himself had raised during the husband's evidence in the wife's favour H on the question of condonation. Having had his doubts on condonation and some other matters allayed by the arguments of the husband's counsel, he gave judgment in which he dealt with the unfortunate course of the trial and the facts of the case itself. He pronounced a decree nisi in the husband's favour.

We have no transcript of the observations by the commissioner of which complaint is made, since they arose out of a discussion which, by agreement of I counsel and the commissioner, was informal although conducted in open court. The shorthand writer had been released. We have, however, a transcript of the argument that followed counsel's protest. It is clear that both the learned commissioner and the wife's counsel were feeling genuine indignation and that, in addition, the commissioner was extremely hurt at the suggestion that he had acted unjudicially. Nevertheless, a long argument was conducted with complete decorum on both sides. The learned commissioner gave several assurances (which we have no doubt were genuine) that he had not prejudged the case, that he had in fact taken the condonation point in the wife's favour, and that he would not

reach any final conclusion on the case until the evidence on both sides was terminated. Counsel's attitude was not altered by these assurances, though he accepted their good faith. On the wife's instructions, he declined to call any evidence or take any further part in the trial. It was not suggested that there was any interruption or interference with counsel's conduct of the case. The commissioner was throughout courteous and ready to listen to anything that was said. The sole complaint is that the learned commissioner in open court made remarks which led the wife and her counsel to believe that he had prejudged the issues against the wife after hearing only the husband's case.

Before considering the effect of the remarks of which complaint is made we must observe that only a very strong case indeed would justify a refusal by a party to continue to take part in the trial. If a party, though aggrieved, continues to present his evidence and arguments he can always reserve his complaint and appeal against an unfair decision when it has been given. And any remarks which show that the tribunal prejudged the case against him before he had called his evidence will always in this court add very great weight to the substance of the appeal and may in themselves constitute a sufficient ground of appeal. The aggrieved party will then at least have shown that he has a genuine case on which he either ought to have, or could have, succeeded. In the present case, there is now nothing to show what was the weight of the wife's case against which the commissioner is said to have closed his mind, except in so far as it was revealed in cross-examination. The commissioner, though accepting (as we do) counsel's good faith in the attitude which he took up, appears to have thought at the end that the wife was taking advantage of the situation to avoid going into the witness-box. Whatever be the truth of that matter, where parties refuse to call their evidence or take any further part in the trial a very heavy onus lies on them

> "to satisfy the Court of Appeal that the apprehension that for them it would have been futile to continue and that had they done so they would not have had a fair, proper or satisfactory hearing was truly justified."

(See per LORD EVERSHED, M.R., in *Badcock* v. *Middlesex County Council* (1).) If it be open for counsel for the defendant or respondent to break off a losing battle when the court appears to be very much against him and then to ask this court for a re-hearing, it would create an opportunity for many applications to this court by undeserving litigants. They might, by an opportune manoeuvre, take advantage of a recourse to this court which should only be available to those who have suffered a real denial of justice. In our opinion, only in very exceptional circumstances should such relief be open to litigants who have voluntarily left the field before the battle is concluded.

The words of which the wife complains came to be spoken in circumstances which are set out in the transcript of counsel's remarks, which are accepted as accurate, and in the judgment of the learned commissioner, where again the facts are not really disputed. [HIS LORDSHIP referred to the circumstances in which the words of which the wife complained came to be spoken, and read relevant passages from the judgment of the commissioner, which referred to an informal approach made to him at the end of the first day's hearing by junior counsel for the husband with the consent of junior counsel for the wife, that the former might discuss with the husband the question of custody, although the husband's evidence had been begun but had not then been completed. In all the circumstances of the case, and having regard to the medical history involved, it had seemed, as the commissioner said, to him that an informal discussion in open court after the evidence of the husband and his witnesses had been concluded might be helpful. HIS LORDSHIP continued:] We feel some sympathy for the commissioner. There are moments when a court may well feel that an indication of the court's point of view may be valuable and helpful to the parties. But such

(1) (Mar. 15, 1960), "The Times", Mar. 16, 1960.

A an intervention is always fraught with dangers. To a judge's mind, it is axiomatic that any view which he may hold before the conclusion of the case is merely provisional and that, if any evidence or argument subsequently appears which makes his present view of the case untenable, he will abandon that view. Litigants, however, often do not appreciate this. They may mistake a provisional view for a concluded prejudgment. There may be cases where it is obviously desirable to B ventilate or even dispose of the issue of custody and access at an early stage. But a discussion on custody while the main issue of cruelty is still being contested and before the judge has heard both sides may give rise to misunderstanding; and this court bears in mind that it is important that in open court justice must be seen to be done. Nevertheless, before this court will intervene, a party who declines to proceed with his case must show that the judge (however well-meaning C and conscientious) has so conducted himself that a litigant in his position would reasonably feel that the case had been prejudged and that it would be impossible for him to obtain justice.

We cannot find that anything said by the learned commissioner reasonably led to such a conclusion in the mind of the litigant. The commissioner pointed out that the husband had made a favourable impression on him. There was D nothing final about that. It was still open to the wife (although difficult, it may be) to make an even more favourable impression by her evidence and that of her witnesses. Nothing that was said in our opinion justified the wife in reasonably concluding that the commissioner would thereafter turn a deaf ear to her evidence or to argument on her behalf. There was nothing to justify her in refusing to give evidence and coming to this court instead. Nor can we accept the contention that E the wife is entitled to a new trial on the ground that the commissioner offered a re-hearing which was accepted by counsel and that, therefore, he was bound to order a new trial. The commissioner intended to indicate, we think, that, if counsel resiled from his allegations, the commissioner was of a mind to grant a new trial as a way of settling the whole unfortunate incident. But counsel did not resile, and the opportunity and inclination for compromise was lost. We make no criti- F cism of counsel or the commissioner in this respect, since by then the situation had become very difficult indeed.

In our judgment, the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *J. A. H. Powell* (for the appellant wife); *F. W. P. Lupton* (for the respondent husband).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PONTIN AND ANOTHER *v.* WOOD.

A

[QUEEN'S BENCH DIVISION (Edmund Davies, J.), October 18, 1961.]

Limitation of Action—Amendment of writ—Writ issued within period of limitation—Defective indorsement claiming damages for personal injuries—Writ a nullity—Defendant informed by plaintiffs' solicitor's letter shortly after accident giving rise to claim that damages for negligent driving would be claimed—Writ issued nearly three years later—Summons to set aside service after limitation period expired—Statement of claim filed after summons heard—Whether amendment should be allowed or service of writ set aside.

B

On Mar. 18, 1958, the plaintiffs were injured in an alleged collision between them and a motor cyclist, the defendant. On Mar. 27, 1958, the plaintiffs, through their solicitor, sent a letter to the defendant, notifying him that a claim for damages would be preferred in due course on the ground of his negligent driving. On Mar. 13, 1961, shortly before the expiration of the period of limitation, a writ was issued which was served on the defendant personally on Mar. 25, 1961. The indorsement on the writ was defective in that it failed to set out the nature of the claim. The defendant did not then enter an appearance. On Aug. 4, 1961, the defendant took out a summons for an order that the service of the writ be set aside on the ground that it was a nullity. On Aug. 16, 1961, the summons was dismissed. On Aug. 17, 1961, the plaintiffs filed a statement of claim; and on Aug. 22, 1961, the defendant entered a conditional appearance. On appeal by the defendant against the dismissal of the summons to set aside the service of the writ,

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Held: at the date of the hearing of the summons the writ was a nullity by reason of the defective indorsement, and, even assuming that it was capable of amendment, the defects had not been cured by that date by the filing of a statement of claim and could not be so cured, because the action would have been statute-barred at the date of the amendment and no peculiar circumstance justifying amendment despite the expiry of the limitation period was shown; therefore, service of the writ would be set aside.

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Hill v. *Luton Corpn.* ([1951] 1 All E.R. 1028) considered and distinguished.

Dictum of LORD ESHER, M.R., in *Weldon* v. *Neal* ((1887), 19 Q.B.D. at p. 395) considered.

SEMBLE: a writ can be amended in a proper case, although the indorsement is so defective as to render the writ a nullity (see p. 993, letter H, post).

Appeal allowed.

G

[As to the amendment of a writ out of time, see 24 HALSBURY'S LAWS (3rd Edn.) 200, para. 358; and for cases on the subject, see 32 DIGEST 536, 537, *1891-1897*.

As to setting aside service of a writ, see 30 HALSBURY'S LAWS (3rd Edn.) 363, 364, para. 676; and for cases on the subject, see DIGEST (Practice) 270, *67, 68*.]

H

Cases referred to:

Graff Brothers Estates, Ltd. v. *Rimrose Brook Joint Sewerage Board*, [1953] 2 All E.R. 631; [1953] 2 Q.B. 318; [1953] 3 W.L.R. 419; 3rd Digest Supp.

Grounsell v. *Cuthell and Linley*, [1952] 2 All E.R. 135; [1952] 2 Q.B. 673; 3rd Digest Supp.

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Hall v. *Meyrick*, [1957] 2 All E.R. 722; [1957] 2 Q.B. 455; [1957] 3 W.L.R. 273; 3rd Digest Supp.

Hill v. *Luton Corpn.*, [1951] 1 All E.R. 1028; [1951] 2 K.B. 387; 115 J.P. 340; 2nd Digest Supp.

Marshall v. *London Passenger Transport Board*, [1936] 3 All E.R. 83; Digest Supp.

Weldon v. *Neal*, (1887), 19 Q.B.D. 394; 56 L.J.Q.B. 621; 32 Digest 536, *1892*.

A **Appeal.**

Appeal by the defendant, Frederick Wood, from a decision of Mr. District Registrar H. M. DRAPER, given at Northampton District Registry on Aug. 16, 1961, refusing to order that a writ of summons issued by the plaintiffs, Mary Pontin and her infant son Norman Albert Pontin, the service thereof and all subsequent proceedings in the action be set aside with costs on the ground that the B indorsement on the writ disclosed no cause of action and did not comply with R.S.C., Ord. 3, r. 3. The facts are set out in the judgment of EDMUND DAVIES, J.

P. Bennett for the defendant.

J. A. D. Owen for the plaintiffs.

Cur. adv. vult.

C Oct. 18. **EDMUND DAVIES, J.,** read the following judgment: This is an appeal against the Northampton District Registrar's refusal to set aside service of the writ on the ground that the writ was, and remains, a nullity. I decided in chambers that the appeal must be allowed, but learned counsel have requested me to deliver judgment in open court on the ground that to do so would afford some help to practitioners. As DEVLIN, J., observed in *Hill* v. *Luton Corpn.* (1) D that there was no reported decision where a writ was set aside on the grounds that the defective indorsement thereon rendered it a nullity, I have thought it right to accede to counsel's request.

The proceedings arose out of an alleged collision between two pedestrians and a motor cyclist on Mar. 18, 1958. Nine days later, a solicitor's letter was sent to the motor cyclist, the defendant, notifying him that a claim for damages would E be preferred in due course on the grounds of his negligent driving. I stress that fact at the outset, for it follows that thereafter the defendant must have been fully aware of the nature and basis of the claim; but the writ was not issued until the statutory period for claiming was nearly over, namely, Mar. 13, 1961. It was indorsed simply, " The plaintiffs' claim is for damages for personal injuries ". That this was a defective indorsement plaintiffs' counsel conceded. While a F slavish following of the forms prescribed by R.S.C., Ord. 3, r. 3, and Appendix A, Part 3, may not be called for, the defendant was entitled to be informed by the indorsement of the " nature of the claim " (see R.S.C., Ord. 2, r. 1), albeit without setting forth " the precise ground of complaint " (R.S.C., Ord. 3, r. 2). This the writ did not do, and this case is, therefore, distinguishable from such cases as *Graff Brothers Estates, Ltd.* v. *Rimrose Brook Joint Sewerage Board* (2). Was this G indorsement such as to render the writ a nullity, or did it contain merely a defect curable by amendment? If the latter, I should have been strongly inclined to grant leave to amend (on stringent terms as to costs) but, for reasons which will appear later, such a course is not open to me. The conclusion to which I have come is that the indorsement is such as to render this writ as it stands a nullity. Even so, I should have granted an amendment were it open to me to do so, and H this despite the view expressed by DEVLIN, J., in *Hill* v. *Luton Corpn.* (3) that ". . . if [a writ] is a nullity, there is nothing to be amended ". With respect, I see no reason why even an utterly worthless indorsement cannot with regularity be put into proper shape by an amendment authorised by the court, so that what was a complete nullity becomes an effective writ, thus rendering unnecessary the issuing of a fresh writ, and even re-service of the amended one, unless leave to I amend be granted conditionally on re-service (see R.S.C., Ord. 28, r. 10 and the note thereto in the ANNUAL PRACTICE, 1961). In the last-mentioned case, the writ claimed simply " damages for negligence and breach of contract ". In an unreported case, SLADE, J., had held a writ so indorsed a mere nullity and set aside its service, whereas DEVLIN, J., decided that the indorsement was merely

(1) [1951] 1 All E.R. at p. 1029; [1951] 2 K.B. at p. 390.
(2) [1953] 2 All E.R. 631; [1953] 2 Q.B. 318.
(3) [1951] 1 All E.R. at p. 1030; [1951] 2 K.B. at p. 390.

defective. But the more important point for present purposes is that, in *Hill* v. *Luton Corpn.* (4), the writ was served together with the statement of claim, and DEVLIN, J., held that the imperfections of the former were cured by the latter. In the instant case, however, the course of events was quite different, and it is time for me now to state just what occurred. The writ having been issued on Mar. 13, 1961, it was served on the defendant personally on Mar. 25. It needs to be stressed that no appearance was entered, but, on July 6, the plaintiffs' solicitors informed the defendant's insurers of the fact of service. On Aug. 4, a summons was taken out for

> "an order that the writ of summons herein the service thereof and all subsequent proceedings in this action be set aside with costs on the ground that the indorsement of the said writ disclosed no cause of action . . ."

On Aug. 16 the district registrar dismissed this summons, and his admirable note discloses that, following *Hill* v. *Luton Corpn.* (4), he held that

> "It is implicit in a claim for personal injuries that the injuries are inflicted by the defendant. The lack of particularity is capable of being remedied."

At that date, it is to be noted that (unlike *Hill* v. *Luton Corpn.* (4)) there was no statement of claim; but the very next day, Aug. 17, one was filed, and on Aug. 22 a conditional appearance was entered.

Were I free to read together the writ and the statement of claim, as DEVLIN, J., did, I should gladly have done so. But counsel for the defendant submitted that such a course was not open to me. His submissions, shortly expressed, are these. By R.S.C., Ord. 13, r. 5:

> "If the claim indorsed on the writ is, as against any defendant, for unliquidated damages only, and that defendant fails to appear, the plaintiff may enter interlocutory judgment against him for damages to be assessed and costs . . ."

No interlocutory judgment was entered, but, even assuming it had been, the plaintiffs should have proceeded (in accordance with R.S.C., Ord. 19, r. 10) to file the statement of claim with the proper officer, no appearance having been entered. That also had not been done by the time the summons was heard before the district registrar. The action could not proceed as if in fact the defendant had appeared, for R.S.C., Ord. 13, r. 12, called for the

> "filing by the plaintiff of a proper affidavit of service, and if the writ is not specially indorsed under Ord. 3, r. 6, of a statement of claim . . ."

and, ex concessis, no such affidavit had ever been filed. Finally, R.S.C., Ord. 20, r. 1, renders mandatory the compliance with R.S.C., Ord. 13, r. 12, ". . . as to filing a statement of claim when there is no appearance . . .", whereas in the present case non-compliance therewith was established and, indeed, admitted. Accordingly, counsel for the defendant submitted that there was no statement of claim properly before the court, and the one which had been filed after the summons was ineffective to cure the defects in the writ. When DEVLIN, J., said in *Hill* v. *Luton Corpn.* (5):

> "I gravely doubt that there is power to set aside a writ on the ground of a defective indorsement once that has been cured by delivery of a proper statement of claim",

he was, counsel submitted, adverting only to the wholly different facts of that case. I, myself, think that the words of DEVLIN, J., must indeed be so read, and that to make them of general application one needs to insert before the word "delivery" some such qualifying adjective as "regular" or "proper".

Clearly, the position fell to be decided on the facts as they existed at the date

(4) [1951] 1 All E.R. 1028; [1951] 2 K.B. 387.
(5) [1951] 1 All E.R. at p. 1031; [1951] 2 K.B. at pp. 391, 392.

A of the hearing before the district registrar (*Grounsell* v. *Cuthell* (6)), and I have come to the conclusion, though reluctantly, that the submissions of counsel for the defendant are well founded: that, at the hearing of the summons, the writ was a nullity, and that, even assuming that the indorsement was merely defective, its defects had not been at the hearing of the summons, and now cannot be, cured by a statement of claim filed at a time and in the irregular circumstances B in which a statement of claim first made its appearance in the present proceedings. "To set aside a writ for a defective indorsement is a very strong thing to do"; the words are again those of DEVLIN, J., in *Hill* v. *Luton Corpn.* (7), and I would respectfully echo them, particularly in the circumstances of the present case, where the defendant knew within a few days of the accident the nature of the claim which was to be launched against him. I would, accordingly, willingly C have implemented R.S.C., Ord. 28, r. 1, and R.S.C., Ord. 70, r. 1, (8) and granted leave to amend the present indorsement (be it a nullity or merely defective) by adding the few necessary words, were I free to do so. But I am not. This accident occurred in March, 1958, now well over three years ago. It is long established that an amendment will not be permitted to add a new cause of action which, if set up in an action begun at the date of the amendment, would have been statute-D barred (see *Marshall* v. *London Passenger Transport Board* (9) and *Hall* v. *Meyrick* (10), and the cases there cited). In *Weldon* v. *Neal* (11), LORD ESHER, M.R., said:

> "Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."

HODSON, L.J., in *Hall* v. *Meyrick* (12), cited as examples of such peculiar circumstances: E

> ". . . that the plaintiff was tricked by the defendant or lulled into a sense of false security that the statute would not be pleaded against her."

In a valiant attempt to extricate his clients from their present difficulties, plaintiffs' counsel stressed that, by reason of the letter written to the defendant very shortly after the accident, he was never in any doubt as to the nature or basis F of the claim. But I cannot regard that as a "peculiar circumstance" within the meaning of LORD ESHER's phrase, and none other was suggested to me. For these reasons, while I should have been prepared to allow an amendment of the writ on the terms that the defendant was to have all the costs thrown away, I have felt constrained to hold that I have no such power. For these reasons, in my judgment, this appeal must be allowed with costs, and I make the order asked for by the G defendant.

Appeal allowed.

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *Ray & Vials*, Northampton (for the defendant); *Parker, Thomas & Co.*, agents for *Max Engel & Co.*, Northampton (for the plaintiffs).

[*Reported by* KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

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(6) [1952] 2 All E.R. 135; [1952] 2 Q.B. 673.

(7) [1951] 1 All E.R. at p. 1031; [1951] 2 K.B. at p. 392.

(8) R.S.C., Ord. 28, r. 1, provides: "The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such I manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

R.S.C., Ord. 70, r. 1, provides: "Non-compliance with any of these rules . . . shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

(9) [1936] 3 All E.R. 83.

(10) [1957] 2 All E.R. 722; [1957] 2 Q.B. 455.

(11) (1887), 19 Q.B.D. at p. 395.

(12) [1957] 2 All E.R. at p. 728; [1957] 2 Q.B. at p. 480.

A

SHOUKATALLIE *v.* R.

[PRIVY COUNCIL (Lord Denning, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva), July 4, 5, 27, 1961.]

Privy Council—West Indies—Criminal law—Jury—Intimidation or threat—Jury told by judge to remember their oath—Direction to put aside extraneous matters, to make up their minds one way or the other and to accept reason one from the other—Whether such coercion as to invalidate jury's verdict.

B

On the last day of the trial in British Guiana of the appellant and another man who were charged with murder, the trial judge's summing-up to the jury took nearly 5½ hours to deliver. The jury retired at 4.50 p.m. At 8.40 p.m. they returned to court and, the foreman having said that they needed no further directions, the judge reminded them of the oath which each and every one of them had taken; he directed them to put aside all extraneous matters from their deliberations and to accept reason one from the other; he asked them not to besmirch the fair name of their country; and he ordered them to return to the jury room "to give you an opportunity of arriving at an honest verdict". He did not tell the jury that they were at liberty to disagree. The jury retired again and at 10.0 p.m. returned and asked for further legal directions. After the judge had given these, they retired for nearly another 3½ hours, after which they unanimously found the appellant guilty but only found the other man guilty with a strong recommendation to mercy. The appellant appealed against his conviction on the ground that the trial judge exerted undue pressure on the jury when they returned into court at 8.40 p.m.

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Held: though the exhortation by the trial judge to the jury to reach a verdict might have been differently put, it did not import such a measure of coercion as would invalidate a verdict, and, accordingly, the appeal would be dismissed.

Appeal dismissed.

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[As to the retirement of juries to consider their verdicts, see 10 HALSBURY'S LAWS (3rd Edn.) 431, para. 795; and for cases on the subject, see 14 DIGEST (Repl.) 367, 368, *3557-3563.*]

Cases referred to:

Penn and Mead's Case, (1670), 6 State Tr. 951; 16 Digest 253, *542.*

R. v. *Creasey*, (1953), 37 Cr. App. Rep. 179; 14 Digest (Repl.) 332, *3223.*

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R. v. *Klein*, (1932), 23 Cr. App. Rep. 185; 15 Digest (Repl.) 1141, *11,496.*

R. v. *Mills*, [1939] 2 All E.R. 299; [1939] 2 K.B. 90; 108 L.J.K.B. 449; 160 L.T. 439; 103 J.P. 171; 27 Cr. App. Rep. 80; 14 Digest (Repl.) 370, *3586.*

R. v. *Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; 113 J.P. 468; 33 Cr. App. Rep. 189; 14 Digest (Repl.) 662, *6717.*

H

R. v. *Walhein*, (1952), 36 Cr. App. Rep. 167; 14 Digest (Repl.) 367, *3563.*

Winsor v. *R.*, (1866), L.R. 1 Q.B. 390; 7 B. & S. 490; 35 L.J.M.C. 161; 14 L.T. 567; 30 J.P. 374; *affg.* L.R. 1 Q.B. 289; 14 Digest (Repl.) 370, *3590.*

Appeal.

I

Appeal by special leave in forma pauperis by the appellant, Shoukatallie, from an order of the Federal Supreme Court of the West Indies, Appellate Jurisdiction (HALLINAN, C.J., RENNIE and MARNAN, F.JJ.), dated Sept. 14, 1960, dismissing the appellant's appeal from his conviction and sentence to death on June 3, 1960, by the Supreme Court of British Guiana (BOLLERS, Ag.J., sitting with a jury). The facts are set out in the judgment of the Board.

Phineas Quass, Q.C., M. P. Solomon and *Shokoo Manraj* for the appellant.

J. T. Molony, Q.C., and *J. G. Le Quesne* for the Crown.

A **LORD DENNING:** In British Guiana on Feb. 10, 1960, a man named Rampat (also called Peeka) was murdered. Their Lordships will call him Peeka. He had gone in the early morning to visit his cows at a creek on the Mahaica River. He was paddling a corial, which is a dug-out canoe. He never returned alive. Five days later his body was recovered from the river; and from its condition it appeared that someone had shot him with a shot-gun, then his body B (whilst he was still alive) had been tied to a log of wood by means of vine branches, and it had then been thrown into the river. Suspicion fastened on two brothers named Shoukatallie (No. 1 accused), the appellant, and Mahomed Ali (No. 2 accused). They were arrested and charged with the murder. On May 16, 1960, they were indicted in the Supreme Court of British Guiana and tried before BOLLERS, Ag.J., and a jury. The case was heard on fifteen days between May 16, C 1960, and June 3, 1960 (including a visit to the locus in quo), and in the early morning of June 3, 1960, the jury found the appellant guilty of murder; and they also found Mahomed Ali (No. 2 accused) guilty of murder, but in his case with a very strong recommendation to mercy. BOLLERS, J., sentenced both of them to death. Both appealed to the Federal Supreme Court (HALLINAN, C.J., RENNIE and MARNAN, F.JJ.), who, on Sept. 14, 1960, dismissed the appeal of the appellant; D but they allowed the appeal of Mahomed Ali and set aside his conviction and sentence. The appellant applied for special leave to appeal to Her Majesty in Council and was granted it. His appeal was heard on July 4 and 5, 1961, when their Lordships said that they would humbly advise Her Majesty that his appeal should be dismissed. They now give their reasons.

The appeal was based on the conduct of the judge at the trial. It was said E that he had exerted undue pressure on the jury to come to an agreement; and that, for this reason, the verdict could not stand. The point cannot properly be appreciated without some description of the nature of the case. The case for the Crown was that the appellant and Mahomed Ali were acting together in concert in a common design to kill Peeka. The evidence of the prosecution was to the following effect:—Shortly before his death, Peeka was paddling along the river F in his corial. A shot rang out. It came from another corial in which were the two accused men, the appellant and Mahomed Ali (No. 2 accused). The appellant was the man who had fired the shot. He had a gun in his hand. Mahomed Ali was steering the corial. The appellant shouted out: "Shut your rass, you no dead yet". The appellant then fired the gun again at Peeka. Peeka fell on his face in his corial. Mahomed Ali then paddled their corial close to Peeka's corial. G The appellant got hold of Peeka's corial and pulled it across the creek. A short time later, the appellant and Mahomed were seen near two corials. The appellant was chopping wood. Mahomed was twisting vine branches. Five days later a search was made in the river and a diver employed. The body of Peeka was found tied to a log of wood by a vine. A post-mortem examination indicated that Peeka was shot, then tied up and immersed in the water while still alive. The H accused men, the appellant and Mahomed Ali, did not give evidence on oath. They both made statements from the dock denying they were in the vicinity or knew anything at all about the crime. The defence attacked the credibility of the witnesses for the prosecution saying that four of the principal witnesses were members of a family who had a feud with the family of the accused, and that the fifth had been bribed.

I Before their Lordships, counsel for the appellant argued strongly that, on the evidence, either *both* the appellant and Mahomed Ali were guilty of murder or that *neither* was guilty. "How strange, then," he said, "that as the matter stands, the appellant has been found guilty and Mahomed Ali goes free!". Their Lordships think the case is not so simple as that; for, even if the jury rejected the alibi of the accused men (as they did), nevertheless they would have to consider whether the evidence of the prosecution was sufficient to bring home the guilt of *both* accused. So far as the appellant was concerned, there could be no doubt. On the evidence, if accepted, he was the man who fired both shots. But

what about Mahomed Ali? Even if the evidence of the prosecution was accepted, was it altogether clear that the shooting was pre-arranged? Might it not, perhaps, be that the appellant fired the shots on his own account, with Mahomed Ali merely a spectator? The learned judge himself had that possibility in mind. He put it clearly to the jury that, if Mahomed Ali took no part in the crime, and his presence there was merely accidental, they should acquit him. But he pointed out a difficulty in taking that view. If the medical evidence was accepted, it was not the shots which killed Peeka, but the immersion in the water. So he told the jury:

> "You may very well feel that the [appellant] shot Peeka in cold blood, with malice aforethought, and that while he was still alive the number 2 accused then joined in concert with him in order to kill Peeka by drowning him, and that it was in those circumstances that Peeka came to his death. If you feel that they were acting in concert then . . . they would be equally guilty of the offence of murder in the eyes of the law."

Now, clear and comprehensive as he was, the judge in his summing-up seems to have missed one point which might operate in favour of Mahomed Ali; up to the moment that Peeka fell shot, Mahomed Ali may have been merely a spectator. Then Peeka fell so badly wounded that he was to all appearances dead, so that Mahomed Ali *thought* he was dead. Then Mahomed Ali, in order to save his brother, the appellant, from conviction, helped him to dispose of the body by throwing it into the water. In that event, Mahomed Ali would not have been guilty of murder for he had no intent to kill. He would only have been guilty of manslaughter. Another view which the jury might conceivably have taken was that, despite the medical evidence, Peeka was actually shot dead, so that he was not alive but dead, before Mohamed Ali took any part in the matter. In that event, Mahomed Ali would only have been guilty as an accessory after the fact.

Their Lordships must now recount the concluding stages of the trial. On June 2, 1960, the jury took their places at 8.40 a.m. The judge sat at 9 a.m. Crown counsel continued his final address until 10 a.m. when he concluded it. The court then adjourned for a few minutes until 10.14 a.m. when the judge began his summing-up. It lasted from 10.14 a.m. to 4.50 p.m., but with a break of one hour and ten minutes for lunch from 11.20 a.m. to 12.30 p.m. So the summing-up took nearly 5½ hours to deliver. The jury retired at 4.50 p.m. Looking back on it now, it would have been better if the judge had not finished his summing-up that night but had left it over till the next morning; but, no doubt, he thought that the jury would be able to reach their verdict in an hour or so. At 5.30 p.m. they were served with sandwiches, tea and ice cream. At 8.40 p.m. they returned into court. It is not known whether they returned at their own initiative or at the request of the judge. Then this took place: "The marshal: Have the jury arrived at a verdict? The foreman: No, My Lord, we are disagreed on our verdict." The judge clearly interpreted this as meaning: "We have not yet agreed on our verdict", for he went on to say: "The judge: I would like to know, Mr. Foreman, if the jury need any further directions. The foreman: No. My Lord." The judge evidently could not see why the case should cause the jury any difficulty. He seems to have thought that some one or more of them were not mindful of their duty, for he went on to address them in this way:

> "Gentlemen of the jury, I want to remind you of the oath that each and every one of you took at the commencement of this case. It reads as follows:—'You shall well and truly try and true deliverance make between Our Sovereign Lady the Queen and the prisoners at the Bar whom you shall have in charge, and a true verdict give according to the evidence. So help you God.' I want to direct your attention to the last two sentences in that oath that you have taken—'And a true verdict give according to the evidence. So help you God.' Well, the evidence that has been led in this case by the Crown and by the accused persons is clear and I can see no difficulty at all

A why you should not arrive at a final conclusion in this matter. When you get into that jury room you must put all extraneous matter away from your deliberations. If you take extraneous matter and improper matter into your deliberations in deciding whether the case has been proved or not proved against the accused persons, then you will not be acting in accordance with the oath which you have taken. It appears to me that this Colony is B reaching a stage, or wants to reach a stage, when it can manage its own affairs. Well, this kind of thing that is going on amongst the jury would not help. In my very humble submission I cannot see how it will help one way or the other. Now, you must return to that jury room and consider the matter again and then make up your minds one way or the other. If you feel one way and another member of the jury thinks another way, then you must C examine the arguments of each other and accept reason. You must not be pig-headed. Not because you may feel one way or the other does it mean that you must never give way, even though sound common sense and good reason are placed before you. The community is looking to you to return a verdict in accordance with the evidence and in accordance with your own conscience. If you fail to do that you will not only be bringing disgrace upon the D community but you will be bringing disgrace upon yourselves, which is perhaps even worse. Gentlemen of the jury, I am now going to order you to return to that jury room and consider the matter calmly and dispassionately, and give you an opportunity of arriving at an honest verdict in this case. Please see that you do not besmirch the fair name of your country. Please return to the jury room."

E At 8.49 p.m. the jury retired to the jury room, but they returned again at 10 p.m. and asked for further directions:

"The foreman: We would like further legal directions as to accomplices after the fact.

"The judge: I am not quite sure what that means. During the course F of my summing-up I did not mention the word 'accomplices'. What I did mention was 'acting in concert in pursuance of a common design to commit the offence for which the accused persons stand charged'. Do the jury desire further directions on that aspect of the matter?

"The foreman: Yes."

The judge then proceeded to direct the jury about principals in the first G degree and in the second degree, but he did not deal with accessories after the fact. Presumably he thought it did not arise. He again made his own view of the facts fairly clear when he said:

"You may feel that in this case the [appellant] shot Peeka and having shot Peeka, when he was in a helpless condition but still alive, he decided to drown Peeka, and it was at that stage that the number 2 accused proceeded H to act in concert with the [appellant] and assisted him, and was present at aiding and abetting the [appellant] in the killing of Peeka. If you find that is so, then they would be equally guilty of murder."

Their Lordships notice that, in these further directions, the learned judge missed the one point that he had missed in his summing-up, namely, that Peeka may have been dead or to all appearances dead and that Mohamed Ali (the I No. 2 accused) believed he was dead before he took any part in the matter. At 10.15 p.m. the judge concluded his further directions and the jury retired again. At 1.35 a.m. on June 3, 1960, the jury returned and gave verdicts as follows:

"Unanimous verdict: No. 1 accused guilty of murder.

"Unanimous verdict: No. 2 accused guilty of murder with a very strong recommendation to mercy."

On Sept. 14, 1960, the Federal Supreme Court set aside the conviction of Mahomed Ali, the second accused. They observed that the judge had not directed

the jury on the point that their Lordships have already mentioned. The Federal Supreme Court put it in this way: A

> "The jury may have thought the deceased [Peeka] was dead before the second appellant [Mahomed Ali] assisted in the disposal of his body or, even if he was not dead that the second appellant [Mahomed Ali] might have believed that he was, so that when he assisted in tying the deceased to a log and putting him in the river he had not the intention to kill" B

in which case "the second appellant was not guilty of murder". Now, if Peeka was already dead before Mahomed Ali gave any assistance, he could only be guilty as accessory after the fact: whereas if Peeka was still alive but Mahomed Ali believed he was dead, he would only be guilty of manslaughter, not of murder. It was the failure of the judge to assist the jury on this point which led (amongst other reasons) to the Federal Supreme Court quashing the conviction. It is a point which was not available to the appellant and is clearly enough to distinguish the two cases. C

Now the appellant appeals on the ground that the judge exerted undue pressure on the jury when they returned at 8.40 p.m. Their Lordships have already set out the passage in full. The gist of the complaint is that the judge told the jury that they *must* give a verdict one way or the other. He never told them that they were at liberty to disagree; and they may have been left under the impression that they would not be discharged until they did agree. D

In England, in olden times, there would have been nothing wrong in a judge telling the jury that they must agree and that he could not discharge them until they did agree; for that was, indeed, the law of the land. LORD COKE said that "a jury sworn and charged in case of life or member cannot be discharged by the court or any other, but they ought to give a verdict"; see Co. Litt. 227b; Co. 3rd Inst. 110; and SIR WILLIAM BLACKSTONE said that: "when the evidence on both sides is closed, the jury cannot be discharged till they have given in their verdict"; see 4 BLACKSTONE'S COMMENTARIES 360. Strong measures of coercion were adopted to secure a verdict. The jury were not allowed to separate. They were kept in the jury room without meat, drink or fire (candle-light excepted) until they did agree. You have only to read the report of *Penn and Mead's Case* (1) to see what compulsion was brought to bear on jurors. COCKBURN, C.J., said: E F

> "Our ancestors insisted on unanimity as the very essence of the verdict, but they were unscrupulous as to the means by which they obtained it"; G

see *Winsor* v. *R.* (2). All that is, of course, ancient history now. We have outlived those inhumanities. No longer is any measure of coercion acceptable. Once the judge has finished his summing-up and the jury given in charge of the bailiff, they are still not allowed to separate, but they are provided with refreshment and, if need be, accommodation for the night in a hotel; see *R.* v. *Neal* (3). If they should return and say they cannot agree, the judge usually explains to them that it is their duty to agree if they can honestly and conscientiously do so. He tells them that they must be unanimous, but he explains what unanimity means on the lines of the direction of FINLAY, J., in *R.* v. *Klein* (4) which was followed in substance in *R.* v. *Walhein* (5) and *R.* v. *Creasey* (6). He reminds them that it is most important that they should agree if it is possible to do so; that, with a view to agreeing, they must inevitably take differing views into account; that, if any member should find himself in a small minority and disposed to differ from the rest, he should consider the matter carefully, weigh the reasons for and against his view, and remember that he may be wrong; that if, on so doing, he can honestly bring himself to come to a different view and thus to concur H I

(1) (1670), 6 State Tr. at pp. 962-966.
(2) (1866), L.R. 1 Q.B. at p. 395.
(3) [1949] 2 All E.R. 438; [1949] 2 K.B. 590.
(4) Feb. 9, 1932 (unreported on this point).
(5) (1952), 36 Cr. App. Rep. 167.
(6) (1953), 37 Cr. App. Rep. 179.

A in the view of the majority, he should do so; but if he cannot do so, consistently with the oath he has taken, and he cannot bring the others round to his point of view, then it is his duty to differ, and, for want of agreement, there will be no verdict. It is everyday practice for a judge thus to exhort a jury to reach a verdict. There is nothing wrong in it, indeed it may be very proper he should do so, so long as he does not use phrases which import a measure of coercion such as B was held to have been exerted in *R.* v. *Mills* (7).

The question in this case is whether the judge went beyond exhortation which is permissible, and exerted some measure of coercion which is not. The words spoken by the judge show clearly enough what was in his mind. He thought it was a straightforward case which should not present an honest jury with any difficulty in reaching a verdict; and he could only account for their disagreement C by supposing that some of them were taking extraneous and improper matter into their deliberations or were being pig-headed about it. So he reminded them of the oath which each and everyone of them had taken—an oath which makes it clear that it is their duty to give a verdict, a true verdict, according to the evidence. He directed them to put aside all extraneous matters, and told them to accept reason one from the other. And he asked them not to besmirch the fair D name of their country. It was, perhaps, as the Federal Supreme Court said, too strongly worded and might have been differently put. But the Federal Supreme Court did not see in it such a measure of coercion as to invalidate the verdict. Nor do their Lordships. The more especially as the conduct of the jury shows that they were not in the least coerced by it. They deliberated for more than an hour and then came back with a request for further directions on a pertinent point E —about the case of Mahomed Ali—which they had seen for themselves. Then, after further directions, they deliberated for nearly another 3½ hours and then came back with a verdict which, one can readily infer, reflected the course of their discussions. They unanimously found the appellant guilty. But they only found Mahomed Ali (No. 2 accused) guilty with a strong recommendation to mercy. It is apparent that they thought that Mahomed Ali did not participate F in the shooting of Peeka, but only came in after the shooting and helped the appellant to dispose of the body. But they thought that, when the body was put into the water, Peeka was still alive; and for that reason Mahomed Ali was guilty of murder. The judge had told them so. But, as Mahomed Ali played so minor a part, they made a strong recommendation to mercy. If they had realised that, even though Peeka was still alive, there was still a possible point in favour of G Mahomed Ali—in that he might have *thought* that Peeka was dead—the jury might well have found Mahomed Ali not guilty of murder, but at most of manslaughter. At any rate, in view of the non-direction, it was quite right for the Federal Supreme Court to allow the appeal of Mahomed Ali and set aside his conviction of murder; and at the same time to dismiss the appeal of the appellant.

Their Lordships notice, as did the Federal Supreme Court, the heavy strain H on the jury in listening and deliberating over so many hours. It was unfortunate and unforeseen; but it is no ground for upsetting the verdict. And, as their Lordships have said, despite the strain, the jury came to a verdict which can readily be understood. Their Lordships notice that, before the Federal Supreme Court, the appellants sought to adduce affidavits from two of the jurors as to what took place in the jury room. The Federal Supreme Court quite rightly refused to I admit these affidavits and the point was not pressed before their Lordships.

For these reasons, their Lordships have, therefore, humbly advised Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *John Morris, Wilkes & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

(7) [1939] 2 All E.R. 299; [1939] 2 K.B. 90.

A

ATTORNEY-GENERAL *v.* CRAYFORD URBAN DISTRICT COUNCIL.

[CHANCERY DIVISION (Pennycuick, J.), October 16, 17, 18, 1961.]

Housing—Insurance—Tenants' personal and household effects—Arrangements made by housing authority for issuing group policy of insurance of its tenants' personal and household effects—Premiums collected by housing authority with weekly rent—Whether insurance scheme ultra vires the housing authority—Whether insurance was an act of general management of the housing authority's properties—Housing Act, 1957 (5 *&* 6 *Eliz.* 2 *c.* 56), *s.* 111 (1).

B

An urban district council, as the authority under the Housing Act, 1957, and previous enactments, erected houses and flats in its area, whose rents were payable weekly. In accordance with a resolution to that effect the council made arrangements with an insurance company for the issue of a group policy described as "Householders policy, collective insurance of tenants' effects" under which tenants could insure their effects. The premiums (5d. per week) were payable quarterly to the company. The total amount so insured for a dwelling was uniformly £575. Out of a total of 3,100 tenants, 893 participated in the arrangement. The weekly sum of 5d. was collected by the council's officer at the same time as the rent. In an action against the council, in which it was sought to establish that the scheme was ultra vires, the council relied on s. 111 (1) of the Housing Act, 1957, which provided that the "general management . . . of houses provided by a local authority . . . shall be vested in and exercised by the authority . . ."

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Held: since most tenants of the class which occupied council houses did not insure their personal effects independently and, if they lost their effects, were likely to default in paying their rent, a prudent landlord might reasonably seek to protect his rent by facilitating insurance of personal effects by way of a collective policy against loss; accordingly, the acts done to facilitate such insurance were acts of general management of the property in the ordinary sense of the term, and were within the power conferred by s. 111 (1) of the Housing Act, 1957.

F

[As to the limit of powers of local authorities as statutory bodies, see 24 HALSBURY'S LAWS (3rd Edn.) 602, para. 1108; cf. 9 HALSBURY'S LAWS (3rd Edn.) 62, para. 129; and for cases on the subject, see 13 DIGEST (Repl.) 263, 264, *897-906*.

G

As to the management of local authority houses, see 19 HALSBURY'S LAWS (3rd Edn.) 696, para. 1118; and for cases on the subject, see 26 DIGEST (Repl.) 703-706, *138-150*.

For the Housing Act, 1936, s. 83, see 11 HALSBURY'S STATUTES (2nd Edn.) 522.

For the Housing Act, 1957, s. 94, s. 111 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 401, 411.]

H

Cases referred to:

Amalgamated Society of Railway Servants v. *Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 12 Digest (Repl.) 283, *2182*.

A.-G. v. *Great Eastern Ry. Co.*, (1879), 11 Ch.D. 449; 48 L.J.Ch. 428; 40 L.T. 265; *affd.* H.L., (1880), 5 App. Cas. 473; 38 Digest (Repl.) 384, *519*.

I

A.-G. v. *Leeds Corpn.*, [1929] 2 Ch. 291; 99 L.J.Ch. 9; 141 L.T. 658; 93 J.P. 153; 13 Digest (Repl.) 280, *1016*.

A.-G. v. *Logan*, [1891] 2 Q.B. 100; 65 L.T. 162; 55 J.P. 615; 33 Digest 24, *104*.

A.-G. v. *Smethwick Corpn.*, [1932] All E.R. Rep. 304; [1932] 1 Ch. 562; 101 L.J.Ch. 137; 146 L.T. 480; 96 J.P. 105; Digest Supp.

R. v. *Snell, Ex p. Marylebone Borough Council*, [1942] 1 All E.R. 612; [1942] 2 K.B. 137; 111 L.J.K.B. 530; 167 L.T. 13; 106 J.P. 160; 31 Digest (Repl.) 616, *7318*.

A *Shelley* v. *London County Council, Harcourt* v. *London County Council,* [1947] 2 All E.R. 720; [1948] 1 K.B. 274; [1948] L.J.R. 333; *affd.* H.L., [1948] 2 All E.R. 898; [1949] A.C. 56; [1949] L.J.R. 57; 113 J.P. 1; 31 Digest (Repl.) 616, *7317.*

Smith v. *Cardiff Corpn.,* [1955] 1 All E.R. 113; [1955] Ch. 159; 119 J.P. 128; [1955] 2 W.L.R. 126; 26 Digest (Repl.) 704, *139.*

B *Tredegar* v. *Harwood,* [1928] All E.R. Rep. 11; [1929] A.C. 72; 97 L.J.Ch. 392; 139 L.T. 642; 31 Digest (Repl.) 400, *5297.*

Action.

This was an action commenced by writ dated Aug. 5, 1960, by the plaintiff, Her Majesty's Attorney-General at and by the relation of the Prudential Staff Union, against the defendant, Crayford Urban District Council. The plaintiff C claimed, first, a declaration that the defendant council was not empowered to effect the insurance of the personal and household goods belonging to persons occupying housing accommodation provided by the defendant council or to collect premiums in respect of such insurances and that the effecting of the insurance and the collection of the premiums were ultra vires the defendant council. Secondly, the plaintiff claimed an injunction to restrain the defendant council D by itself, its servants or agents or otherwise from effecting the insurance of personal and household goods or collecting any premiums or other moneys payable in respect of any such insurance. The facts appear in the judgment.

Sir Lynn Ungoed-Thomas, Q.C., and *P. R. Oliver* for the plaintiff.
Gerald Gardiner, Q.C., and *S. L. Newcombe* for the defendants.

E **PENNYCUICK, J.:** In this action the Attorney-General, at and by the relation of the Prudential Staff Union, seeks a declaration that Crayford Urban District Council is not empowered to effect the insurance of the personal and household goods of council tenants or to collect premiums in respect of such insurance and that the effecting of such insurance and the collection of such F premiums are ultra vires the council, with a similar relief by way of injunction.

The council, as the authority under the Housing Act, 1957, and previous enactments, has erected a considerable number of houses and flats in its area. The rent in respect of this accommodation is payable weekly. In accordance with a resolution passed on Nov. 26, 1958, the council made arrangements with the Municipal Mutual Insurance, Ltd. for the issue of a policy described as "Householders policy; collective insurance of tenants' effects."

G The policy opens with a recital in these terms:

> "Whereas the insured named in the schedule [the schedule contains the names of a number of individual tenants] being tenants of Crayford Urban District Council (hereinafter called "the agent") have by a signed proposal declaration and undertaking which the insured have agreed shall be the basis H of this contract and be held as incorporated herein separately applied to the company for membership and insurance against the contingencies specified in the schedule hereto and separately agreed to pay by equal weekly instalments to the company per the agent the premium due for one full year of insurance from the commencement thereof . . ."

The operative provision is in these terms:

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> "The company hereby agrees (subject to the conditions herein or indorsed or otherwise expressed hereon which conditions shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the insured to recover hereunder) that in the event of any of the said contingencies happening before 4 o'clock in the afternoon of the last day of the said year of insurance or any subsequent year of insurance during the currency of this policy in respect of which the insured shall pay in the aforesaid manner to the agent who shall accept the premium required for

the renewal of the insurance the company will at its option, by payment, reinstatement, or repair indemnify the insured as hereinafter provided." A

There follows a number of conditions; and then there is the schedule specifying the contingencies insured against and the property insured. These consist of

"household goods and personal effects of every description (except as aftermentioned)—including cash, currency notes, bank notes and stamps (not forming part of a stamp collection) to an amount not exceeding £50 or five per cent. of the sum insured, whichever is the less belonging to the insured or for which they are responsible or members of their family permanently residing with them; and fixtures and fittings the insureds' own or for which they are responsible." B

The premiums are payable quarterly by the agent to the company as regards each individual tenant who comes into the policy; the total amount insured works out at £575 and the premium works out at 5d. per week. The council proceeded to circularise its tenants, the original form of circular being in these terms: C

"Dear Sir or Madam, Insurance of tenants' furniture and effects. Whilst the council insure the premises which you occupy, it is the tenant's responsibility to insure his furniture and effects. In the circumstances, are you satisfied that your furniture and effects are adequately covered against fire, storm, tempest and similar risks? If not, then the scheme got out by the council's insurers whereby you can take out cover against all the risks set out in the enclosed leaflet, will interest you. The aim is simplicity of operation achieved by having a uniform sum insured of £575 at a fixed payment of 5d. per week which will be collected with your rent. Claims will normally be handled direct by the company, but you may hand them to your rent collector, for convenience. From now onwards, this scheme will be operated by the council for your benefit and is open for your acceptance at any time provided one week's notice is given. If you wish to take advantage of it, all that you have to do is complete the enclosed proposal form and hand it to your rent collector. Your insurance will be included in a 'group' policy which will be held by the council, but you will be provided with a certificate giving complete details." D E F

This form was subsequently varied in certain respects.

A large number of tenants has come into the arrangement, the number today being 893 out of a total of 3,100. The weekly sum of 5d. is collected by the council's officer at the same time as the rent. I shall refer later to certain other facts which may be material to the issues I have to decide. G

The powers and duties of the council in regard to provision of housing accommodation are contained in Part V of the Housing Act, 1957. It is necessary to refer to Part V of the Act as a whole, in order to determine the scope of those powers and duties; but for the present purpose the crucial provision is s. 111 (1), which is in the following terms: H

"The general management, regulation and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine."

It is under this provision, and this provision alone, that the council contends that it has power to effect and administer the collective policy. The only other section to which I need refer specifically is s. 94, which is as follows: I

"A local authority may fit out, furnish and supply any house erected, converted or acquired by them under s. 92 of this Act with all requisite furniture, fittings and conveniences and may sell, or supply under a hire-purchase agreement, furniture to the occupants of houses provided by the local authority and, for that purpose, may buy furniture."

A The law is not in doubt. The council, as a corporation established by statute, has only such powers as are conferred on it by statute, or as may fairly be regarded as incidental to, or consequential on, them; see *A.-G.* v. *Great Eastern Ry. Co.* (1), per LORD SELBORNE, L.C., where he said:

> "But I agree with JAMES, L.J., that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may B fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Then LORD BLACKBURN said (2):

> "My Lords, I quite agree with what JAMES, L.J., has said on this first C point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

In this connexion it should be observed that the expression "incidental to" is not equivalent to "in connexion with" but has a narrow meaning, expressed by LORD MACNAGHTEN in *Amalgamated Society of Railway Servants* v. *Osborne* (3) D to be "what might be derived by reasonable implication from the language of the Act".

It is unnecessary in the present case to consider the precise shades of meaning carried by the words "regulation" and "control" in contradistinction to the word "management".

The statutory predecessor of s. 111 of the Housing Act, 1957, namely s. 83 of E the Housing Act, 1936, has been considered in *R.* v. *Snell, Ex p. Marylebone Borough Council* (4) and *Shelley* v. *London County Council* (5). In *Shelley* v. *London County Council*, LORD GREENE, M.R., in the Court of Appeal said (6):

> "Section 83 deals with a stage in the activities of the council when the housing accommodation for the working classes has been provided, and F with what may be done in connexion with the running, so to speak, of the accommodation so provided."

Then he said (7):

> "The contrary argument put forward by the tenant would have the result that the management of these properties—I use that expression in the widest possible sense, as I think it is meant to be used—on a working class G estate belonging to the county council would be shared, in effect, between the county council and the county court judge . . ."

The cases relate to an entirely different subject-matter, and I do not think that they throw any further light on the present problem. I have been referred to a number of other authorities, including *A.-G.* v. *Logan* (8), *A.-G.* v. *Leeds Corpn.* (9), *Tredegar* v. *Harwood* (10), *A.-G.* v. *Smethwick Corpn.* (11), and *Smith* v. H *Cardiff Corpn.* (12). These cases illustrate the general principles, which are not in dispute, and I do not think that it would be useful for me to refer to them here.

The issue, then, in this action is whether in effecting and administering a collective policy, the council is doing acts of general management of the properties within s. 111 or alternatively, acts incidental to such general management. If so, the council has power to do them; if not, the council has not power to do them.

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(1) (1880), 5 App. Cas. at p. 478. (2) (1880), 5 App. Cas. at p. 481.
(3) [1910] A.C. at p. 97. (4) [1942] 1 All E.R. 612; [1942] 2 K.B. 137.
(5) [1947] 2 All E.R. 720; [1948] 1 K.B. 274; *affd.* H.L., [1948] 2 All E.R. 898; [1949] A.C. 56.
(6) [1947] 2 All E.R. at p. 723; [1948] 1 K.B. at p. 285.
(7) [1947] 2 All E.R. at p. 724; [1948] 1 K.B. at p. 286. (8) [1891] 2 Q.B. 100.
(9) [1929] 2 Ch. 291. (10) [1928] All E.R. Rep. 11; [1929] A.C. 72.
(11) [1932] All E.R. Rep. 304; [1932] 1 Ch. 562.
(12) [1955] 1 All E.R. 113; [1955] Ch. 159.

The Act contains no definition of " management ", so the word must bear its ordinary meaning; that is, as LORD GREENE, M.R. (13), put it, " running ". A

I must next state certain further facts as they appear from evidence given by the town clerk and the treasurer of the council, and by an assistant manager of Municipal Mutual Insurance, Ltd. The latter company formulated its first scheme for insurance in respect of tenants' effects as the result of a fire in 1945 which destroyed the effects of a number of tenants in council flats at Brentford and Chiswick. The company has now current such collective insurances with fifty-three local authorities. The council itself effected a collective insurance on comparable lines against damage to outside television aerials in 1955, this being a form of insurance adopted by very many councils. B

In the autumn of 1958 there was a severe storm in the Crayford area and a number of the council's tenants suffered damage to their household and personal effects by flooding. A test check made by the council showed that at least thirty out of forty tenants were not insured in respect of such damage and in this state of affairs the council, as the result of a call by a representative of Municipal Mutual Insurance, Ltd., decided to adopt a collective insurance scheme. The council receives fifteen per cent. commission for its services as agent under the policy. After taking into account small additional expenditure such as postage and the like, the commission leaves the council in pocket. The amount collected by the council from tenants under the collective insurance is about £900, representing less than one-third of one per cent. of the total collection in respect of rent and rates. The council's tenants are as a rule weekly wage earners or elderly people and it is difficult to collect substantial sums from them. If a tenant suffers some disaster like a burglary or a fire, the financial strain imposed on him in dealing with it is likely to jeopardise the regular payment of rent, and it is found in practice that the rent is perhaps the first thing to go when the tenant has other pressing needs. The council would in any event feel obliged to secure assistance for a tenant in such circumstances through voluntary welfare sources. The council brings no pressure to bear on tenants to enter into a collective insurance. The council, by way of " general management " under s. 111 of the Act, performs a considerable number of miscellaneous services for the welfare of its tenants. C D E F

Counsel for the plaintiff advanced with force a very simple argument; he contended that (i) the power of the local authority under s. 111 is confined to the management of houses provided by the authority; (ii) this power does not extend to the management of the private lives or possessions of the tenants of those houses; and (iii) the collective insurance is concerned with the private lives and possessions of tenants and consequently he concludes that the power of management under s. 111 does not authorise an authority to arrange for, or administer, a policy of this kind. G

Counsel for the defendants contended first, in broad terms that the power of general management under s. 111, read in its context, covers advancement of the welfare of tenants in virtually any respect connected with their occupancy of the authority's houses. In my judgment it is not possible to derive such a wide power from the terms of the section; the power of the authority under the section is to manage its houses and the authority is limited to such acts as may fairly be regarded as acts of management by a landlord of his property in the ordinary sense of that term. H

Secondly, counsel for the defendants contended that looking at all the particular circumstances, the facilitation of insurance on personal effects by way of a collective policy is an act of management in the ordinary sense of that term. This seems to me to be a formidable argument, and I have come to the conclusion that it is well founded. Once it is accepted, as it must be, (a) that most tenants of the class which occupies the council houses do not insure their effects independently, and (b) that such tenants, if they lose their effects, are likely to default on their I

(13) [1947] 2 All E.R. at p. 723; [1948] 1 K.B. at p. 285.

A rent, then it follows that a prudent landlord, acting in his interests as such, may reasonably seek to protect his rent by facilitating insurance against such loss. If he elects to do so, I do not see how this can be said to be otherwise than an act done in the general management of his property.

Relating this conclusion to the argument of counsel for the plaintiff, such an act, from the point of view of the council, is none the less an act done in the B general management of the property by reason that it is incidentally concerned with the private possessions of the tenants. The point admits of little elaboration, though it is easy to imagine comparable examples.

Counsel for the defendants has put his second contention in another way. This type of collective insurance has now been adopted by a number of authorities for upwards of fifteen years. Therefore, the argument runs, even if the operation C of such collective insurance was not originally an act of management in the ordinary sense, yet, by the frequency of its adoption, it has now become such an act. It is true that a particular act may not originally be an act of management in the ordinary sense, but in the course of time it may become so. I do not think, however, that local authorities by purporting, over a period of fifteen years, to do acts which were in truth ultra vires and, in consequence, not their acts at all D but nullities, could in some way have altered the quality of those acts, and I therefore reject this way of putting it.

I also reject one other argument which was advanced by counsel for the defendants. He pointed out that the policy covers the effects belonging to the council as landlords, but for which the tenant is responsible. It follows, he contended, that the arrangement for the issue of a policy is to be regarded as an E act done in the management, or incidental to the management, of the house itself. It seems to me that this risk could have been covered by a separate policy, and that the inclusion of the risk in the policy cannot bring the arrangement within the section if it were otherwise outside it.

Counsel for the plaintiff referred to various specific powers conferred on the authority by the Housing Act, 1957, particularly by s. 94, relating to furniture F and contents, and argued that if Parliament had intended to confer on authorities the power now in question it would have done so expressly. I do not think, however, that the Act contains any context which enables the court to place on the words " general management " in s. 111, anything less than their ordinary meaning.

It may be worth while in conclusion to refer, by way of illustration only, to G s. 102 (2) of the Settled Land Act, 1925, which provides as follows:

> " The trustees shall manage or superintend the management of the land, with full power . . . (f) to make allowances to and arrangements with tenants and others . . . (h) generally to deal with the land in a proper and due course of management."

For the reasons which I have sought to give, I must dismiss this action.

Order accordingly.

Solicitors: *J. H. Milner & Son* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

CULLIMORE *v.* LYME REGIS CORPORATION.

[QUEEN'S BENCH DIVISION (Edmund Davies, J.), October 26, 1961.]

Water and Watercourses—Coast protection—Works scheme—Coast protection charges—Time within which cost to be apportioned after the completion of the work to be specified in the scheme—Whether mandatory or directory provision—Whether determination after nearly two years was substantial compliance with time limit of six months—Coast Protection Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 74), *s.* 7 (4) (*b*), (5).

Statute—Construction—Mandatory or directory provisions—Coast protection—Works scheme providing for coast protection charges—Whether time limit within which coast protection authority to levy charges was mandatory or directory—Coast Protection Act, 1949 (12, 13 *&* 14 *Geo.* 6 *c.* 74), *s.* 7 (4) (*b*).

The defendants, who were a coast protection authority, made a works scheme for the carrying out of certain coast protection works under s. 5, s. 6 and s. 7 of the Coast Protection Act, 1949. In accordance with s. 7 (4) (b) of the Act*, the scheme provided, inter alia, that the defendants would, within six months after the completion of the works, determine the interests in the contributory land by reference to which the charges were to be levied and the amount of the charge leviable in respect of each interest. The plaintiff was the fee simple owner of land within the scheme. The works were completed on Oct. 7, 1957. On Sept. 14, 1959, the defendants determined the interests in the land affected and fixed the charges to be levied. On Oct. 16, 1959, the defendants served a notice on the plaintiff under s. 7 (5) of the Act† containing particulars of the determination.

Held: the determination of Sept. 14, 1959, was null and void and no coast protection charge was leviable, because

(i) in formulating the works scheme, the defendants were exercising statutory powers and compliance with conditions imposed on or assumed by them by or under s. 7 (4) (b) of the Coast Protection Act, 1949, was mandatory, and the non-compliance with such conditions and with s. 7 (5) that there had been in the present case invalidated the determination;

(ii) assuming (contrary to (i) above) that s. 7 imposed a duty and that the conditions imposed or assumed by or under s. 7 (4) (b), and the provisions of s. 7 (5), were directory only, the determination of the interests and charges so long after the completion of the works was not a substantial compliance with those provisions.

Dicta of DENMAN, J., in *Caldow* v. *Pixell* ((1877), 2 C.P.D. at p. 566) applied.

[As to the distinction between directory and mandatory statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 434-436, para. 656; and for cases on the subject, see 42 DIGEST 710, 711, *1278-1282*.

For the Coast Protection Act, 1949, s. 7, see 26 HALSBURY'S STATUTES (2nd Edn.) 1152.]

Cases referred to:

Caldow v. *Pixell*, (1877), 2 C.P.D. 562; 46 L.J.Q.B. 541; 36 L.T. 469; 41 J.P. 647; 42 Digest 712, *1296*.

Montreal Street Ry. Co. v. *Normandin*, [1917] A.C. 170; 86 L.J.P.C. 113; 116 L.T. 162; 42 Digest 713, *1314*.

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* Section 7 (4) is set out at p. 1010, letter F, post.

† Section 7 (5) provides: "Where a works scheme contains such a statement as is mentioned in para. (b) of the last foregoing subsection, the authority may, at any time within the period specified in the scheme, determine the charges to be levied thereunder as mentioned in that paragraph, and shall serve on each person upon whom a charge is leviable under the scheme a notice containing full particulars of their determination as to all the charges to be so levied."

A *Smith* v. *Jones*, (1830), 1 B. & Ad. 328; 8 L.J.O.S.K.B. 402; 109 E.R. 809; 11 Digest (Repl.) 86, *1044*.

Action.

The plaintiff, Dudley John Cullimore, was the owner in fee simple of property known as Bay Garth, East Cliff, Lyme Regis. The defendants were the Mayor, B Aldermen and Burgesses of the Borough of Lyme Regis, and the council of the borough were the coast protection authority for the borough under the Coast Protection Act, 1949. On Dec. 8, 1952, they made a works scheme for the carrying out of certain coast protection works at East Cliff, in pursuance of s. 5, s. 6 and s. 7 of the Act. On Apr. 13, 1954, the scheme was confirmed subject to certain modifications by the Minister of Housing and Local Govern- C ment pursuant to s. 8. Under the scheme, the coast protection authority were, within six months after completion of the works, to determine the interests in the contributory land and the amount of the charge leviable in respect thereof. The scheme was completed on Oct. 7, 1957. On Sept. 14, 1959, the coast protection authority determined the interests in the land affected and the amount leviable in respect of each interest. On Oct. 16, 1959, the coast protection D authority served a notice under s. 7 (5) of the Act on the plaintiff containing particulars of their determination, and specifying in pursuance of s. 10 (1) the sum of £425 as the amount due from the plaintiff to them in respect of his interest. The plaintiff sought the following declarations: (i) that the determination of Sept. 14, 1959, was ultra vires, null, void and of no effect; (ii) that the notice of Oct. 16, 1959, was invalid and ineffective and the coast protection E authority had no power to serve it; (iii) that no coast protection charge was leviable, payable, or due on, by or from him by or to the defendants under or in respect of the scheme.

Sir Frank Soskice, Q.C., and *C. F. Dehn* for the plaintiff.
G. D. Squibb, Q.C., and *D. G. Widdicombe* for the defendants.

F **EDMUND DAVIES, J.**, stated the facts and continued: The conclusion to which I have quite firmly come is that the plaintiff is entitled to each and every one of the declarations he has asked for. In coming to that conclusion, I have directed myself, as DENMAN, J., did in *Caldow* v. *Pixell* (1), that, in determining the sort of questions which are raised by these proceedings, regard should be had to the whole scope and object of the particular piece of legislation under G consideration. I accordingly turn to consider the Coast Protection Act, 1949, with which we are here concerned, though fortunately not with every portion of that Act. The long title describes it as:

> "An Act to amend the law relating to the protection of the coast of Great Britain against erosion and encroachment by the sea; . . . and for purposes connected with"

H that and other matters. By Part 1, viz., s. 1 to s. 33 inclusive, coast protection authorities are provided for. Section 1 (1) provides that:

> "The council of each maritime county borough or county district shall . . . be the coast protection authority for the county borough or county district, as the case may be."

I By sub-s. (2), they are to

> ". . . have such powers and perform such duties in connexion with the protection of land in their area as are conferred or imposed on coast protection authorities by this Act."

Section 4 makes provision for the general powers of coast protection authorities, and by sub-s. (1) they are to

(1) (1877), 2 C.P.D. at p. 566.

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"... have power to carry out such coast protection work, whether within or outside their area, as may appear to them to be necessary or expedient for the protection of any land in their area."

By s. 6:

"(1) Where a coast protection authority propose that coast protection work (not being work of maintenance or repair) should be carried out on any land, and it appears to the authority—(a) that the work cannot be carried out except in the exercise of compulsory powers, or (b) that persons interested in land benefited by the carrying out of the work ought to pay to the authority charges (hereinafter referred to as 'coast protection charges') in accordance with the following provisions of this Act in that behalf, the authority may prepare a scheme (hereinafter referred to as a 'works scheme') for the carrying out of the work.

B

C

"(2) A works scheme shall—(a) indicate the nature of any work to be carried out by the authority on land vested in them or proposed to be acquired by them for the purposes of the scheme; (b) specify the work (if any) to be carried out on land not so vested or proposed to be acquired; and (c) specify the estimated cost of all work comprised in the scheme."

D

Then, by s. 7:

"(1) A works scheme may indicate land (hereinafter referred to as 'contributory land') as land in respect of which coast protection charges are to be payable under the scheme on the ground that it will be benefited by the carrying out of the work provided for by the scheme.

"(2) Coast protection charges under a works scheme shall be levied by reference to interests in contributory land."

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A limitation on the charge is imposed by s. 7 (3), and sub-s. (4) and sub-s. (5) of s. 7 contain the provisions with which we are particularly concerned in this present action. Subsection (4) provides:

"A works scheme which provides for the levying of coast protection charges shall either—(a) specify the persons by whom such charges are to be paid, the amount of the charge to be paid by each person and the interest in land by reference to which the charge is levied upon him; or (b) state that the authority by whom the scheme is prepared will, within such period after the completion of the work as may be specified in the scheme, determine the interests in land by reference to which coast protection charges are to be levied and, in the case of each of those interests, the amount of the charge leviable in respect thereof; and in a case falling within para. (b) of this subsection a coast protection charge shall be payable by the person who, at the time of the determination of the interest by reference to which the charge is to be levied, is entitled to that interest."

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The defendants proceeded under s. 7 (4) (b). By their scheme, which is dated Dec. 8, 1952, they set out the estimated cost at £49,980 which the minister on confirmation reduced by £400, and then by para. 4 thereto they declared that:

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"The land coloured orange on the plan annexed hereto ... is hereby designated as contributory land that is to say land in respect of which coast protection charges will be payable under this works scheme on the ground that it will be benefited by the carrying out of the works."

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Some forty-four properties, of which the plaintiff's property is one, were designated in that manner. This is, accordingly, described as in the nature of a test action and is one of considerable importance, therefore, not only to a large body of ratepayers but to the defendants as the coast protection authority and the rating authority. The sum involved, I am told, is something in the region of £25,000 in totality. The action is also of considerable interest to the forty-four

A persons interested in the contributory land designated in the works scheme. By para. 5 thereof, it was provided that:

> "The council will within six months after completion of the works determine the interests in the contributory land by reference to which coast protection charges are to be levied, and in the case of each of those interests the amount of the charge leviable in respect thereof."

B That paragraph, of course, was inserted to comply with s. 7 (4) (b). The defendants, as I have already stated, certainly did not within six months after completion of the works, namely, on Oct. 7, 1957, determine the interests in the contributory land. They did not do so for two years or thereabouts after that date. The plaintiff says that that failure, which arose from reasons not C disclosed to this court, is such as to render the notices when they were served on the parties interested in the contributory land null and void, and that the sums specified therein are consequently irrecoverable. The grounds on which those submissions are made on the plaintiff's behalf are shortly stated thus. It is said that the defendants were here exercising powers conferred on them by the Act of 1949, and the directions in sub-ss. (4) and (5) of s. 7 as to the manner D in which the powers could be exercised were, accordingly, mandatory; those mandatory provisions were not complied with, and, accordingly, the actions of the defendants were and are null and void. Secondly, it is said that, if the plaintiff is wrong in submitting that the defendants were exercising such powers, if they were indeed pursuing duties and the provisions in s. 7 (4) and (5) are to be regarded as directions as to the manner in which the duties are to be fulfilled, E then, although on that basis substantial compliance with the provisions would be sufficient, there was here nothing like substantial compliance, so that, in the result, the position is exactly the same as though these powers and the provisions as there exercised were mandatory.

For the defence, it is submitted that all the defendants were doing was to discharge duties imposed on them by the statute; that, accordingly, it was F sufficient if they substantially complied with the provisions in s. 7 (4) and (5), and that there has been substantial compliance. I agree with counsel for the defendants to this extent: that the first question, namely, whether these provisions are mandatory or directory depends on the Act as a whole without reference to the particular facts in this case. I agree with him further, that the second question whether, assuming the provisions are directory only, there has been G substantial compliance therewith, cannot be answered without reference to the facts of this particular case. A number of cases has been helpfully cited to me by learned counsel, but every case where questions of the kind raised here come before the court has to be determined primarily by looking at the statute which is under consideration and examining the whole scope and purpose thereof. Other cases may provide some assistance in determining what the general H principles to be applied are, and those general principles are conveniently stated in summary form in MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.), at p. 376:

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an I implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment . . . A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public

duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative."

A little later, referring to a judgment of SIR ARTHUR CHANNELL, in *Montreal Street Ry. Co.* v. *Normandin* (2), MAXWELL continues, at p. 381:

> "On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only."

I turn to the Coast Protection Act, 1949, once more. It is quite clear that the works scheme need not have provided for the payment of contributions at all. Section 7 (1) has as its opening words:

> "A works scheme may indicate land (hereinafter referred to as 'contributory land') as land in respect of which coast protection charges are to be payable under the scheme . . ."

It is a matter for the coast protection authority to decide whether or not its works scheme will designate contributory land. It may not seek to recover contributions from people interested in such properties. There are provisions in later sections of the Act, particularly s. 20 and s. 21, whereby the cost of carrying out a works scheme may be met by contributions or by exchequer grants.

The conclusion to which I have come here is that most certainly the defendants, in formulating this particular scheme, were exercising powers conferred on them by the Act of 1949. They were, in formulating this particular works scheme in the form which it took, exercising powers conferred on them by s. 7, and particularly by sub-s. (4) thereof. It was entirely open to them to designate, having decided to proceed under para. (b) of s. 7 (4), what period of time should be left to them for determining the interests in the lands after completion of the work. They it was who chose to fix a period of six months from the completion of the work, and, they being the unfettered judges in deciding that period, it is certainly not without relevance when one comes to deal with the subsidiary question whether or not there was substantial compliance with the provisions of the Act, assuming that they were merely directory, that the period of time which elapsed between the completion of the work and the determination of the interests and the costs exceeded the period of six months designated, by nearly four times that period. This case, as I have said, is and must be one virtually of first impression. So regarded, and, having come to the conclusion that the defendants were exercising statutory powers, it seems to me beyond dispute that it was obligatory on them to comply with the provisions of s. 7 (5). In other words, it was essential for them, were they to act regularly and effectively, to determine within the period of six months specified in their scheme the charges to be levied. That, it is admitted, they have not done, and I cannot accordingly regard their purported action as having any validity at all.

Let me turn to the second question. It is undisputed that, if these be mere duties and if, accordingly, the provisions as to their exercise are to be regarded

(2) [1917] A.C. at pp. 174, 175.

A as directory only, it is sufficient if there has been substantial compliance with those directions. In *Smith* v. *Jones* (3), LITTLEDALE, J., said:

> "But it has often been held, where an Act ordered any thing to be performed by a public body, and merely pointed out the specific time when it was to be done, that such Act was not imperative, but directory, and might
> B be complied with in a reasonable time after the period prescribed."

In *Caldow* v. *Pixell* (4), DENMAN, J., said:

> "... where a public officer is directed by a statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a statute is imperative, a balance may be
> C struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms."

That some regard must be had to the six months' period designated by the defendants in their own works scheme is conceded by counsel on their behalf. Almost his last words to this court were that, admittedly, serious inconvenience
D might have resulted if the determination had been indefinitely delayed, but he added that the determination had not been indefinitely delayed, and that a lapse of twenty-three months between completion of the works and the determination was a substantial compliance with the provision in the works scheme that such period would be six months only. Every case must turn on its own facts. I simply cannot accept that submission. It is highly desirable that
E there should be no unnecessary delay in interested parties knowing with exactitude what their financial liabilities are. After all, here are a coast protection authority, doubtless having formed the view that coast protection works were called for, seeking to impose on people interested in the lands liability to pay not inconsiderable sums of money, and the sooner they know the extent of their liability, the better for them. I entirely accept what counsel has said
F on behalf of the plaintiff, that considerable inconvenience may well result if some promptitude is not exhibited in determining the liability of interested parties. The owner of "Black Acre" which is on the sea front may have a prospective purchaser at a good price. As an upright man, it would be his duty to disclose to the prospective purchaser that there was an impending liability to pay a proportion of this substantial cost of works, and on being asked, as he
G naturally would be, by the prospective purchaser what the sum would be likely to be, the answer which he would be compelled to make, namely, "I have no idea at all if there has been any determination", would be highly unsatisfactory to the prospective purchaser, and might inconvenience and might be unfortunate for both parties.

I am satisfied that, for the reasons which I have stated, it was obligatory on
H the defendants strictly to comply with the provisions of their own scheme, and particularly para. 5 thereof, because they were, in formulating this scheme, exercising statutory powers. If that be wrong, and if they were performing duties under s. 7 and the provisions as to the manner of exercising those duties are to be regarded as directory only, then quite clearly, in my judgment, there was nothing approaching substantial compliance therewith. It is said by counsel
I for the defendants that, in the result, the plaintiff, the value of whose land has been enhanced by some £425, and the forty-three other interested land owners whose properties have been enhanced in the aggregate by something like £25,000, will have had their properties improved without being under any liability to pay one penny towards the works. If that be the case, I think that it is an unfortunate result, but it is a result which is entirely flowing from the failure of the defendants to implement and fulfil the terms of their own scheme.

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(3) (1830), 1 B. & Ad. at p. 334. (4) (1877), 2 C.P.D. at p. 567.

For those reasons, in my judgment the plaintiff is entitled to succeed, and I accordingly make each and every one of the declarations asked for.

Declarations accordingly.

Solicitors: *Longbourne, Stevens & Powell*, agents for *Roper & Roper*, Lyme Regis (for the plaintiff); *Charles Russell & Co.*, agents for *Kitson & Trotman*, Beaminster (for the defendants).

[*Reported by* KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

WYLD AND OTHERS *v.* SILVER.

[CHANCERY DIVISION (Lloyd-Jacob, J.), October 19, 20, 23, 24, November 1, 1961.]

Markets and Fairs—Disturbance—Annual "fair" or "wake"—Right to hold annual fair or wake acquired by inhabitants of parish by ancient usage—Enclosure award made pursuant to private Act of Parliament appointing certain parcels of land in parish on which inhabitants might hold fair—Declaration in award of future right of inhabitants to hold fair annually and bar against disturbing surface—Part of land acquired by defendant in ignorance of right—Annual fair or wake had not then been held within living memory—Planning permission obtained by defendant and building begun—Inhabitants of parish claimed to be entitled to preserve right to hold fair—Whether right existed or whether it had been waived and abandoned—Whether action was maintainable by plaintiffs as representatives of inhabitants of parish—Whether Attorney-General a necessary party—Whether right vested in parish council—Local Government Act, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 6 (1) (*a*).

A private Act of Parliament of 1799 directed some open and common fields, commons and waste grounds in a parish to be divided, allotted and enclosed and provided that this should be determined by named commissioners, which determination was set out in an enclosure award. The Act recited that the inhabitants of the parish were, by ancient usage, entitled to hold a fair or wake annually on the Friday in Whitsun week on a part of the waste lands of the parish and enacted that the commissioners should be empowered to appoint a parcel of the waste lands for the purpose of holding the fair on it, as near as possible to the place where it was most commonly held, and that the inhabitants should forever after have the same right to hold it on the same day on the appointed parcel and enjoy and exercise all the rights and privileges thereon as they had before the passing of the Act. It further enacted that the surface of the appointed parcel should not be disturbed. By the award the commissioners allotted three adjoining parcels to named recipients subject to holding the annual fair thereon. They then made a declaration of the future right of the inhabitants to hold the fair as previously and recited the bar against disturbing the surface. One of the three parcels, plot 279, was acquired by the defendant in October and November, 1958. The abstract of title then made available to him, which commenced in April, 1900, contained no reference to the right to hold a fair thereon. Planning permission to erect one house on the parcel had been granted in December, 1957, following a public inquiry to which one of the plaintiffs had submitted an objection mentioning the liability to flooding on the site but not referring to the restrictions in the enclosure award. In 1959 the local planning authority gave permission for five dwellings to be erected on the site

A and the defendant began to build. The defendant caused a special parish meeting to be held with the intention of securing approval of an application to alter the award by excluding the plot from its ambit. By a large majority the inhabitants present at the meeting resolved to protect their rights under the enclosure award and called on the parish council to act in that respect, but it refused to do so. The defendant continued his building on the plot. B Until Whitsun, 1960, no fair had been held within living memory. The plaintiffs, inhabitants of the parish, brought an action on behalf of themselves and all other inhabitants than the defendant for declarations and injunctions whose effect would be to preserve the alleged right to hold an annual fair on the defendant's land.

Held: (i) the defendant, whose title to plot 279 originated from the award, C was bound by the restriction that the award placed on the property and, although the Act did not recite that the right to hold the fair or wake was proved to exist, the proper inference was that the right of the inhabitants to use some land within the parish for a fair or wake could not be questioned in 1799, and the three parcels of land were properly allocated by the award to secure the continuance of the fair or wake (see pp. 1018, 1019, post).

D (ii) the Attorney-General was not a necessary party since the right to hold the fair, as distinct from the right to have it held, was a private right.

(iii) the right to hold the fair was a right of property and was not one of the "powers, duties or liabilities" transferred by s. 6 (1) (a) of the Local Government Act, 1894*, to the parish council; accordingly the parish council was not the proper plaintiff to the exclusion of the actual plaintiffs in this E action, and they were prima facie entitled to an injunction (see p. 1020, letter E, post).

[As to the presumption of markets from long user, see 25 HALSBURY'S LAWS (3rd Edn.) 383, 384, para. 744; as to non-user not destroying a franchise of market, see ibid., p. 410, para. 800.

As to disturbance of the right to hold a market or fair, see 25 HALSBURY'S F LAWS (3rd Edn.) 403, 404, paras. 788, 791; and for cases on the subject, see 33 DIGEST 548, 549, *306-312*.

As to the joinder of the Attorney-General where a claim is made for an injunction where the injury affects the public interest, see 21 HALSBURY'S LAWS (3rd Edn.) 407, 408, para. 855.

As to the transferred powers of parish councils, see 24 HALSBURY'S LAWS G (3rd Edn.) 624, 625, para. 1141.

For the Local Government Act, 1894, s. 6 (1) (a), s. 62, s. 67, s. 75, see 14 HALSBURY'S STATUTES (2nd Edn.) 228, 243, 245, 246.]

Action.

This was an action commenced by writ dated Nov. 18, 1960, by the plaintiffs, Robert Stodart Balganie Wyld, Nina Wyld, Muriel Rebecca Beale and Christine H Daisy Ord Mosley. They claimed on behalf of themselves and all the other inhabitants of the parish of Wraysbury (otherwise Wraisbury or Wyrardisbury) in the county of Buckingham (other than the defendant), first a declaration that the inhabitants of the parish of Wraysbury were entitled to hold an annual fair or wake on the Friday in Whitsun week on certain lands in the parish including the allotment numbered 279 on the plan annexed to the Wraisbury I Enclosure Award dated June 17, 1803, made pursuant to the Act of Parliament 39 Geo. 3 c. 118, of which allotment the defendant, Albert Edward Silver, was the owner or occupier. In the second paragraph of the writ they claimed a declaration that on the true construction of the enclosure award the defendant was not entitled at any time to dig any gravel or break up, disturb, remove or take away any of the soil in or on or from the allotment or to erect any building

* For the effect of s. 6 (1) (a) of the Local Government Act, 1894, see p. 1020, letter A, post.

thereon or to lay down timber, soil or dung or other filth or annoyance whatsoever on the allotment or any part or parcel thereof unless it were for the better and more commodious enjoyment of the annual fair or wake and then only during the time of holding it. Thirdly, the plaintiffs claimed an injunction restraining the defendant by himself his servants, workmen, agents or others from doing any of the acts mentioned in the second paragraph of the writ. Fourthly, they claimed an order that the defendant should forthwith remove from the allotment the shed and all brick walls, bricks, breeze blocks, sand, cement, scrap iron, wood, pipes, cables, rubbish and other erections and materials erected or placed on or in the allotment by the defendant or by his servants, agents or workmen and that the defendant should forthwith fill up all holes, diggings and excavations made on the allotment by the defendant or by his servants, agents, or workmen since Mar. 1, 1959, and in all respects restore the surface of the allotment to the condition in which it was immediately before that date. The facts appear in the judgment.

Arthur Bagnall, Q.C., and *Oliver Lodge* for the plaintiffs.
H. E. Francis, Q.C., and *D. S. Chetwood* for the defendant.

Cur. adv. vult.

Nov. 1. **LLOYD-JACOB, J.**, read the following judgment: By a private Act of Parliament of 1799, 39 Geo. 3 c. 118, certain open and common fields, common meadows, commons and waste grounds within the parish and manor of Wyrardisbury, otherwise Wraisbury, in the county of Buckingham (now generally known as Wraysbury) were directed to be divided, allotted and enclosed; the Act provided for such division, allotment and enclosure to be determined by named commissioners, which determination was set out in an Enclosure Award enrolled in the Court of Common Pleas in 1803.

This Act recited that the inhabitants of the parish were by ancient usage entitled to hold a fair or wake annually on the Friday in Whitsun week on a certain part of the waste lands of the parish and enacted that the commissioners should be empowered to appoint a parcel of the waste lands " as near as may be to the place where such fair or wake hath been most commonly held " for the purpose of holding the fair or wake thereon to the end that the inhabitants should forever after have the same right to hold the fair or wake annually on the same day on the appointed parcel (with rights of entrance and exit) and enjoy and exercise all the rights and privileges thereon as they had had and to which they were accustomed prior to the passing of the Act in respect of the waste land now proposed to be enclosed. It further enacted that the surface of the appointed parcel should not be disturbed.

By the award the commissioners allotted three adjoining parcels, identified under numbers 277, 278 and 279, to named recipients

> " subject to holding the same annual fair or wake thereon and for which a due compensation hath been made by the said commissioners on the quantity of earth of the said allotments, the said three several allotments being the situation and place as near as may be where such fair or wake have most commonly been holden."

This allotment was followed by a declaration of the future right of the inhabitants to continue to hold the fair or wake as previously, and recited the bar against disturbance of the surface.

Of these three parcels, No. 277, which is some four acres in extent, was purchased by public subscription, commenced in about 1928, and conveyed in 1930 to the Wraysbury Parish Council to be preserved as an open and accessible pleasure space subject to the right reserved by the enclosure award in respect of the annual fair or wake. Since that conveyance, the area has been developed by the erection of a village hall (originally a scouts' hut) and establishment of a children's playground in the north and south-west corners respectively, and

A further adapted by the provision of a table area suitable for cricket pitches. The three parcels together are named Wraysbury Green in the map annexed to a justices' award dated 1840, but in more recent times this parcel alone has been termed the Village Green. The next adjoining parcel, No. 278, for at any rate the last thirty years, has been owned by the local tennis club and laid out with hard courts and a pavilion for use by the members. The third parcel, No. 279, B in area approximating to one acre, was acquired by the defendant in two lots by conveyances in October and November, 1958, and the abstract of title then made available to him, commencing in April, 1900, contains no reference to the reserved right to which the enclosure award related. Between December, 1958, and August, 1960, when it was reconveyed to the defendant, the legal title to this parcel was held by a Mr. Evans but, as the evidence of the defendant estab- C lished, the beneficial interest in the land remained in him throughout. Prior to the date of acquisition by the defendant, and consequent on a public inquiry held as a result of an appeal to the Minister of Town and Country Planning, planning permission for the erection of one house on this parcel had been granted in December, 1957. This was not proceeded with and in June, 1958, the local planning authority gave outline permission for five dwellings to be erected D thereon. The plaintiff, Robert Stodart Balganie Wyld, submitted an objection in writing for consideration at the public inquiry referred to, in which, the evidence suggests, he drew attention to the liability of flooding of the site at certain seasons. The document was not produced in evidence at the trial and the report in the correspondence does not confirm that it was considered, but it appears that it is not disputed that it contained no reference to the enclosure E award nor to the incompatibility between the proposed use of the site for building and the bar against disturbance of the soil which that award, and the Act from which it stemmed, both contained. At the date of the defendant's acquisition of the plot, a few portable wooden buildings were proved to have been on the site as was also a concrete platform on which, at some time, a caravan had been placed. In my judgment, there was nothing observable to passers-by which F would indicate that any difficulty would be experienced in preparing the site for use as a temporary market.

Early in 1959 the defendant's detailed plans of the five bungalows and garages which he proposed to build on this site were passed by the appropriate local authority and preparatory work at the site had progressed sufficiently by March, 1959, for it to be observed by parishioners. By letter dated Mar. 18, 1959, the G clerk to the parish council drew the attention of the defendant to the terms of the enclosure award. A week later, the clerk to the planning authority also wrote to the defendant and advised him to consider his position in the light of the prohibition contained in the award. The defendant took steps to cause a special parish meeting to be convened by securing six local government electors to demand it and on June 22, 1959, the meeting was held. The intention of the H convenors of the meeting was apparently to secure the approval of the meeting to an application to alter the award by excluding from its ambit plot 279. The recollection of certain of the witnesses differed as to the detailed conduct of this meeting. Having seen and listened to them, I entertain no doubt whatever that Mr. Ruffell's account of the meeting substantially represents what occurred, an account which is amply confirmed by the minutes. Mr. J. R. Smith, I thought I was an inaccurate and imprecise witness and I can place no reliance on his alleged recollection of this meeting. By the overwhelming majority of three hundred and one to eleven with eighteen abstentions, the inhabitants present resolved to protect their full rights under the enclosure award and called on the parish council to act in this respect. In January, 1961, the parish council refused to take any action in the matter which by that time was being urged by a body of parishioners calling themselves the Wraysbury Association, but as the evidence established that all the five candidates supported by the Wraysbury Association were elected to the parish council at the election held in May, 1961, it cannot

be taken that this refusal indicated any change in the wishes of the inhabitants of the parish as shown by the result of the June, 1959, meeting. At the time of the refusal by the parish council the present proceedings had been instituted and their attitude was undoubtedly influenced by the fear that liability for costs might fall to be met out of the parish rates. The electioneering pamphlet dated May 5, 1961, should not be criticised because it is contentious in character, but the evidence to which I listened made it quite impossible to indorse two of the statements which it contains, (a) that most of the parishioners have no interest in preserving the right to a fair or wake, and (b) that such right has no value to current ratepayers. The statement that until Whitsun, 1960, no fair had been held in the village within living memory was confirmed by the evidence, and indeed has not at any time been disputed by the plaintiffs. A certified copy of the issue of May 29, 1875, of the "Windsor and Eton Express" etc., referred to the annual pleasure fair being held at Wraysbury in that month.

Completing the history of the matter, the defendant continued his building operations in the face of warning, and the writ in this action was issued. On Jan. 17, 1961, this court, on motion, granted an interim injunction substantially in the terms of para. 3 of the prayer.

By this action, the plaintiffs, four in number and all inhabitants of the parish, sue on behalf of themselves and the other inhabitants (excepting the defendant) for declarations and injunctions the effect of which would be to preserve this alleged right to hold on the defendant's land this annual fair or wake. The defendant, as a matter of substance, denies the existence of the right, and contends that if it existed it has long since been released, waived and abandoned, and alleges that in any event the action is not maintainable at the instance of the plaintiffs.

So far as concerns the first of these points, it is clear that neither the Act nor the award purported to create any new right for the enjoyment of the inhabitants of this parish. What the Act did was to treat as requiring allotment a sufficient amount of the hitherto waste lands, the enclosure of which it was authorising, for the purpose of securing the future location of the activity to which, as was recited, the inhabitants by ancient usage had become entitled. The award then defined this future location in terms which implied that an examination of previous locations had been made by the commissioners, and allotted the three plots to named recipients in grants which specifically attached to the land the exercise of the franchise. The defendant, whose title to plot 279 originates from this award, must therefore be bound by the restriction which the award placed on the property. He is, of course, entitled to contest the scope and meaning of the restriction as contended for by the plaintiffs. He points to the fact that what was being dealt with was the preservation of a right recited as having been acquired by ancient usage but not recited as proved to have existed, at any rate not proved to the satisfaction of any authoritative person or body, and he relies on cases which establish that a mere recital in a local Act is not conclusive of the fact. In a case such as the present, where the defendant can adduce no positive evidence to question the accuracy of the recital, it would be strange to find that three commissioners purported to discharge a statutory duty to set out a parcel of land as near as may be to the place where a fair was commonly held in a general apportionment of land, in which the lord of the manor, the dean and canons of St. George's Chapel, Windsor, the Marquess of Downshire and several other persons were claimants, and actually attached the exercise of the franchise to three plots which the recipients were prepared to accept as so fettered, if the truth be that the alleged ancient usage was not so completely apprehended and accepted as to make any proof of it then supererogatory. I entertain no doubt that the long-continued enjoyment of the right of the inhabitants of Wraysbury to use at annual intervals some land within the parish boundary for a fair or wake could not be questioned in 1799 with any hope of success, and that the land which included plot 279 was properly

A allocated by the award to secure its continuance. It seems to me, too, a proper inference that in the seventy-two years which followed the award the fair had been held with sufficient regularity to justify the reference to it in 1875 as an annual fair. True it is, that the reference is to an annual pleasure fair, but there is nothing in the introduction of the word "pleasure" to justify the suggestion that the characteristics of a fair properly so-called were absent. B Nor does the identification of the site as belonging to the licensee of the George Inn justify any inference that the plots allotted by the commissioners were not utilised in whole or in part for the purposes of the fair. The failure to hold an annual fair in more recent times cannot in my judgment deny the reality of its regular observance in times past.

It therefore becomes necessary to consider what was meant by the words C "fair or wake", for such rights as the inhabitants can now claim must be equated with the right to which they were entitled by ancient usage. The word "fair" is a term of art and connotes a concourse of buyers and sellers for the purchase and sale of commodities pursuant to a franchise (i.e., a privilege granted under the Crown prerogative) with an optional addition of provision for amusement. A "wake" according to English usage is an annual parochial D activity, usually on the day (which is treated as a holiday) following some saint's day of special significance to the parish, which takes the form of demonstrations of special skills and athletic prowess. Such activity is not appropriate subject-matter for the grant of a franchise. In the present circumstances it would, in my judgment, be erroneous to construe the description on the footing that the word "wake" was intended to be interpretative or expository of the E word "fair" and thus to deprive the franchise of its implied dependence on a Crown grant. Rather do I interpret the use of these two words in the description of the activity as a confirmation of the presence of facilities for amusement (which would explain why the word "fair" was used and not "mart" or "market") and an acknowledgment that in this village such amusements had been of the character which the ecclesiastical interests concerned could readily F accept as an appropriate sequel to a solemn vigil.

There is no evidence which would indicate that the grant of this franchise has been repealed, so that it is not necessary for me to consider what effect, if any, such repeal would have had on the continuance of the restriction on plot 279.

The defendant then contested the right of the plaintiffs to maintain this action, asserting that the Attorney-General was a necessary party, or alternatively G that the parish council, now being the true owners of this franchise, was possessed of the right to sue for its enforcement. It is, of course, true that if the right in question is a public right, the Crown is the true guardian of it and the law officer should appear to maintain it. But the mere fact that a right is possessed by persons who are members of the public does not make that right a public right. A franchise of a fair may in effect create two distinct rights, one to H hold it and the other to have it held. The former may be limited to a private individual or a corporation or, as in the present case, to a group of private individuals being the residents of this parish of whom the plaintiffs claim to be representative. The latter may include all members of the public, and the only justifiable claim to be representative of them may well be with the Attorney-General. In asserting the present claim the plaintiffs do so as representatives I of a group of ascertainable private individuals. They claim to be a body of persons exclusively entitled to a right in common which does not serve any charitable object, for the protection of which the assistance of the court is thought to be required, and I can find no justification for holding that in so doing they are asserting other than a private right. The contention that the Attorney-General, either in his own right or at the relation of another, is a necessary party is, in my judgment, without foundation.

I turn to consider the alternative suggestion, that the parish council is the only proper complainant. This is founded on the provisions of the Local

Government Act, 1894. By s. 6 (1) (a), the powers, duties and liabilities of the vestry of the parish (with certain exceptions not here relevant) were transferred to the parish council, and by s. 75 (2) the expression "vestry" is defined as meaning the inhabitants of the parish. If, therefore, this franchise falls within the class of powers, duties and liabilities, its statutory transfer from the residents to the parish council is clear. The words "powers, duties and liabilities" are not specially defined in the Act, but the internal evidence of the Act (see particularly s. 62 and s. 67) indicates clearly that the transfer of powers and duties does not necessarily include the transfer of property. The possession of this franchise does not impose on its holder the duty of implementing it, so that what has to be considered is whether it can rightly be termed a power. A power is an authority to dispose, in whole or in part, of property. The transfer of the power to another holder does not and cannot transfer the property itself but merely the right, whatever it may be, to dispose of the property. In the present case the inhabitants possessed, at the vesting date under the Local Government Act, 1894, a right of property, namely, an incorporeal hereditament, and not only is this something wholly different from a power to deal in or dispose of the property, but in fact the property was of a quality which excluded the possibility of its disposition save for the special case of surrender to the Crown. Neither the right itself nor the enjoyment of the right by the inhabitants of the parish of Wraysbury was transferred to the parish council by the Local Government Act, 1894, and I cannot hold the action as at present constituted not to be maintainable. Had the parish council been willing to join as co-plaintiff, the representative nature of the other plaintiffs' position might have been to some extent corroborated, but, as I am satisfied on this point, its absence can be disregarded.

The plaintiffs have established a common law right, the violation of which, by the defendant, cannot be effectively denied and the intended interference with which, he positively affirms; and they would, in the absence of special circumstances, be entitled to an injunction to prevent any recurrence of that of which they complain.

On the matters pleaded in para. 6 of the defence, I have already stated, and this fact was not contested by the plaintiffs, that no fair had been held prior to May, 1960, within the memory of any living person either on any part of plots 277, 278 and 279 or anywhere else within the parish. The house "Orange Cot" was not proved to have been erected on plot 279 or to be comprised within it, and only temporary and removable structures were spoken of as having been placed on this plot. Plot 278 was proved to have been adapted for the purposes of a tennis club and provided with two hard courts, a pavilion and boundary fencing, but the evidence did not establish that such adaptation precluded the use of the plot as a site for temporary structures such as the purposes of a fair might require. Plot 277 was proved to have been vested in the parish council in trust for the inhabitants. The evidence established that prudence would require that portion of the ground which had been prepared for the pitching of wickets to be protected from the damage likely to follow the passage of pedestrians or vehicles over it, a protection which could be secured by temporary roping off. Nothing in the evidence established any unsuitability in the present condition of this plot for the purposes of a fair. The fact that in 1960 and 1961 village activities having certain characteristics of a fair were held on this plot 277, and not on plots 278 and 279, does not establish that these two latter plots will not reasonably be required in the future should the inhabitants desire to exercise their franchise. Nor can the fact that plot 279 was not previously acquired by village interests, as were the other two, justify an inference that the inhabitants were uninterested in its retention for the purposes of the franchise for there was no evidence of it having been on offer when the others were acquired. It was further established that the first plaintiff, Robert Stodart Balganie Wyld,

A entered a written objection to the application made by the defendant's predecessor in title, a Mrs. Barrett, under the Town and Country Planning Act, 1947, for permission to build one house on plot 279, which objection appeared not to contain any reference to the alleged right to hold an annual fair on land of which it formed part. There was no evidence that the first plaintiff was, at the time, aware of this alleged right, nor any evidence that the absence of any B reference to it by anyone played any part whatever in the decision to grant the planning permission sought. The defendant's real grievance, so far as I was able to understand it, is that no one warned him when he was considering the purchase of this plot for development as a building site that a franchise could be claimed which if effective would frustrate his intended use of the site. None of these matters, in my judgment, would justify the denial to the plaintiffs of C the exercise of the right they claim, and I pass to the last but far from the least, of the considerations that I must have in mind.

The plaintiffs are here asking the court to interpose to prevent the defendant from acting in a manner which would deny the exercise of their franchise, by an order which must necessarily cause damage to the defendant by reducing the value of his asset substantially below the price that he paid for it, which damage D must in fairness be contrasted with the possible advantage to the plaintiffs in having their right maintained.

The defendant contended that the true conclusion on the evidence should be that the plaintiffs are here concerned to resurrect an obsolete and purposeless right, not genuinely to facilitate the coming together of buyers and sellers for the exchange of goods, but to serve some collateral purpose or purposes which they E think will be of benefit to the inhabitants. Mr. Ruffell and Mrs. Veale, whom I regard as witnesses of truth, made it plain in the course of their evidence that they sincerely desire this franchise to be exercised and are prepared to assist in arranging such exercise because they believe an annual fair to be for the good of the community in which they dwell. I can see no reason to doubt that this desire is shared by many residents in the parish. It is possible that the desire F to assert the right to exercise the franchise on plot 279 is conditioned by a fear that they must claim the full franchise if they are to retain any benefit from it, as a safeguard against interference with plot 277, and in this they may be right or wrong. But so far from throwing doubt on the genuineness of the desire, this fear implicitly confirms it for it provides an additional reason for the promotion of the fair to command the support of the inhabitants and require the full area G to which the franchise extends. I can find no such special circumstances as would require the court to deny these plaintiffs the protection of the legal right which they have established.

Declarations accordingly; leave to apply for an injunction if necessary.

Solicitors: *Jaques & Co.*, agents for *Barrett & Thomson*, Slough (for the plaintiffs); *Gillhams*, agents for *Boyes, Turner & Burrows*, Staines (for the defendant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

Re JEWISON'S WILL TRUSTS. TILL *v.* MARKET WEIGHTON PARISH COUNCIL AND ANOTHER.

[CHANCERY DIVISION (Wilberforce, J.), November 2, 1961.]

Burial—Burial ground—Disused—Whole of ground set apart for interments but not all used for that purpose—Legacy to erect lodge for sexton on unconsecrated part not so used—Whether building on part not yet used for burial was forbidden as building on disused burial ground—Disused Burial Grounds Act, 1884 (47 *&* 48 *Vict. c.* 72), *s.* 2, *s.* 3—*Open Spaces Act,* 1887 (50 *&* 51 *Vict. c.* 32), *s.* 4—*Open Spaces Act,* 1906 (6 *Edw.* 7 *c.* 25), *s.* 20.

The erection of a building by a burial authority on land owned by it which forms part of a burial ground within the statutory definition* but is not used as such, is not forbidden, by s. 3 of the Disused Burial Grounds Act, 1884†, if no separation or disuse prior to the building has actually taken place (see p. 1027, letter I, to p. 1028, letter A, post).

Re Ponsford and Newport District School Board ([1894] 1 Ch. 454); *London County Council* v. *Greenwich Corpn.* ([1928] All E.R. Rep. 724); *Re Bosworth and Gravesend Corpn.* ([1905] 2 K.B. 426); and *Re St. John, Hampstead* ([1939] P. 281) considered.

A parish council, as the burial authority, administered a cemetery under the provisions of the Burial Acts. The cemetery as a whole had been set apart for interments, but only part had been consecrated. Many burials had taken place, but the cemetery was not yet full and burials continued to take place in it. A testatrix gave £1,500 to her trustees on trust to erect a small dwelling-house or lodge in the cemetery for the use and occupation of the caretaker or sexton. The parish council proposed that it should be built on a site in the unconsecrated part of the cemetery which had not yet been used for burials. By s. 3 of the Disused Burial Grounds Act, 1884, it was unlawful to erect buildings on any disused burial ground, which expression was defined for the purposes of that Act by s. 4 of the Open Spaces Act, 1887, as "any burial ground which is no longer used for interments."

Held: the proposed site was not a disused burial ground within the definition quoted above, since at the relevant time, namely before the erection of the proposed building, there had been no disuse of the site for interments; accordingly the erection of the building was not prohibited by s. 3 of the Disused Burial Grounds Act, 1884.

[As to what is a disused burial ground, see 4 HALSBURY'S LAWS (3rd Edn.) 88, 89, paras. 252, 253; and for cases on the subject, see 7 DIGEST (Repl.) 584, 585, *317-323.*

For the Disused Burial Grounds Act, 1884, s. 2, s. 3 and the Open Spaces Act, 1887, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 792, 793; and for the Open Spaces Act, 1906, s. 20, see 17 HALSBURY'S STATUTES (2nd Edn.) 265.]

Cases referred to:

Bosworth and Gravesend Corpn., Re, [1905] 2 K.B. 426; 74 L.J.K.B. 810; 93 L.T. 226; 69 J.P. 337; *affg.* [1905] 1 K.B. 403; 7 Digest (Repl.) 584, *319.*

London County Council v. *Greenwich Corpn.,* [1928] All E.R. Rep. 724; [1929] 1 Ch. 305; 98 L.J.Ch. 49; 140 L.T. 456; 93 J.P. 123; 7 Digest (Repl.) 585, *322.*

Ponsford and Newport District School Board, Re, [1894] 1 Ch. 454; 63 L.J.Ch. 278; sub nom. *Ponsford* v. *Newport District School Board,* 70 L.T. 502; 7 Digest (Repl.) 584, *317.*

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* See the definition of burial ground in s. 20 of the Open Spaces Act, 1906, which by virtue of s. 4 of the Open Spaces Act, 1887, and s. 38 (1) of the Interpretation Act, 1889, applies to the interpretation of the Disused Burial Grounds Act, 1884 (cf. p. 1024, post).

† The relevant terms of s. 3 are set out at p. 1024, footnote (1), post.

A *St. John, Hampstead, Re*, [1939] P. 281; 160 L.T. 641; 7 Digest (Repl.) 585, *323.*

Adjourned Summons.

This was an application by originating summons dated June 2, 1961, by the plaintiff, Noel Oughtred Till, who was one of the two trustees and executors of the will of Annie Jewison, deceased, the testatrix, to determine (1) whether on the true construction of the will of the testatrix and of the Disused Burial Grounds Act, 1884, and in the events which had happened, the bequest to the trustees of the testatrix of £1,500 on trust to erect, if permitted so to do by the governing body or other appropriate authority, a small suitable dwelling-house or lodge in Market Weighton cemetery for the use and occupation of the caretaker or sexton for the time being of such cemetery was either (a) a valid bequest which could and should be carried into effect; or (b) a bequest which could not be carried into effect without infringing the provisions of the Disused Burial Grounds Act, 1884, and which therefore lapsed.

The defendants were the parish council of the parish of Market Weighton which was the burial authority for the parish for the purposes of the Burial Acts and Harry Greensides, who was the other executor and trustee of the will and was beneficially entitled under the will to the residuary estate of the testatrix.

The facts are set out in the judgment.

W. S. Wigglesworth for the plaintiff, one of the trustees.

Raymond Walton for the first defendant, the parish council, the burial authority.

B. T. Buckle for the second defendant, the other trustee and the residuary legatee.

WILBERFORCE, J.: Miss Jewison by her will which was made on Nov. 16, 1955, gave her trustees a sum of £1,500

> "upon trust that they shall erect, if permitted so to do by the governing body or other appropriate authority, a small suitable dwelling-house or lodge in Market Weighton cemetery such dwelling-house or lodge to be for the use and occupation of the caretaker or sexton for the time being of such cemetery."

The will did not give any supplementary directions as to the dwelling-house but provided:

> "In the event of the said governing body or other appropriate authority not agreeing to the erection of the said dwelling-house or lodge or to accept it or in the event of any consents or licences required for its erection being refused, this trust shall lapse."

The testatrix died on May 21, 1956, without having revoked or varied her will and it is agreed that there is sufficient to provide the £1,500. The parish council, which is the relevant burial authority, has raised no objection to the carrying out of the bequest but a question has been raised whether the bequest can legally be carried out having regard to certain provisions contained in the Disused Burial Grounds Act, 1884.

The facts with regard to the ground in question are set out in an affidavit of the plaintiff, who is one of the executors of the will. He has obtained his information from the clerk to the parish council. It appears from that affidavit that the Market Weighton cemetery has been provided by and is administered by the parish council as a burial ground for the parish under the provisions of the Burial Acts, that the cemetery, as a whole, has been set apart for interments, and part has been consecrated and the remainder has been left unconsecrated. Many burials have taken place in the cemetery, but the cemetery is not yet full and burials continue to take place therein.

The proposal of the parish council is that the house in question should be built on a site which has not yet been used for burials in the unconsecrated part of the

cemetery. It appears that the Minister of Housing and Local Government has no objection to the erection of the house in the cemetery. It does not appear that there has been any separation of any part of the cemetery from any other part. The whole ground was set aside for burials although actual burials have only taken place so far in a portion of it.

I must now refer to the relevant statutory provisions. Those are contained, in effect, in three Acts of Parliament, the Disused Burial Grounds Act, 1884, the Open Spaces Act, 1887, and the Open Spaces Act, 1906, which replaced the Metropolitan Open Spaces Act, 1881. By s. 20 of the Open Spaces Act, 1906, "burial ground" is defined as including

> "any churchyard, cemetery, or other ground, whether consecrated or not, which has been at any time set apart for the purpose of interment."

No difficulty, it would appear, can arise in respect of that definition. The cemetery here is clearly a burial ground. The expression "disused burial ground" is defined by s. 4 of the Open Spaces Act, 1887, which provides:

> ". . . the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council . . ."

Looking at that statutory provision in the context of the Disused Burial Grounds Act, 1884, it seems to me, at first sight, to be difficult to say that to erect a building such as is in the circumstances proposed, would involve a contravention of the Act. The only prohibition in the Act of 1884 is against building on a disused burial ground (1). The Act does not prohibit building on a burial ground and it does not appear to me that a burial ground becomes disused until it can be said of it that it is no longer used for interment.

The argument for the residuary legatee, who seeks a declaration that the legacy is illegal, really involves interpreting the statute so as to prevent building on a burial ground; and so, in effect, treating the act of building as itself amounting to a disuse of the burial ground. I am inclined to think that is not so. It would appear to me that what has to be considered is whether the ground is a disused burial ground before the building, which is contemplated, takes place. The legality of that building must be in question then and not after the building has been built. It seems to me that the residuary legatee's argument involves reading the Act of 1884 as preventing building on a burial ground as well as on a disused burial ground, which is not what the Act says. Applying s. 3 to the facts of this case, the facts being that as to this land there has been no act of disuse as a burial ground, I would be inclined to the view that there is no prohibition against the erection of a building on this land.

However, there are a number of decided cases on these Acts, which I must examine somewhat carefully, since they appear to come close to deciding the point with which I am concerned. The first case, *Re Ponsford and Newport District School Board* (2), was decided by the Court of Appeal on appeal from NORTH, J. It is necessary to examine the facts there somewhat closely. There was a cemetery in Newport, Monmouthshire, and an Order in Council had been made in 1878 that burials should be discontinued forthwith in what was described as the Old Cemetery of Newport, Monmouthshire. Following on that Order in Council the Old Cemetery was conveyed by the trustee of a deed of settlement, in whom it was vested to trustees on trust for sale. In 1887 a wall was built separating the unused portion of the cemetery from the used portion, there having previously been no actual division between the two. In 1890 another Order in Council was made which varied the 1878 Order in Council in so far as the old cemetery was concerned and it was ordered that, with the exception of the

(1) See s. 3 of the Act of 1884 which, so far as material, reads as follows: "It shall not be lawful to erect any buildings upon any disused burial ground . . ."

(2) [1894] 1 Ch. 454.

A portion of the cemetery company's land coloured green on the plan which had been deposited at the Home Office, "burials should be discontinued forthwith . . ." The land coloured green represented the unused portion of the cemetery. The case was concerned with the land coloured green and that land was sold in 1891 under the trust for sale to one Thomas Ponsford for £500. The case was not concerned in any way with that sale which had taken place before the matters B which were involved in the action arose. In 1892, Ponsford, in his turn, entered into an agreement to sell the same land to the Newport District School Board and the question that the court had to decide, which was raised by way of objection to the title, was whether the Newport District School Board could use the land conveyed for putting a building on it and whether that was prevented because of the previous consecrated use of the ground. It was clear on the C facts there that before the question whether building on the land could take place had to be considered, the land had not only been marked off by the wall but had been disposed of by the trustees, in whom it was vested, to Ponsford, and it would seem that those circumstances might well amount to the disuse of the land as a cemetery.

The judgments in the Court of Appeal fall into two parts. First of all, the point D is brought out that in considering whether land had been set apart as a cemetery one should look at the whole of the land and not look at it in bits; that is what LINDLEY, L.J., said (3). Applying that I am able here to treat the whole of the land in question as having been set apart as a cemetery.

Then on the question of disuse the relevant passage is found in the judgment of KAY, L.J., where after referring to s. 2 of the Act of 1884 and its amendment by E s. 4 of the Act of 1887, he said that the section should be read as follows (4):

> "'And the expression "disused burial ground" shall mean any burial ground . . . which is not used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council'."

F Reliance in the argument in this case was placed on those words "which is not used for interments". It seems to me, however, that they must be read in conjunction with what follows in the next paragraph where the lord justice said (4):

> "Now one sees the alterations in the law. In 1884 a 'disused burial ground' only meant a burial ground in respect of which an Order in Council had been made for the discontinuance of burials therein. At the present day it G means a piece of ground set apart for interments in which interments have or have not taken place, whether it has been partially or wholly closed under any statute or Order in Council, or has become otherwise disused."

So that it seems to me that KAY, L.J., is there accepting that the test of whether land is prohibited from having a building on it is whether it has become otherwise disused as a burial ground. Read in that way and in relation to the facts I H do not find anything in that case which runs counter to the view which I should have been inclined to take of the section. It seems to me to have been a clear case of disuse by setting apart and by building the wall in question and is quite a different situation from that with which I am concerned here.

The next case is *London County Council* v. *Greenwich Corpn.* (5). That is a case which comes very close to the point with which I am concerned here. There again I it is necessary to look at the facts with great care. There was a piece of land, the extent and dimensions of which were set out in a plan (6), which was conveyed in 1857 to the Greenwich Hospital Commissioners to be used as a burial ground for Greenwich Hospital. It is to be noted that on the property there was a lodge which presumably was used in connexion with the purposes of the cemetery. In 1926 there was a conveyance made by the Admiralty, which apparently had

(3) [1894] 1 Ch. at p. 464.
(4) [1894] 1 Ch. at p. 467.
(5) [1928] All E.R. Rep. 724; [1929] 1 Ch. 305.
(6) [1929] 1 Ch. at p. 307.

acquired statutory powers to dispose of the land, to Greenwich Corporation. The effect of that conveyance was to separate various portions of the land from other portions. Putting it shortly, the Admiralty proposed to use one part of the land, namely the pink land, for burial purposes as a burial ground and convey the rest of the land, including the land coloured brown, for other purposes which included various public purposes in which Greenwich Corporation might be interested. So that it seems quite clear that at that point in 1926 there was a separation of the land which was to continue to be used as a burial ground, from the rest of the land which was to be used for other purposes. The question was then raised in proceedings brought by the London County Council whether in fact it was open to Greenwich Corporation to erect a welfare centre on the brown land and also to erect houses on the other part of the land. It was decided by ASTBURY, J., that the ground was a disused burial ground and that the particular exception contained in s. 5 of the Act of 1884 did not apply. There is nothing to which I need refer in the judgment but again on the facts it seems to me plain that when the land was conveyed by the burial authority to Greenwich Corporation for use for other purposes, there was an act which was in effect a disuse of the relevant land as a burial ground. So, again, that case does not touch on the precise question with which I am now faced.

In between these two cases there is a third case, *Re Bosworth and Gravesend Corpn.* (7), which was relied on by the residuary legatee. That was a case which arose on a Case Stated by an arbitrator, the question being at what price certain land was to be valued—whether it should be valued on the footing that building could take place on it or on the footing that, by virtue of the Disused Burial Grounds Act, 1884, it was not to be built on. The facts there seem to have been that the original owner of the burial ground in question was Gravesend and Milton Cemetery Company. In 1859 a Mr. Hull who was one of the predecessors in title of the vendors had apparently acquired the cemetery and also an additional piece of adjoining land which was not authorised to be used as a burial ground. Hull, it appears, though the instrument is not set out in the report, had conveyed the additional piece of land in question to the vendors, Emily Lucy Bosworth and Helen Pauline Bosworth. The arbitration arose on an agreement for sale between those ladies and the corporation of Gravesend. The question of law which the court had to decide was whether the additional piece of land, which was so severed, was a disused burial ground within the section. It seems to me that on the facts that Hull, the cemetery owner, in parting with the land to the Misses Bosworth had done an act which might well amount and probably did amount to a disuse of the ground as a burial ground. BRAY, J., held that the land in question was a burial ground but reliance was placed on certain words at the end of his judgment where he said (8):

> ". . . the case of *Re Ponsford and Newport District School Board* (9) shows that the words 'no longer used' mean nothing more than 'not used', and do not necessarily import that there has ever been any user at all."

That presents no difficulty here because I do not think it can be disputed that the ground was a burial ground and could become a disused burial ground even though there was no actual use of it as a burial ground. That passage does not seem to me to negative the requirement that in order that there may be a disused burial ground there must be some disuse of it showing that it is no longer used as a burial ground.

Then reference was made to the judgment of MATHEW, L.J., in the Court of Appeal where he dealt very shortly with the point about disuse. After dealing with that question he said (10):

> "With regard to the second question, namely, whether the additional

(7) [1905] 1 K.B. 403; *affd.* C.A., [1905] 2 K.B. 426. (8) [1905] 1 K.B. at p. 409.
(9) [1894] 1 Ch. 454. (10) [1905] 2 K.B. at p. 436.

A land can be used for building purposes, it appears to me clear, upon consideration on the language of the Acts to which we have been referred, that this question must be answered in the negative. This land was in fact 'set apart for the purposes of interment', and I think that, upon ceasing to be used for those purposes, it became 'a disused burial ground' within the meaning of s. 4 of the Open Spaces Act, 1887."

B That passage in no way assists the residuary legatee here. It is certainly not saying that the proposed act by the purchaser under the agreement in question would amount to a disuse so as to make it a disused burial ground. An argument is based on the finding or assumption that the land had ceased to be used for the purposes of interment but I have no doubt that the learned lord justice had in mind that it had ceased to be used when it was conveyed away by Hull to the C Misses Bosworth.

The last case which has been relied on by the residuary legatee is a case decided in the Consistory Court of London by CHANCELLOR ERRINGTON in 1939. That is the case of *Re St. John, Hampstead* (11). The question there was whether a faculty could be granted for the erection of a columbarium on a site which formed part of a consecrated burial ground. It appears that an Order in Council had been D made closing the burial ground except for certain purposes, namely, burials in private vaults or in graves of a specified minimum depth. On the facts it appears that the site of the proposed building was useless for burial purposes. The learned chancellor decided first that the columbarium could not be treated as an above ground vault or an extension of the burial ground and so he declined to grant a faculty. Further he decided that as the site was a disused burial ground he could E not legally grant a faculty for the erection of a building because to do so would be contrary to the Act of 1884. It is not quite clear on what basis the learned chancellor decided that the Act of 1884 did apply to the circumstances of that case. In his judgment he said this (12):

> "The proposed columbarium is plainly a building and does not come within F the exceptions. It is contended, however, that inasmuch as burials still take place in the burial ground, it is not a disused burial ground within the meaning of the Act."

So there he must have been dealing with an argument whether the ground as a whole was a disused burial ground. Then after referring to *Re Ponsford and Newport District School Board* (13) and *London County Council* v. *Greenwich* G *Corpn.* (14) he says (15) that he read those cases

> "as deciding that the Act applies as much to a disused part (however small) of a burial ground as to a disused whole."

That decision really amounts to a decision either that the whole of the burial ground or a part of it was on the facts disused, but I do not read the decision as amounting to a decision that the erection of the columbarium on the portion of the H burial ground in question would have been a disuse. On the contrary it seems to me that the chancellor applied his mind to the facts as they existed at the time when he was considering the matter, whether a columbarium should be erected, and he decided that, on those facts and in that situation, either the ground as a whole or part of it was a disused burial ground. So read there is nothing in that decision which conflicts with the view which I take of the section.

I I, therefore, come back to the interpretation which I feel inclined and indeed compelled to place on the section. This is that where, as here, the burial authority is still the owner of the burial ground and the ground is within the definition of burial ground, but is not used wholly as a burial ground, then in the case of a mere proposal that the ground should be built on by the burial authority itself,

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(11) [1939] P. 281.
(12) [1939] P. at p. 284.
(13) [1894] 1 Ch. 454.
(14) [1928] All E.R. Rep. 724; [1929] 1 Ch. 305.
(15) [1939] P. at p. 286.

where no separation or disuse prior to the proposed building has actually taken place, there is nothing in the Act of 1884 which prohibits such a building from being erected. Accordingly, I propose to answer the question raised by the summons (16) in the sense of para. 1 (a).

I add only this. I can decide this question only as between the parties before me and there is nothing, as I see it, which can in any way prevent any relevant authority, the Attorney-General or anyone else, from taking such action as he may be advised if he thinks that the Act has been infringed. I am only dealing with this as a matter arising out of the will of the testatrix.

Order accordingly.

Solicitors: *Payne, Hicks Beach & Co.*, agents for *Robinson, Sheffield & Till*, Beverley (for all parties other than the first defendant); *Durrant Cooper & Hambling* (for the first defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

RENNELL (LORD) AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Lord Evershed, M.R., Donovan and Danckwerts, L.JJ.), October 24, 25, 26, 27, 30, 1961.]

Estate Duty—Exemption and remission—Gift in consideration of marriage—Marriage settlement—Discretionary trusts in favour of class—Inclusion of persons not within the marriage consideration—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7 *c.* 8), *s.* 59 (2).

A settlement dated Mar. 20, 1956, was made between a father, his (then unmarried) daughter, the intended husband of the daughter, and trustees. It recited that a marriage was shortly intended to be solemnised between the daughter and her intended husband, that it had been agreed that the husband should settle property in manner provided by a deed of even date, and that the father had agreed to make the settlement thereinafter contained. The settlement was stated to be made in execution of the agreement and in consideration of the intended marriage. The operative part provided for a "specified period", which began with the solemnisation of the marriage and ended on a date selected so as to fall within the perpetuity period, and defined "the beneficiaries" as meaning the daughter, her issue and all other issue of the father, who had six children, and the intended husband and every other person who should at any time have intermarried with any of the said issue. The settlement conferred on the trustees a power during the specified period to appoint the fund in favour of any of the beneficiaries, and subject to the exercise of that power the trustees were empowered during the specified period to pay or apply the income of the trust fund to or for the benefit of any of the beneficiaries. From and after the end of the specified period the trust fund was directed to be held on trust absolutely for the issue per stirpes of the father then living and if more than one in equal shares per stirpes. The settlement contained an ultimate gift in favour of the daughter. On Apr. 4, 1956, the intended marriage was solemnised, and on Mar. 3, 1959, the father died. Estate duty was claimed on the trust fund under the Finance Act, 1894, s. 2 (1) (c).

Held: no estate duty was payable in respect of the trust fund because the settled property was, on the facts and evidence, a gift "made in consideration of marriage" within the terms of the exception from s. 2 (1) (c)

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(16) See p. 1023, letter B, ante.

A of the Act of 1894 enacted by the Finance (1909-10) Act, 1910, s. 59 (2); and (per DONOVAN and DANCKWERTS, L.JJ.) the words of the exception were directed to the position of the donor, not to that of the recipient beneficiaries, and it was consequently immaterial that some of them were not within the marriage consideration.

A.-G. v. *Jacobs Smith* ([1895] 2 Q.B. 341) considered.

B Appeal dismissed.

[As to the exemption of gifts made in consideration of marriage, see 15 HALSBURY'S LAWS (3rd Edn.) 37, 38, para. 73.

For the Finance (1909-10) Act, 1910, s. 59 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 403.]

Cases referred to:

C *A.-G.* v. *Jacobs Smith*, [1895] 2 Q.B. 341; 64 L.J.Q.B. 605; 72 L.T. 714; 59 J.P. 468; 21 Digest 10, *47*.

A.-G. v. *Smyth*, [1905] 2 I.R. 553; 21 Digest 10, *h*.

A.-G. for Ontario v. *Perry*, [1934] All E.R. Rep. 422; [1934] A.C. 477; 153 L.J.P.C. 145; 151 L.T. 405; Digest Supp.

D *Canadian Eagle Oil Co., Ltd.* v. *R.*, [1945] 2 All E.R. 499; [1946] A.C. 119; 114 L.J.K.B. 451; 173 L.T. 234; 27 Tax Cas. 206; 28 Digest (Repl.) 205, *860*.

Cape Brandy Syndicate v. *Inland Revenue Comrs.*, [1921] 1 K.B. 64; 90 L.J.K.B. 113; *affd.* C.A., [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; 42 Digest 666, *765*.

E *Fitzwilliam's (Earl) Agreement, Re, Peacock* v. *Inland Revenue Comrs.*, [1950] 1 All E.R. 191; [1950] Ch. 448; 2nd Digest Supp.

Mackie v. *Herbertson*, (1884), 9 App. Cas. 303; 40 Digest (Repl.) 570, *762*.

Newstead v. *Searle*, (1737), West *temp.* Hard. 287; 1 Atk. 265; 25 E.R. 942; 25 Digest 238, *656*.

Appeal.

F This was an appeal by the Crown from an order of BUCKLEY, J., dated May 2, 1961, declaring that on the death on Mar. 3, 1959, of Augustine Courtauld, deceased, the property then comprised in a settlement dated Mar. 20, 1956, was exempted from estate duty by the Finance (1909-10) Act, 1910, s. 59 (2), as being property taken under a gift made in consideration of the marriage of Christopher Jeremy King Fordham and Perina Fordham.

G The settlement was made between Augustine Courtauld (the settlor) of the first part, Perina Courtauld (the wife) of the second part, Christopher Jeremy King Fordham (the husband) of the third part, and trustees, the Rt. Hon. Lord Rennell of Rodd and Sir Walter Leslie Farrer, of the fourth part. The settlement recited that a marriage was intended shortly to be solemnised between the husband and the wife, and continued:

H "And whereas upon the treaty for the said intended marriage it was agreed that the husband should settle certain personal estate belonging to him in manner provided by a certain deed bearing even date (and intended to be executed contemporaneously) with this deed and that the settlor should make such settlement as is hereinafter contained And whereas the settlor with a view to performing the said agreement has transferred or caused to be transferred to the trustees the several investments specified in the schedule hereto. Now in execution of the said agreement and in consideration of the said intended marriage this deed witnesseth . . . as follows."

I

Clause 1 of the operative part defined "the specified period" as meaning a period beginning on the solemnisation of the marriage and ending on any one of several specified dates, and "the beneficiaries" was defined as meaning the wife, the issue of the wife and all other issue of the settlor (whether children or more remote and whether present or future) and also the husband and every other person (whether then alive or thereafter coming into existence) who should

at any time have intermarried with any of the said issue. The beneficial trusts were as follows: A

"4. The trust fund and the income thereof shall be held upon such trusts and subject to such charges powers and provisions whatever in favour or for the benefit of all or any one or more exclusively of the others or other of the beneficiaries as the trustees in their absolute discretion shall at any time or times during the specified period by any deed or deeds revocable or irrevocable appoint (regard being had to the law relating to remoteness) And so that the trustees shall have power: (i) to direct that the trust fund or any part or parts thereof shall be transferred or paid to and held by any persons or person corporations or corporation as trustees or trustee thereof (whose receipt shall be a good discharge to any other trustees or trustee accordingly); (ii) to provide for the appointment or remuneration of trustees (whether individual or corporate); (iii) to make any appointment upon the trusts or to the trustees of any settlement made in consideration of the marriage of any of the beneficiaries notwithstanding that persons (not being the settlor or any wife of his) other than the objects above mentioned of this power of appointment may be interested under the trusts or provisions of such settlement; (iv) to direct or authorise the investment in any manner of the trust fund or any part or parts thereof by or at the discretion of any persons or person corporations or corporation; (v) to create protective or discretionary trusts or powers operative or exercisable at the discretion of any persons or person corporations or corporation; (vi) to delegate in any manner and to any extent to any persons or person corporations or corporation the exercise at any time or times within the specified period of this power of appointment; (vii) generally to make or confer in favour or for the benefit of all or any of the objects of this special power of appointment all such dispositions charges or powers of or in relation to the trust fund and the income thereof or any part or parts thereof respectively as the trustees could lawfully make or confer of or in relation to any property belonging to them absolutely and beneficially (regard being had nevertheless to the law relating to remoteness) Provided nevertheless that the power or powers conferred by this clause shall not during the lifetime of any child of the settlor authorise the absolute appointment of the capital of the trust fund or any part thereof to any persons other than a child of the settlor or the wife husband or issue of such a child And provided also that no exercise of the said power or powers shall invalidate any prior payment or application of the trust fund or the income thereof or any part or parts thereof respectively made under any other power conferred by this deed or by law.

"5. In default of and until and subject to any and every appointment made under the power or powers conferred by cl. 4 hereof the income of the trust fund shall during the specified period be held by the trustees upon trust from time to time to pay or apply the same unto or for the benefit in any manner of all or any one or more exclusively of the others or other of the beneficiaries for the time being in existence Provided that: (i) Such payment or application shall from time to time be made in such shares in such manner and upon such terms and conditions (if any) as the trustees in their discretion shall from time to time think proper and shall give no right to enjoyment of any future income of the trust fund; (ii) The trustees in their discretion may pay any income to any persons or person corporations or corporation to be applied for any purpose hereby authorised without themselves being bound to see to the actual application thereof and may delegate to any persons or person corporations or corporation and to any extent the execution of the foregoing discretionary trust; (iii) Without prejudice to any other mode of applying income for the benefit of an infant income may (if thought fit) be so applied by allocating the same in writing either (a) to such

A infant absolutely or (b) to such infant contingently on his attaining a specified age (with or without a provision for vesting on marriage under that age) or being alive at the earlier expiration of the specified period and to another person (qualified to benefit under the foregoing discretionary trust) absolutely should such infant fail to attain a vested interest And any income so allocated shall be held and disposed of by the trustees in conformity with the B terms of the allocation; (iv) The trustees may during any part or parts of the specified period permit any of the beneficiaries (either alone or concurrently or successively) to occupy use or enjoy personally all or any part or parts of the trust fund upon any terms or conditions whatever which the trustees may think fit but such permission shall in each case be revocable at any time by and at the absolute discretion of the trustees.

C "6. In default of and subject to any and every appointment made under the power or powers conferred by cl. 4 hereof the trust fund and the future income thereof shall from and after the end of the specified period be held upon trust absolutely for the issue per stirpes of the settlor living immediately after the end of the specified period and if more than one in equal shares per stirpes.

D "7. Subject to all the trusts powers and provisions of this deed and if and so far as (for any reason whatever) not wholly disposed of thereby the trust fund and the income thereof shall be held upon trust for the wife and her personal representatives absolutely."

R. W. Goff, Q.C., and *E. Blanshard Stamp* for the Crown.

Sir Lynn Ungoed-Thomas, Q.C., and *E. I. Goulding, Q.C.*, for the trustees.

E

LORD EVERSHED, M.R.: We have had an opportunity of considering this case since the conclusion of the arguments, and having reached a clear conclusion on it, we have thought that there would be no point in our reserving judgment.

The question raised in the action is whether certain property, which, according F to the evidence, at the material date amounted in value to some £450,000, is liable to estate duty as deemed to pass on the death of the late Mr. Augustine Courtauld, that death having occurred on Mar. 3, 1959. The property in question is subject to a settlement dated nearly three years before, viz., Mar. 20, 1956, made by Mr. Courtauld on the occasion (and I now deliberately use a neutral word) of the marriage of his daughter Perina to a Mr. Fordham, the parties G to the instrument being first, the settlor, Mr. Courtauld, second, the daughter Miss Perina Courtauld, third, Mr. Fordham, the intending bridegroom, and fourth, the trustees who are the plaintiffs in the present proceedings. The terms of the settlement, so far as relevant to our decision, are fully set out in the judgment of BUCKLEY, J., and I shall not, therefore, take time to repeat them now, but shall treat the citation in the judgment of BUCKLEY, J., as now repeated. H I observe, however, that the short effect of the settlement was that the beneficial interests thereby created were to take effect only on the happening of the marriage between Mr. Fordham and Miss Perina Courtauld and then there was for a specified period beginning with the marriage a trust as to both capital, subject to certain limitations, and as to income at the entire discretion of the trustees in favour of a large class, viz., the issue of the settlor, Mr. Courtauld, of Mr. I Fordham and of the husband or wife of any of the settlor's issue. At the end of the specified period the remaining corpus was then divisible among the living issue per stirpes of the settlor, Mr. Courtauld, and there was a final limitation in favour of the personal representatives of Miss Perina Courtauld.

Junior counsel for the Crown suggested that discretionary trusts of this character were a very unusual subject-matter of a marriage settlement in 1910 and that the legislators of that year, in passing the Finance (1909-10) Act, 1910, could not have contemplated marriage settlements in which the beneficial interests were of this discretionary character. Whether that view is right or not, it no doubt

is unusual, as a form of settlement on the marriage of one child only, to find dispositions of this kind, whether discretionary or otherwise, in favour not only of that child and the issue of that child's intending marriage, but of the issue of all the children of the settlor, of which in this case there were six. If, therefore, the learned judge was right, as I think that he was, there is no doubt something startling in the conclusion that this property should be free of duty as having been made in consideration of the marriage of Perina within the terms of s. 59 of the Act of 1910. I agree also with counsel for the Crown that it would be quite impossible to evaluate, in any sensible way whatever, the interests which Miss Perina Courtauld, her intending husband and the issue of her marriage were entitled to enjoy under the settlement. The argument put forward by counsel for the trustees, following such decisions as that of *Newstead* v. *Searle* (1) and *Mackie* v. *Herbertson* (2), was to this effect, that where the interests of the parties to the marriage in question and the issue of that marriage, i.e., those strictly within the marriage consideration, were so mixed up with the interests of other persons, either in being or to come into being, being quoad that marriage volunteers, as to be incapable of severance, it was legitimate to treat all the beneficial interests as being within the marriage consideration; or, to put it the other way round, if it were necessary to show, in order to get the benefit of s. 59 of the Act of 1910, that the gift had to be in favour of persons within the consideration of the marriage which was the occasion of the gift, it was sufficient that some, at any rate, of such persons were within that consideration and that they were so inextricably mixed with the other beneficiaries. Per contra, counsel for the Crown contended that the cases referred to did not establish any such broad proposition, being rather directed to a more limited and different question, e.g., whether in certain circumstances gifts to volunteers properly so called were liable to be overridden by a subsequent transfer of the property concerned to a purchaser for value. In that connexion, counsel for the Crown strongly relied on certain language of LINDLEY, L.J., in *A.-G.* v. *Jacobs Smith* (3), a case which was indeed very much relied on generally by counsel for the Crown. I read only, in reference to *Newstead* v. *Searle* (1), these sentences (4):

> "I do not think you can read *Newstead* v. *Searle* (1) or any other case as going the whole length of saying that those persons to whom I have alluded are not volunteers. They are volunteers, but not liable to be defeated under the Statute of 27 Eliz. c. 4. The Revenue Act with which we are now dealing [that was the Customs and Inland Revenue Act, 1881 as amended] has nothing to do with that question."

Having regard to the conclusion I have reached on the whole matter, I find it unnecessary to express any view on this matter debated between counsel.

Having referred, however, to *A.-G.* v. *Jacobs Smith* (5), it would perhaps be convenient if I stated this further matter about it. It was a case which arose, as I have said, under the Customs and Inland Revenue Acts, 1881 and 1889, i.e., the relevant date was prior to the passing of the Act of 1894, and it was concerned with a settlement made on the second marriage of a widow whereunder certain property became payable to children of the widow's former marriage, putting the matter quite briefly, and it was a question whether that settlement was or was not within the ambit of the Customs and Inland Revenue Acts. It was in the course of their judgments that the learned judges of this court, LINDLEY, LOPES and KAY, L.JJ., made very clear the point that the marriage consideration covers only the husband and wife and the issue of the particular marriage in respect to which the consideration passes and does not cover anyone else. I need not repeat citations, but in that case it was held quite clearly that the children of the former marriage of the widow were, for the purposes of taxation, volunteers.

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(1) (1737), 1 Atk. 265.
(2) (1884), 9 App. Cas. 303.
(3) [1895] 2 Q.B. 341, see particularly at pp. 348, 349.
(4) [1895] 2 Q.B. at p. 349.
(5) [1895] 2 Q.B. 341.

A The question now before us depends, of course, first and last, on the meaning of the statutory language which is relevant, as found in the series of Acts beginning with the Customs and Inland Revenue Act, 1881, and ending with s. 59 of the Finance (1909-10) Act, 1910. The language is no doubt familiar and I will not take too long in citation. It begins with s. 38 (2) of the Act of 1881, which refers, among other things, to property taken under a voluntary disposition purporting to B operate as an immediate gift inter vivos which shall not have been made before a period, now increased to five years, before the death of the deceased. By s. 11 of the Act of 1889 there was further amendment to that provision, and finally by s. 2 (1) of the Act of 1894 it was provided as follows:

> "Property passing on the death of the deceased shall be deemed to include . . . (c) Property which would be required on the death of the deceased C to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' [those references being found in other provisions of s. 38 of the Act of 1881] were omitted therefrom."

D Then finally, to complete my citations, in s. 59 (2) of the Act of 1910 it is provided:

> "So much of para. (c) of s. 2 (1) of the principal Act and this section as makes gifts inter vivos property which is deemed to pass on the death of the deceased, shall not apply to gifts which are made in consideration of marriage, or which . . ."

E and the alternative it is not necessary for me to read. Having read those sentences from the legislation, it is true to say, as counsel for the Crown stressed, that the relevant disposition is no doubt the disposition to the trustees and that the property taken is the whole of the settled property which is the subject of the disposition and not merely, or not limited to, or not the same as, the beneficial interests under the disposition or any of those beneficial interests. So it was said F by counsel for the Crown that the question is whether the disposition of the whole fund was a disposition purporting to operate as an immediate gift inter vivos in consideration of marriage. So far, I am not at all disposed to dissent from counsel's formulation of the question. But then it is said on behalf of the Crown that as a matter of law the test posed by s. 59 of the Act of 1910 cannot be satisfied unless the beneficial interests taken under the disposition are taken exclusively or, G at any rate, primarily, by persons within the marriage consideration; i.e., in this case, following what was laid down in *A.-G.* v. *Jacobs Smith* (6), Miss Perina Courtauld and Mr. Fordham after their marriage and the issue of that marriage. And that conclusion, it is said, is inherent in the formula in s. 59, "gifts . . . made in consideration of marriage", when read in conjunction with the earlier section which speaks, as I have already indicated, of dispositions of property. The H answer to the question obviously depends on the meaning of the words which Parliament has used. True the language of s. 59 of the Act of 1910 departs in some degree from the formulation inherent in the earlier legislation. But still the phrase is there and, on the face of it, not one difficult of comprehension—"gifts which are made in consideration of marriage"; and the duty of the court, as pointed out by BUCKLEY, J., who referred to the well-known statement of I ROWLATT, J. (7), itself cited in *Canadian Eagle Oil Co., Ltd.* v. *R.* (8), is to construe the words as English words without preconceived ideas as to what might have been intended—unless, of course, one can gather the intention beyond peradventure from some other context in the Act.

It is, at this stage perhaps, not unhelpful to bear in mind, so far as relevant, the history of liability to duty in regard to property settled on marriage prior to

(6) [1895] 2 Q.B. 341.
(7) In *Cape Brandy Syndicate* v. *Inland Revenue Comrs.*, [1921] 1 K.B. at p. 71.
(8) [1945] 2 All E.R. at p. 507; [1946] A.C. at p. 140.

the passing of the Act of 1910. Thus, as counsel for the trustees pointed out, there were (and one should bear in mind that there were) always two classes of such settlements, viz., first, a settlement made by a man on his own marriage and a settlement made by a settlor not on his own marriage but on the marriage of someone else, commonly, of course, but not necessarily, the marriage of one of his children. In both cases the beneficial interests might be confined to the persons within the marriage consideration, that is the consideration of the marriage in question, or they might not be so confined and might extend to or might be exclusively in favour of volunteers so far as that marriage consideration is concerned. As the law stood from 1894 to 1910, if there was a settlement by a settlor on the occasion of his own marriage in favour of persons within that marriage consideration, then it was never in doubt that the property in question was not within the scope of the 1881 to 1894 legislation and the parties were not in any sense volunteers. As KAY, L.J., pointed out (9), they were parties to the most valuable consideration imaginable. On the other hand, if the beneficial interests created by the settlement made by the settlor on his own marriage were in favour of volunteers as regards that marriage consideration, then the persons who took would be volunteers and the disposition would be in favour of volunteers. When one turns to the other class of settlement, a settlement by a settlor not in consideration of his own marriage but on the marriage of someone else, then it is, I think, clear that prior to 1910 the subject-matter was always liable to duty whether or not the beneficial interests were exclusively in favour of persons within the consideration of the marriage in question. I take that to be the conclusion of the well-known decision of PALLES, C.B., in the Irish case of *A.-G.* v. *Smyth* (10), and for my statement I rely on the discussion of that case in the judgment of LORD BLANESBURGH in the Privy Council in *A.-G. for Ontario* v. *Perry* (11).

It was in that state of affairs that there came to be passed the Act of 1910, and it is important, therefore, to have in mind that it was passed in light of the circumstance that the only case in which property settled on a marriage settlement would be regarded as free from duty if the settlor's death occurred within the relevant time, was the case of a settlement by a settlor on his own marriage in favour of persons within the consideration of that marriage. In those circumstances this simple phrase was inserted in the statute " gifts which are made in consideration of marriage ". Counsel for the Crown observed that the section contains no such reference as " made *wholly* in consideration of marriage ", and he contrasted that omission with the language, e.g., of s. 3 (2) of the Finance Act, 1894, where it is stated: " Where any such purchase was made . . . for partial consideration. . . ". But as counsel for the trustees pointed out, the language of s. 3 (2) is to be read in conjunction with what is said in the preceding subsection which deals with " full consideration in money or money's worth ". I cannot, therefore, get any assistance from the fact that there is no word of qualification in s. 59 to the noun " consideration ". I conclude, therefore, as a matter of law that if in fact and in truth and as a matter of ordinary sense one finds that the settlement in question was made in consideration of marriage, as those words are understood in our language, then if the settlor's death occurs within the relevant time, the property, the subject of the disposition, is free from the impost of duty, whether the beneficial interests are only in favour or primarily in favour of parties within the marriage consideration in question or whether they are not. If one is considering what the section says and does not say, it is perhaps fair to observe, as one of my brethren pointed out to me, that had the legislature intended such a limitation as that for which counsel for the Crown contends, it would have been indeed simple to insert into the section after the words " gifts which are made in consideration of marriage ", the words " in favour of persons within the marriage consideration "; but the legislature did not so provide.

(9) [1895] 2 Q.B. at p. 354. (10) [1905] 2 I.R. at p. 559.
(11) [1934] All E.R. Rep. at p. 426; [1934] A.C. at p. 485.

A One other point I mention in passing, and that is this. It was suggested on the side of the Crown that s. 59 being what was called an exempting section, there was an onus on the subject to show that he brought himself within the exemption. That consideration may be relevant in considering the matter of fact, and it may therefore be appropriate to mention it now; but for my part I do not think in this case there is any real force in this question of onus. As was observed by B DONOVAN, L.J., in the course of the argument, we are here dealing with property which does not in fact pass, but is by the terms of the Act of 1894 deemed to pass. That property is defined by the section in the Act of 1894 and that section has been modified so that the scope of the property now deemed to pass is limited as a result of the Act of 1910. I do not think in the circumstances that the result is to impose such an onus as was underlying counsel for the Crown's contention.

C I come, accordingly, to the question of fact. Applying the ordinary standards of the sense of language and in light of the not inconsiderable evidence, of which the learned judge had the benefit, can it here be said that this settlement of March, 1956, was in truth really made in consideration of the marriage of Perina Courtauld to Mr. Fordham? The learned judge concluded that question of fact affirmatively. He put the matter summarily thus:

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> "The matters which seem to me to point to the view that this settlement is one which ought properly to be described as having been made in consideration of the marriage are these: First, that in terms it is so expressed [that is incontrovertible]; secondly, that it was made as part of a bargain under which Mr. Fordham himself executed a settlement on himself, his wife and his family; thirdly, that the settlement was one which I am satisfied the settlor contemplated would confer substantial benefits on Mr. and Mrs. Fordham [the daughter, Perina, and her husband]; fourthly, that the trusts are trusts of a kind which could not come into force unless the marriage was solemnised."

E

That last matter is again incontrovertible. Counsel for the trustees indicated in F the course of his argument the benefits which in truth could be expected to be enjoyed by the parties to the Fordham marriage and their issue. The figures show that Mrs. Fordham has had a share of income, though it is right to say that one of the other children has had an appreciably larger share of that income. I think it necessary to go no further than to state that the matter, as Sir Leslie Farrer pointed out in the evidence, was deliberately left to the complete discretion of G the trustees who, as each period of distribution arose, would consider the real needs of all the family, including the needs of the Fordhams and (now) their one child subsequently born. In other words, at least this may be said, that the interest which the Fordham marriage and those within the Fordham marriage took was certainly by no means illusory, and it was clearly established, as I think, that it was not intended so to be.

H Returning to this second head, stated thus by the learned judge "that it was made as part of a bargain", etc., it was the contention of counsel for the Crown (and I think I may fairly say that this was the main burden of his attack on the matter of fact) that if one examined the story in the light of the evidence, one would be led inevitably, or at least properly, to the conclusion that although when the engagement of Miss Courtauld first occurred, her father communicated I with Sir Leslie and said: "What about a marriage settlement?", or words to that effect, by the time the matter was completed the idea of a marriage settlement on Perina's marriage, a marriage settlement of the more ordinary kind as would be commonly understood, had been altogether dropped and had been superseded by a much different idea, viz., that of making a very substantial settlement, not limited to those within Miss Perina's marriage consideration but covering Mr. Courtauld's entire family of six children, the other five of whom were then unmarried and covering also their issue if and when they should subsequently marry. It is, as I have said, a question of fact and the inferences to be drawn from

it. No doubt, as Sir Leslie Farrer pointed out in his evidence, when one comes to deal in a case of this kind with the daughter of an extremely wealthy man marrying someone who was, I understand, an estate agent, the idea of a bargain in any very strict, certainly in a commercial, sense is not a reality. On the other hand, having read carefully Sir Leslie's evidence, I cannot accept the view that there was a deliberate abandonment, or even, if you will, a subconscious abandonment, of the idea of a marriage settlement in favour of something essentially and inherently different, but rather that when the question of making a settlement arose it was Sir Leslie's suggestion, which Mr. Courtauld accepted, that the occasion should be taken to make a settlement not confined to those within the particular marriage consideration but covering the rest of the family; and it is no doubt true to say, as Sir Leslie pointed out, that he expressed the hope of his client that if that were done, they might get the benefit of exemption under s. 59 should the calamity occur which, be it observed, Mr. Courtauld, as I follow it, had then no reason to anticipate, of his dying as a relatively young man not three years after the settlement.

It would, I think, be an undue elaboration to take too much time pursuing matters in the recorded transcript. I will, however, just make one or two references. On this matter of bargain this question was put in cross-examination to Sir Leslie:

> "You do not suggest that there was a solemn treaty between all the different parties concerned? There was not any negotiation about it?"

The answer was:

> "I think they had all discussed it. My recollection is that when Perina came to see me she knew all about it. She said her father had told her all about it."

Then after being invited to look at certain recitals, he was asked:

> "Q.—'On the treaty for the said intended marriage . . .' It cannot be a different treaty, can it, if there was one, from the treaty referred to in the bride's father's settlement? A.—Yes, I think that is right. They were, so to speak, interlocked."

Then later Sir Leslie pointed out that the draft of the settlement he prepared for his client, Mr. Courtauld, was exchanged by him for the draft of the settlement emerging from the husband's side prepared by the husband's solicitors, and in answer to questions put, Sir Leslie said that if, on the other side, any point had been taken of the unusual character of the settlement, it was a point he would no doubt have taken up in the ordinary course with his client; but no such point was taken. So finally I turn to one question and answer and it is at this point, as it seems to me, that the case for the Crown by way of cross-examination was put at its highest, and I would observe that it might have been put higher if the case suggested was really to be put to Sir Leslie. The question is:

> "You really seized on this marriage to suggest to the settlor that it was just a good opportunity, with a view to the enactments relating to stamp duty [that obviously meant estate duty] to settle a much larger sum than he would have settled if he had been concerned with Perina and her husband and children and remoter issue of that marriage."

The answer was:

> "I am not quite sure I would put it quite like that, but if he wanted to make a settlement, which he did, on the marriage, I certainly told him that I thought we could hope that it might save duty, a settlement in this form."

Having made those allusions, I say for my part that the impression on my mind of the whole of the evidence is that in truth, in reality and in substance this was a settlement made within the meaning of the section in consideration of Perina's

A marriage, and if that is so, it falls within the language of the relevant section of the Act of 1910. Taking that view on the facts, therefore, and having expressed my conclusion about the law, I think that this appeal must be dismissed.

DONOVAN, L.J.: In view of the comprehensive judgment delivered by LORD EVERSHED, M.R., I can limit what I have to say although I may cover part B of the ground again.

It will be seen that the settlor's daughter and her intended husband were not even the principal beneficiaries under this settlement. They were simply members of a wide class of potential beneficiaries and as such they might never receive anything at all. In fact, for the period between the execution of the settlement and Mar. 3, 1959, the date when the settlor died, the daughter, now Mrs. Fordham, C received the total sum of £4,290, being settlement income distributed to her. In the same period her brother Augustine received like distributions totalling £18,330. Other beneficiaries received sums of income in the same period not substantially different from Mrs. Fordham's receipts.

The Crown now claims duty on the settled fund under the Finance Act, 1894, s. 2 (1) (c) as being, to put the matter quite broadly, a gift inter vivos made by D the settlor within five years of his death. The trustees of the settlement resist the claim on the ground that the gift was made in consideration of marriage and so is exempt from estate duty under the Finance (1909-10) Act, 1910, s. 59 (2). The arguments by which these rival claims are supported are, in summary, these: Counsel for the Crown says that the transaction is colourable, meaning thereby that the recital in the settlement: "Now in consideration of the said intended E marriage" is untrue; and that the truth is that this was a settlement made by the settlor on his whole family out of ordinary feelings of love and affection, the marriage of his daughter being simply the occasion for the settlement and not the consideration for it. Alternatively, he says that in law this settlement cannot be a gift in consideration of marriage, for the parties to the marriage do not take the whole of the otherwise taxable property. Most of the beneficiaries are strangers F to the marriage consideration, and this defeats the claim to exemption. Counsel for the trustees maintains that the consideration for the settlement *was* the marriage and it is immaterial that strangers to the marriage consideration may benefit under the terms of the settlement. The exemption still operates.

In my opinion the first contention of the Crown cannot be sustained. It would involve that the original intention to make a marriage settlement was abandoned G and an intention to make a family settlement, but behind the façade of a marriage settlement, substituted. The evidence does not support that conclusion, it being clear, among other things, that had there been no marriage, this settlement would not have operated. The most one can say is this: that the opportunity was taken to include in a marriage settlement beneficiaries outside the marriage consideration itself. That raises the question of law: is such inclusion fatal to the exemp- H tion. It is certainly surprising at first sight, and contrary to the notions one has hitherto entertained, if the exemption accorded to gifts under a marriage settlement can be turned to account in this way. There would seem to be sound reason for exempting newly married couples from the burden of estate duty on gifts which, when the donor subsequently died, would have probably been already expended on the home, or if they took the form of income under a marriage settle- I ment, would have determined their style of living. There is no similar reason in the case of strangers to the marriage. Nevertheless in the end one simply has to look at the words of the statute and construe them fairly and reasonably, and if such a construction yields anomalous results in particular cases, it is a commonplace that they must be accepted, whether it be the Crown or the taxpayer who is thereby advantaged.

The words to be construed are "gifts which are made in consideration of marriage" in the context of s. 59 (2) of the Act of 1910. There had been no express exemption of such gifts before the Act of 1910. The short history of the matter

is this. In 1881 account duty was imposed to make good the loss of probate duty which occurred in cases where property was given away shortly before death or under a disposition which was substantially a substitute for a will. The duty was levied on personal or movable property only and at the same rates as probate duty. Pursuant to this purpose, the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), levied the duty, inter alia, on

> " Any property . . . taken under a voluntary disposition . . . purporting to operate as an immediate gift inter vivos . . . which shall not have been bona fide made three months before the death of the deceased."

This provision was amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), by substituting " twelve months " for " three months ", and in other ways not material to the present case. In 1895 it was decided by the Court of Appeal that the children of a first marriage, to whom their mother gave certain property under a marriage settlement which she made on her second marriage, took such property under a " voluntary disposition " within the meaning of s. 38 of the Act of 1881. They were " volunteers " and not within the consideration of the second marriage. Had it been otherwise, account duty would not have been payable since the consideration of marriage would have deprived the disposition of its voluntary character. This was the decision in *A.-G.* v. *Jacobs Smith* (12). The court there said that the consideration of marriage extends only to the husband and wife and children of that marriage. In 1894, when estate duty superseded both probate duty and account duty, the provisions of the Acts of 1881 and 1889 were further amended. The Finance Act, 1894, s. 2 (1) (c), imposed estate duty on the property formerly liable to account duty under s. 38 (2) (a) of the Act of 1881 but widened the net. It did this by removing the necessity for the disposition to be voluntary. The Finance Act, 1894, s. 2 (1), provides:

> " Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—. . . (c) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words ' voluntary ' and ' voluntarily ' and a reference to a ' volunteer ' were omitted therefrom."

In that state of the law *A.-G.* v. *Smyth* (13) came before PALLES, C.B. He there decided that estate duty was payable on the death of a settlor within twelve months of making a marriage settlement on his son. He reached this conclusion because, by s. 2 (1) (c) of the Act of 1894 the property no longer had to be the subject of a voluntary disposition; and although the son was within the marriage consideration, nevertheless the property was taken under a disposition " purporting to operate as an immediate gift inter vivos ". This decision has been subsequently criticised: see, e.g., the decision of DANCKWERTS, J., in *Re Earl Fitzwilliam's Agreement, Peacock* v. *Inland Revenue Comrs.* (14). But it was the law when the Finance Act of 1910 came to be passed. The situation was then as follows: first, property settled by A on his own marriage escaped estate duty even if he died within twelve months. There was here no voluntary disposition and no gift. A received consideration in the shape of the marriage. Second, property settled by A on the children of a former marriage, the settlement being in consideration of his second marriage, was liable to estate duty if A died within twelve months. The children of the first marriage gave no consideration: they took the property as a gift. Third: property settled by A on the marriage of his own son was now liable: for although the son was within the marriage consideration, he took the property as a gift.

(12) [1895] 2 Q.B. 341. (13) [1905] 2 I.R. 553.
(14) [1950] 1 All E.R. 191; [1950] Ch. 448.

A It is against this background that one has to consider s. 59 (2) of the Finance (1909-10) Act, 1910. If all that the legislature desired was to undo the effect of *A.-G.* v. *Smyth* (15) and restore the immunity from estate duty of property taken on marriage by a person within the marriage consideration (i.e., husband, wife and issue), it would have been extremely easy to say so. We are now asked to read that limitation into the exempting words in s. 59 (2) " gifts made in consider-
B ation of marriage ". The justification urged is that the burden of estate duty in the case of gifts falls on the donee. Why should a donee, who is outside the marriage consideration, be relieved of this burden? There being no satisfactory answer to this question, s. 59 (2) should be construed as requiring that the parties to the marriage consideration should take the whole of the otherwise taxable property. Counsel for the Crown relied very strongly on the decision in *A.-G.* v.
C *Jacobs Smith* (16), but it seems to me to be inconclusive of the present case. Granted that Mrs. Fordham's brothers and sisters are volunteers, the question of construction of s. 59 (2) still remains. On that question there is no direct authority and there seems little point, therefore, in going through the various authorities canvassed in the course of the argument.

For my part I think the difference in language between the taxing enactment
D and the exempting one is significant. The duty is on " property taken . . .". The exemption is of " gifts which are made . . .". So that when one is considering what property is " taken ", it is natural to consider the matter from the point of view of the taker. When one is considering gifts " made " in consideration of marriage, it is natural to consider the matter from the point of view of the maker of the gift. It is, of course, true that in the present case nothing in the way of
E consideration moves from Perina's brothers and sisters to the settlor; but s. 59 (2) does not, in terms at any rate, require that it should. The test propounded is whether the gift was *made* in consideration of marriage, and, as a matter of language, I do not see how this question can be answered in the negative merely because persons outside the marriage consideration take as well as those inside it. It is not an impossible conception that a gift may be made by A to B, C and D
F in consideration only of the marriage of B. Why should not a father say to a daughter: If you will marry so and so, I will make a gift not only to you, but to your brothers and sisters? There ought to be some compelling reason for limiting the exemption in the way the Crown wishes, since the literal language of s. 59 (2) does not do it. I find no such compelling reason. I admit there are plausible reasons of social justice perhaps which can be appealed to, but that is not enough
G and perhaps not even relevant. The fact here is that this gift was made in consideration of marriage and that seems to me to bring the case within the four corners of the exemption as it is expressed.

That being so, it is unnecessary for me to consider the alternative argument for the taxpayer that even if strangers to the marriage are outside the marriage consideration, in this particular case their interests cannot be severed, and so the
H exemption still applies in full. I agree that the appeal should be dismissed.

DANCKWERTS, L.J.: I agree, and I can put my view quite shortly. The settlement is expressed to be made by the settlor in consideration of the intended marriage, and though it is agreed that evidence of the facts is admissible, it seems to me that the statement in the deed must stand unless the evidence
I shows it to be untrue. The Crown contend that on the provisions contained in the settlement, which provide on an equal footing for persons who are not within the class regarded under the rules of equity as being within the marriage consideration as well as those persons within that class, (i) the settlement is in fact not a marriage settlement or a settlement made in consideration of marriage, and if there was an intention to make a marriage settlement it was abandoned by the settlor in favour of a larger scheme; and (ii) as a matter of law a settlement of the nature of the

(15) [1905] 2 I.R. 553. (16) [1895] 2 Q.B. 341.

settlement under consideration cannot be " a gift which is made in consideration of marriage " within the terms of the exemption in s. 59 (2) of the Finance (1909-10) Act, 1910. A

As regards the question of fact, in my opinion the Crown failed to prove on the evidence that the statement in the settlement is untrue. The evidence established that the marriage of Mrs. Fordham was the reason why the settlor made the settlement, and if the marriage had not taken place, the settlement would not have been made. B

On the question of law, in the words of ROWLATT, J., in *Cape Brandy Syndicate* v. *Inland Revenue Comrs.* (17) ". . . in a taxing Act one has to look merely at what is clearly said ". In my view the words in s. 59 (2) of the Act of 1910 are perfectly clear; the taxing provisions " shall not apply to gifts which are made in consideration of marriage ". These words are plainly directed to the position of the maker of the settlement, and (except possibly in an extreme case where the nature of the beneficiaries indicates that the marriage cannot have been the consideration) the benefits taken by the beneficiaries under the settlement are not the test. The terms of the exemption provision in s. 59 (2) of the Act of 1910 are in strong contrast with those of s. 38 (2) (a) of the Act of 1881, which are " taken under a voluntary disposition, made by any person so dying ", which may well refer to the position of the donees. The removal of the word " voluntary " by the Finance Act, 1894, seems to me to make no difference on this point. C D

This construction is also strengthened when it is realised that those marriage settlements which are made by a husband on his wife and future children on his marriage (" the most valuable consideration imaginable ", it has been said) were never subject to the provisions of s. 38 (2) (a) of the Act of 1881 (being regarded as made for valuable consideration), so that the exempting provisions of s. 59 (2) of the Act of 1910 must have been aimed at a wider class of marriage settlements. If that was not the intention, it would have been easy for the legislature to have said so. I do not feel that it is necessary to refer to the cases in which a distinction has been made for certain purposes between those persons who were regarded as being within the marriage consideration and others who were regarded as volunteers. That highly artificial rule seems to me to have nothing to do with the questions which have to be decided in the present case. I think that the decision of the learned judge was right and I agree that the appeal should be dismissed. E F

Appeal dismissed.

On application by the Crown for leave to appeal to the House of Lords LORD EVERSHED, M.R., drew attention to the Crown's argument on fact (18), in effect that the transaction was colourable, and to the finding against this contention at first instance, affirmed on appeal. Counsel for the Crown then took instructions and stated that the Crown desired to appeal merely on the point of law. Leave to appeal on the point of law only was granted by the Court of Appeal. G

Nov. 23. *The Attorney-General* (*Sir Reginald Manningham-Buller, Q.C.*) for the Crown, applied for the Crown to be relieved of the restriction limiting the leave to appeal to the point of law. The Crown wished to submit before the House of Lords that, on the uncontradicted evidence, the marriage of Perina Courtauld was the occasion for the settlement rather than the consideration for it. The order had not yet been drawn up. It was possible that, as in criminal appeals (19), any point might be open once leave to appeal was obtained and that he could not be restricted before the House of Lords by a condition imposed by the Court of Appeal limiting appeal to one ground; or he might have gone direct to the Appeal Committee. He had felt, however, that the right course was to come first to the Court of Appeal. He knew of no precedent in a revenue H I

(17) [1921] 1 K.B. at p. 71.
(18) See p. 1035, letters H and I, and p. 1037, letter D, ante, and letter A, supra.
(19) See, e.g., *A.-G. for Northern Ireland* v. *Gallagher*, p. 299, ante.

A case for the imposition of a condition that an appeal should not cover the whole field.

LORD EVERSHED, M.R.: The House of Lords recently let me know that it was regarded as competent for this court to impose conditions in giving leave to appeal. Hitherto we felt that we could not impose conditions. Any party who is given leave on a condition is entitled to take that as a refusal and to go B to the Appeal Committee.

The Attorney-General: I should wish to argue that conditions cannot be imposed on an appellant by the Court of Appeal against the appellant's wish. I wish to make clear that we take the view that an English appeal to the House of Lords on what is solely a question of fact would not be right, but in tax cases there are mixed questions of law and fact, and questions of inference C from evidence which may be regarded as inferences of fact.

If the Crown were relieved of the condition of granting leave to appeal, the Crown would not seek to argue that the transaction was "colourable" (20) in any sinister sense. "Colourable" is an unfortunate word, because it looks as if there were some impropriety and I do not suggest any impropriety.

D *E. I. Goulding, Q.C.*, for the trustees, submitted that the application was to re-open a concession made in the course of proceedings with full authority, not to relieve the Crown of a condition imposed by the court. There was no difficulty in keeping separate the questions of law and fact.

LORD EVERSHED, M.R., the court having first retired to consider their decision: If the Crown desire to be relieved from the concession made, the E Crown should apply to the Appeal Committee.

Leave to appeal to the House of Lords granted on the question of law.

Solicitors: *Solicitor of Inland Revenue*; *Farrer & Co.* (for the trustees).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

F

BUTTER (INSPECTOR OF TAXES) *v.* BENNETT.

[CHANCERY DIVISION (Cross, J.), October 20, November 6, 1961.]

Income Tax—Income—Accommodation and benefits provided to directors and others—Service house of mill manager—Company's payments for coal, electricity and garden—Emoluments of manager under Sch. E—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 161 (1), (3).

G Expenditure "in or in connexion with the provision of living accommodation" within s. 161 (3) of the Income Tax Act, 1952, is confined to expenditure necessary to provide and maintain some immovable property as a residence for the director or employee concerned (see p. 1046, letter H, post).

Under a term of his service agreement and because it was necessary for H the proper performance of his duties, the manager of a mill earning over £2,000 a year was required to reside in a house about two hundred yards from the mill. Under the same term of the service agreement he was provided with coal and electricity reasonably required for the heating or lighting of the house at the expense of the employers, a limited company, which paid all rent, rates and taxes payable in respect thereof and the cost of I upkeep of the garden. He was assessed to income tax in respect of the payments for coal and electricity and the upkeep of the garden as part of his emoluments under Sch. E to the Income Tax Act, 1952.

Held: assuming without deciding that the taxpayer was not taxable in respect of the benefits for coal, electricity and garden upkeep, because he was not in beneficial occupation of the house, under the principle decided

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(20) DONOVAN, L.J., observed in the course of this application that the word "colourable" was a timid way of saying "untrue", and that in his judgment he had used the word "colourable" as a synonym for "untrue" (see p. 1037, letter D, ante).

in *Tennant* v. *Smith* ([1892] A.C. 150), he was nevertheless taxable in respect of them as "domestic or other services or . . . other benefits or facilities" provided for an employee by a body corporate, by virtue of s. 161 (1) of the Act; that enactment applied to cases of "representative occupation" by employees (viz., occupation of premises as representative of the employer for the purpose of performing duties, not as part of the reward for services), and, although the house was "business premises" for the purposes of s. 161 (3), to moneys expended by the company on providing the benefits of coal, electricity and upkeep, since those expenses were not incurred "in or in connexion with the provision of living accommodation for an employee" within s. 161 (3) and so were not excluded thereby from the scope of s. 161 (1).

Appeal allowed.

[As to tax on benefits in kind to directors and highly paid employees, see 20 HALSBURY'S LAWS (3rd Edn.) 315-317, paras. 578-581; and for cases on the subject, see 28 DIGEST (Repl.) 225-237, *971-1040*.

For the Income Tax Act, 1952, s. 161 (1), (3), see 31 HALSBURY'S STATUTES (2nd Edn.) 156.]

Cases referred to:

Nicoll v. *Austin*, (1935), 19 Tax Cas. 531; 28 Digest (Repl.) 230, *1003*.

Reed v. *Cattermole*, [1937] 1 All E.R. 541; [1937] 1 K.B. 613; 106 L.J.K.B. 407; 156 L.T. 389; 21 Tax Cas. 35; 28 Digest (Repl.) 233, *1018*.

Tennant v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest (Repl.) 216, *916*.

Wilkins (*Inspector of Taxes*) v. *Rogerson*, [1961] 1 All E.R. 358; [1961] Ch. 133; [1961] 2 W.L.R. 102; 3rd Digest Supp.

Case Stated.

The taxpayer appealed to the Special Commissioners of Income Tax against additional assessments made on him under Sch. E to, and s. 16 of, the Income Tax Act, 1952, in the sums of £90, £100 and £80 for 1953-54, 1954-55 and 1955-56 respectively. The taxpayer was employed by Bridgend Paper Mills, Ltd., and resided in a house provided by that company, which bore, inter alia, the cost of coal, electricity and the part-time services of a gardener. The taxpayer's emoluments were at a rate exceeding £2,000 per annum and the question for determination was whether or not the cost was chargeable to the taxpayer having regard to the provisions of s. 161 of the Income Tax Act, 1952, with particular reference to sub-s. (3). The taxpayer contended: (i) that he was required by the company to occupy the company's house by the terms of his employment as manager of the company's mill and that it was necessary for the manager of the mill to reside there for the proper performance of his duties; (ii) that the provision of coal, electricity and the services of a gardener came within the definition of providing living accommodation at the house for the taxpayer as the representative occupier of the company's house and that no part of the expenditure should be apportioned to the taxpayer; and (iii) that the coal supplied from Apr. 6, 1954, to Dec. 1, 1955, was the company's coal to heat the company's house and not the taxpayer's coal, that the electricity was supplied from the company's mill to heat the company's house and the company's representative occupier, and the gardening services were such as an occupier undertook to preserve the appearance of a garden.

The Crown contended (a) that the words "provision of living accommodation" in s. 161 were not apt to include the provision of services or supplies other than those required to maintain the premises concerned in a habitable condition; (b) that the cost of provision of coal, electricity and upkeep of the garden was a benefit falling under s. 161 (1) of the Act of 1952, and that the cost of these was not excluded by sub-s. (3) as such benefits were not within the scope

A of the term "in or in connexion with the provision of living accommodation"; the cost of coal supplied in the first year in any event was outside s. 161; (c) that, if it was accepted that the coal, electricity and services of the gardener partly represented expenses in or in connexion with living accommodation, only that part relating to the provision of reasonable heat and light for the premises and maintenance of the garden should be excluded under sub-s. (3) and the part B relating to cooking, use of electrical appliances and the provision of water heating and other household expenses should remain within the general charge of sub-s. (1); and, accordingly, one-third of the cost of coal and gardening and the whole of the supply of electricity should be treated as a benefit of the taxpayer; and (d) that, under r. 1 of Sch. 9 to the Act of 1952, the coal supplied by the company to the taxpayer was an emolument of his office or money's worth or a liability C which had been borne by the company. The commissioners found as a fact that the real occupier of the house was the company and that the taxpayer's presence there was as a representative of the company. They held that the coal (except for the coal supplied in the first year) electricity and gardening services should be regarded as items in connexion with the living accommodation and allowed the appeal. The Crown appealed by way of Case Stated to the High Court.

D *A. S. Orr* for the Crown.

F. N. Bucher, Q.C., and *R. Buchanan-Dunlop* for the taxpayer.

Cur. adv. vult.

Nov. 6. **CROSS, J.**, read the following judgment: This is an appeal by the Crown against the decision of the Special Commissioners of Income Tax that E the respondent taxpayer, Mr. N. J. M. Bennett, is not liable to tax under Sch. E to the Income Tax Act, 1952, for the years 1953 to 1956 inclusive on sums expended by his employers, Bridgend Paper Mills, Ltd., in respect of coal, electricity and the part-time services of a gardener supplied for him under the provisions of cl. 5 of his service agreement with the company. By that agreement, which was made on Oct. 17, 1951, the taxpayer became the manager of F the company's paper mill, which is situate about a mile and a half from the village of Llangynwyd and about six and a half miles from Bridgend, for a period of five years from Apr. 1, 1951. Clause 5 was in the following terms:

> "During the period of his engagement hereunder the manager shall if so required by the company reside in any house provided for the purpose by and at the expense of the company and so that the company shall be solely G responsible for the cost of all coal coke gas and electricity reasonably required for the heating or lighting of such house for all rent rates and taxes payable in respect thereof and for the upkeep of any garden attached thereto."

When he became manager of the mill the taxpayer was required by the company to live in a house known as "Nant Gwyn" belonging to the company and H situate about two hundred yards from the mill. Having regard to the facts found it is clear, and is not now disputed by the Crown, that not only was the taxpayer required by his service agreement to live at "Nant Gwyn", but that it was in fact necessary for the mill manager to live there for the proper performance of his duties.

All the coal used in "Nant Gwyn" to which this appeal relates was supplied I by a local coal merchant to the company, together with the coal used at the mill, and the taxpayer never became personally liable to the supplier in respect of it. It was used to heat the sitting room and the water and two radiators in the house. The lighting and cooking and the heating of the rest of the house was by electricity, which was supplied by a cable from the company's mill. The company's groundsman at the mill kept the garden at "Nant Gwyn" tidy by weeding, mowing the lawn and cutting the boundary hedges. He did nothing in the kitchen garden, which was worked by the taxpayer himself, and the company did not supply the taxpayer with any seeds or plants.

The cost of the items supplied by the company to the taxpayer is quite small, some £109 in 1953-54, £143 in 1954-55 and £117 in 1955-56. Counsel for the Crown contends, first of all, that the coal was a "perquisite" of the taxpayer within the meaning of r. 1 of the Rules applicable to Sch. E, which are set out in Sch. 9 to the Income Tax Act, 1952. Secondly, he argues that he is taxable in respect of the electricity and the services of the gardener and also, if he is wrong on his first submission, on the coal, under s. 161 of the Income Tax Act, 1952.

The first contention is put in this way. It is admitted that the taxpayer is required by the terms of his employment to live at "Nant Gwyn" and that it is, in fact, necessary that he should do so if he is to perform his duties properly. Therefore, it is admitted that no part of any rent, rates or taxes paid by the company in respect of the premises could be treated as part of his emoluments for the purpose of tax under Sch. E. It is argued, however, that the principle laid down in *Tennant* v. *Smith* (1) and applied in later cases such as *Reed* v. *Cattermole* (2) only covers sums spent by the employers in respect of the premises themselves and does not extend to expenditure the result of which is to relieve the employee of some part of the cost of living in the premises. On that footing it is said that the cost of the coal was properly included in the taxpayer's emoluments, either because it was money's worth which he could have disposed of for his own benefit, or on the principle applied in *Nicoll* v. *Austin* (3), where a director of a company was held to be taxable in respect of sums spent by the company in keeping up his house and garden.

On the wording of cl. 5, it is to my mind at least doubtful whether the taxpayer could have sold this coal without committing a breach of contract, but I see no reason to doubt that, if he had been in beneficial occupation of the house, he would have been taxable in respect of the coal—and also I should have thought, though this was not argued, in respect of the electricity and the gardener's wages—on the principle of *Nicoll* v. *Austin* (3). It is true that in that case—as LORD EVERSHED, M.R., pointed out in the recent case of *Wilkins* (*Inspector of Taxes*) v. *Rogerson* (4)—Mr. Austin was personally liable for the various bills which his employers discharged for him other than, perhaps, the gardener's wages, whereas here the taxpayer was under no personal liability at all. But he got the benefit of the company's expenditure and I do not think that the Court of Appeal in *Wilkins* v. *Rogerson* (5) was intending to say that, where an employee gets the benefit of some expenditure by his employers which does not result in his receiving any property which can itself be regarded as money's worth in his hands, he is not liable to tax unless the employers' expenditure has relieved him of some personal liability.

There remains, however, on this branch of the case the overriding question whether the principle of *Nicoll* v. *Austin* (3) applies at all to a case where the employee is not in beneficial occupation of the house in question but occupies it simply as a representative of his employers. In cases of representative occupation, the employee does not occupy the premises in question as part of his reward for his services but for the purpose of performing them. As GREENE, L.J., put it in *Reed* v. *Cattermole* (6) the house is akin to an implement of trade provided by the employer and put into the employee's hands for him to use in carrying out his duties. On that basis I have some difficulty in seeing why the employee's freedom from liability to tax should be limited to the benefit of rent-free occupation of the premises. If the implement of trade provided by the employer is not an empty house but a house full of furniture belonging to the employer (as it was in fact in *Reed* v. *Cattermole* (7)), or if, because the house is connected with the rest of the business premises, the employee can obtain hot water or electric

(1) [1892] A.C. 150.
(2) [1937] 1 All E.R. 541; [1937] 1 K.B. 613.
(3) 19 Tax Cas. 531.
(4) [1961] 1 All E.R. at p. 361; [1961] Ch. at p. 145.
(5) [1961] 1 All E.R. 358; [1961] Ch. 133.
(6) [1937] 1 All E.R. at p. 554; [1937] 1 K.B. at p. 630.
(7) [1937] 1 All E.R. 541; [1937] 1 K.B. 613.

A current for which he does not have to pay anything by turning a tap or switch, I do not at the moment see why he should be taxable in respect of the advantage to him of the use of the furniture, or the hot water, or the electricity if he is not taxable in respect of the rent-free occupation of the house itself. That point, I am told, has never been raised in any case hitherto and, as I have reached a conclusion adverse to the taxpayer on s. 161, I propose to say no more on this B aspect of the case but to assume for the purpose of my judgment, without deciding the point, that if the taxpayer is not taxable under s. 161 he is not taxable at all in respect of the matters in question.

Sections 160 to 168 of the Income Tax Act, 1952, form a separate Chapter headed "Expenses allowances to directors and others". The parts of it which are relevant to the question which I have to decide are as follows:

C "160. (1) Subject to the provisions of this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of para. 1 of Sch. 9 to this Act as a perquisite of the office or employment of that director or employee and D included in the emoluments thereof assessable to income tax accordingly.

"161. (1) Subject to the following provisions of this Chapter, where a body corporate incurs expense in or in connexion with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies, of living or other accommodation, of entertainment, of domestic or other services or of other benefits or facilities of E whatsoever nature, and, apart from this section, the expense would not be chargeable to income tax as income of the director or employee, paras. 1 and 7 of Sch. 9 to this Act, and s. 27 of this Act, shall have effect in relation to so much of the said expense as is not made good to the body corporate by the director or employee as if the expense had been incurred by the director or employee and the amount thereof had been refunded to him F by the body corporate by means of a payment in respect of expenses.

"(2) The provisions of sub-s. (1) of this section shall not apply to expense incurred by the body corporate in or in connexion with the provision for a director or employee, in any of its business premises, of any accommodation, supplies or services provided for the director or employee himself and used by him solely in performing the duties of his office or employment.

G "(3) The provisions of sub-s. (1) of this section shall not apply to expense incurred by the body corporate in or in connexion with the provision of living accommodation for an employee in part of any of its business premises which include living accommodation if the employee is, for the purpose of enabling him properly to perform his duties, required by the terms of his employment to reside in the accommodation and either . . . [I need H not read para. (a)] (b) it is necessary, in the case of trades of the class in question, that employees of the class in question should reside on premises of the class in question . . .

"163. (3) Subject to the provisions of this and the two next following subsections, the employments to which this Chapter applies are employments the emoluments of which, calculated on the basis that they are employ- I ments to which this Chapter applies, and without any deduction being made under para. 7 of Sch. 9 to this Act in respect of money expended in performing the duties thereof, are at the rate of £2,000 a year or more . . ."

It is agreed that the taxpayer's total emoluments exceed £2,000 per annum and, therefore, that his employment is one to which the section applies.

"167. (1) In the preceding provisions of this Chapter, 'business premises', in relation to a body corporate, includes all premises occupied by that body for the purpose of any trade carried on by it: Provided that, except

where the reference is expressly to premises which include living accommodation, the said expression does not include so much of any such premises as aforesaid as is used wholly or mainly as living accommodation for any of the directors of the body corporate or for any persons employed by the body corporate in any employment to which this Chapter applies.

"(2) Any reference in the preceding provisions of this Chapter to anything provided for a director or employee shall, unless the reference is expressly to something provided for the director or employee himself, be construed as including a reference to anything provided for the spouse, family, servants, dependants or guests of that director or employee, and the reference in the proviso to sub-s. (1) of this section to living accommodation for directors or employees shall be construed accordingly."

Counsel for the taxpayer argued, first, that s. 161 did not apply to cases of representative occupation at all, and, secondly, that s. 160 and s. 161 do not impose a liability to tax on anything which was not subject to tax before, but simply provide that the benefits referred to should be valued by reference to the employee's expenditure. I cannot accept either of these arguments. As to the first, the words of s. 161 (1) are, I think, quite wide enough to cover cases of representative occupation. Indeed it was, as I see it, just because they would cover cases of representative occupation that sub-s. (3) was needed.

As to the second point, s. 160 and s. 161 are expressly stated not to apply to any sums which would be chargeable to income tax apart from them. They operate to charge to tax sums which would otherwise not be chargeable to tax by saying that they are to be treated as perquisites of the employment in question. Section 161 (2) admittedly has no application to this case, first, because "Nant Gwyn" was not "business premises" within the meaning of that expression as used in that subsection, and, secondly, because the services in question here were provided for the taxpayer's family as well as for the taxpayer himself. There is, however, no doubt that "Nant Gwyn" is "business premises" within the meaning of s. 161 (3) or that the taxpayer fulfils the conditions of that subsection.

The real question on this part of the case, as I see it, is therefore whether the expense incurred by the company was incurred in connexion with the provision of living accommodation for the taxpayer or his family. As the subsection refers to residing in the living accommodation, it is, I think, clear that those words refer simply to a house or flat as a physical object and that the expenditure in question in this case cannot be said to have been incurred "in" providing living accommodation. It is argued, however—and this argument found favour with the Special Commissioners—that it was expenditure "in connexion with" the provision of "Nant Gwyn" as a residence for the taxpayer. But if these words cover more than sums spent on the house as a physical object—such as the expenses of repair or decoration—where is one to draw the line? Why should one stop at lighting and heating? The cost of providing and cleaning or washing furniture, carpets and linen might well be included; indeed, why not also the cost of preparing meals to be eaten in the house?

The difficulty of knowing where to stop leads me to think that "expenditure" "in or in connexion with the provision of living accommodation" must be confined to expenditure necessary to provide and maintain some immovable property as a residence for the director or employee. I find support for this view in the wording of s. 161 (1), which draws a distinction between the provision of living accommodation and the provision of services. In my judgment, therefore, the commissioners reached a wrong conclusion in this case and the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Richards, Butler & Co.* (for the taxpayer).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

A

R. v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL AND OTHERS, *Ex parte* HAINES.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Veale, JJ.), October 24, 1961.]

Rent Control—Rent tribunal—Jurisdiction—Determination of question on which jurisdiction depends—Contract of tenancy—Identity of landlord—Circumstances of landlord—Furnished Houses (Rent Control) Act, 1946 (9 & 10 *Geo.* 6 *c.* 34), *s.* 2 (2).

B

At the time when a rent tribunal exercise their jurisdiction under s. 2 (2) of the Furnished Houses (Rent Control) Act, 1946*, to reduce a rent, they must know who are the parties to the contract of tenancy, since it is necessary for them to have ascertained the circumstances of the landlord and, in particular, the expenses which the landlord has incurred in providing services to the tenant, in order to make their decision (see p. 1050, letter B, post); accordingly jurisdiction to reduce the rent cannot be founded merely on the existence of a contract of tenancy, between the tenant and someone other than the person whom the tribunal deem to be the landlord, at the date of the initiation of the reference.

C

D

Francis Jackson Developments, Ltd. v. *Hall* ([1951] 2 All E.R. 74) distinguished.

[As to the consideration of a reference by a rent tribunal, see 23 HALSBURY'S LAWS (3rd Edn.) 863, para. 1667; and for cases on the subject, see 31 DIGEST (Repl.) 729-731, -8 *30.*

E

For the Furnished Houses (Rent Control) Act, 1946, s. 2 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 1086.]

Case referred to:

Francis Jackson Developments, Ltd. v. *Hall,* [1951] 2 All E.R. 74; [1951] 2 K.B. 488; 115 J.P. 384; 2nd Digest Supp.

F

Motion for certiorari.

Sydney William Haines, the owner of a house, 82, Fernhead Road, London, W.9, applied, by leave of the Queen's Bench Divisional Court, for an order of certiorari to bring up and quash a decision of the Paddington and St. Marylebone Rent Tribunal, which was notified on Sept. 30, 1960. The applicant had also appealed against this decision, but he abandoned such appeal. The respondents to the application were the rent tribunal, its chairman, the Ministry of Housing and Local Government, and Mr. G. Cooper.

G

The facts are stated in the judgment of LORD PARKER, C.J.

The applicant appeared in person.

J. R. Cumming-Bruce for the respondents.

H

LORD PARKER, C.J.: The application for certiorari is moved by the applicant in person, and is to bring up and quash a decision of the Paddington and St. Marylebone Rent Tribunal which was notified on Sept. 30, 1960. The notification is in this form:

"Under s. 2 of the Furnished Houses (Rent Control) Act, 1946, I have to notify you that the rent fixed by the tribunal for the premises specified in the schedule below is as entered at para. (6) of the schedule . . ."

I

* Section 2 (2) provides that where a contract within the Act is referred to a tribunal ". . . the tribunal shall consider it and, after making such inquiry as they think fit, and giving to each party (and, if the house is one the general management whereof is vested in and exercisable by a housing authority, to that authority) an opportunity of being heard, or, in his option, of submitting representations in writing, shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case."

The schedule then sets out, first of all, the premises in question, namely, part of 82, Fernhead Road, W.9, described as "one room, basement, back". The name and address of the lessor is given as "K. Wilson & Sons, Ltd., per Mr. S. Haines, 108, Victoria Road, N.W.6", and the name and address of the lessee as Mr. M. G. Cooper, 82, Fernhead Road, W.9. The services provided are stated to be electricity for light, radio and iron, and the rent is stated to have been reduced by the tribunal from £3 per week to £2 per week. The facts were shortly as follows. The applicant was the landlord of the whole of the premises, No. 82, Fernhead Road. At some stage he let those premises, or a part of them, to one A. Harriott, and Mr. Harriott in turn let this one room at the back in the basement to a Mr. Cooper. Whether that letting by Mr. Harriott was in breach of a covenant contained in his tenancy from the applicant is not clear, but at any rate it was Mr. Harriott who was the lessor of the one room in the basement to Mr. Cooper. Mr. Cooper was minded to get a reduction in rent and, as he was entitled to do, he applied on Sept. 10, 1960, to the rent tribunal, filling up the appropriate forms F.R.3A and F.R.1, in which he stated that he was the person to whom the premises were let, and that the name and address of the person by whom the premises were let was "Mr. A. Harriott, caretaker for landlord [the applicant] at 82, Fernhead Road". Thereupon the tribunal notified Mr. Cooper and Mr. Harriott of a date for hearing, the date fixed being Sept. 23, and further notified both those parties that they proposed to inspect the premises. By Sept. 20, the applicant had somehow heard of Mr. Cooper's application, and he wrote to the tribunal on that date in these terms:

> "With reference to the application by Mr. M. G. Cooper I have to inform you that Mr. A. Harriott is not the caretaker of the above premises, as alleged, neither has he any powers or rights to create a letting of any kind."

It was an inference from that letter that the applicant was claiming to be the landlord and that Mr. Harriott had really nothing to do with it. I only mention that because one sympathises with the difficulties in which the tribunal found themselves. On my copy of that letter, there are written these words:

> "Ratepayer per local authority. K. Wilson & Sons, Ltd., 108, Victoria Road, N.W.6. [The applicant] is one of the directors".

It looks as if, on receipt of that letter, some clerk in the tribunal's office had ascertained that information from the local authority. At any rate, the tribunal thought it right to notify the applicant, as they did on Sept. 21, direct, that the public hearing would take place on Sept. 23. On Sept. 23, the date of the hearing, neither the applicant nor Mr. Harriott turned up. Mr. Cooper did, and gave evidence, and, at the end of the hearing, the chairman said this:

> "We shall have to contact [the applicant] for his expenses on forms we sent him and then assess the rent."

Opposite the word "Decision" (1) appears:

> "Write to [the applicant] re form F.R.4A for expenses then consider rent."

That, of course, was on the basis that they suspected that the applicant was the landlord, and, in deciding whether the rent should remain what it was or be reduced, the circumstances of the particular landlord were relevant. The "expenses" clearly, I think, referred to the expenses that the landlord would incur in providing the services. Other relevant matters were whether the landlord was the owner or tenant of the whole house or part of the house, or only of the part which was being considered; what purchase price he had paid if he was the owner; whether there was a mortgage, and what rent he paid if he was the lessee. All those things are relevant for the tribunal's decision. Matters of that sort specifically form the subject of question 8 in form F.R.4A which the

(1) On the notes of evidence of the hearing.

A tribunal decided they should send to the applicant. Thereafter, the applicant, to say the least of it, was quite unhelpful. He did not turn up. He never gave them clear information as to exactly what was the position, and a time came when the tribunal decided that the rent was to be reduced from £3 to £2 and, having regard to the information that they had obtained from the local authority, they notified their decision not only to Mr. Cooper, the lessee, but to K. Wilson B & Sons, Ltd., as the lessors, and also to the town clerk of Paddington, that notification being in order that the rent should be registered under s. 3 of the Furnished Houses (Rent Control) Act, 1946. In the body of that notification, they described the landlord and the lessor as being "K. Wilson & Sons, Ltd., per Mr. S. Haines."

It is in those circumstances that the applicant comes to this court, and his C first point, and the only point which I find it necessary to consider, can be very simply put. He is saying:

> "I point to a notification of a decision which appears to be a decision in regard to this one room, the subject of a contract between K. Wilson & Sons, Ltd., and Mr. M. G. Cooper."

D He quite rightly says that there has to be a contract before the tribunal get jurisdiction, and that is clear from s. 2 of the Act (2). He says:

> "I am going to show, and I do show, that there never was any such contract and, accordingly, the whole basis of this decision falls to the ground and should be quashed."

The court are very indebted to counsel for the respondents for his argument, E which has helped this court very considerably in arriving at a conclusion in the matter, albeit they are against him. His first point is that, while this notification of decision was clearly sent to the wrong people and was entered up wrongly by mistake, yet a notification is not a condition of jurisdiction; it is merely something that the tribunal are directed to do afterwards, and the fact that they have made a mistake does not vitiate their decision at all. I cannot accept F that argument because, as it seems to me, the decision that was reached in this case, quite apart from the notification, was not a decision in relation to the only contract that existed, namely, the contract between Mr. Cooper and Mr. Harriott, but was a decision in relation to an alleged contract between K. Wilson & Sons, Ltd. and Mr. Cooper. At the hearing on Sept. 23, the tribunal did not there and then decide in relation to a contract between Mr. Harriott and Mr. G Cooper to reduce the rent, but they specifically adjourned their decision until after they had communicated with the applicant, and after they had come to the conclusion that K. Wilson & Sons, Ltd. were the landlords. Accordingly, this notification of decision is not a mere mistake in relation to the notification, but itself is referring to a decision which had been made in relation to an alleged contract between K. Wilson & Sons, Ltd. and Mr. Cooper. The second way H in which it is put, which in my view is the real point, is whether or not it is sufficient to found jurisdiction in a tribunal to arrive at a decision that there should be a contract between the lessee who has referred it, Mr. Cooper in this case, and a lessor, who may be called Mr. X. The argument is that it matters not who Mr. X is if in fact there was a contract that was referred by one of the parties, namely, the lessee. It is said that there is then enough to found juris- I diction, and that the decision in fact is a decision in relation to a contract between the lessee and Mr. X, and that it matters not who Mr. X is. That argument is supported by reference to a decision in the Court of Appeal, *Francis Jackson Developments, Ltd.* v. *Hall* (3), where it was held that the fact that the lessee in making the reference to the tribunal did not name his true landlord because

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(2) Section 2 (1) provides: "Where a contract has . . . been entered into . . . it shall be lawful for either party to the contract . . . to refer the contract to the tribunal . . ." The relevant part of s. 2 (2) is printed as a footnote to p. 1047, ante.

(3) [1951] 2 All E.R. 74; [1951] 2 K.B. 488.

he did not know him did not nullify the application and, accordingly, did not nullify the jurisdiction of the tribunal. It was pointed out by DENNING, L.J., that many lessees would only know the person to whom they paid the rent and would not know whether he was an agent or not, and that the fact that the lessee had wrongly named somebody as the lessor could not prevent it being a perfectly valid application. I entirely accept that decision, but it seems to me that the position is quite different when you are considering not the original application but the validity of the decision. I say that because a tribunal, in exercising their jurisdiction to reduce a rent, must, as I have already said, know the circumstances of the individual landlord. It is not enough for them to treat him merely as Mr. X. They must find out who he is and ascertain his circumstances and, in particular, the "expenses", and that, indeed, was what the tribunal were trying to do in this case. Accordingly, it is not sufficient that there should be a contract of tenancy in existence, but the tribunal must know, at the time when they come to their decision, who are the parties to that contract.

Another way in which the case is put is that this tribunal, with whom I have every sympathy, were misled. In the first place they were misled by Mr. Harriott, in that he took no part in the proceedings at all. He did not assist them by filling up form F.R. 4A or, indeed, by coming to the hearing, and they may well have thought, especially having regard to the fact that he had been described as "caretaker for", which I think is synonymous with "agent for" the applicant, that Mr. Harriott had nothing to do with it at all. It is said, in those circumstances, that the tribunal having been misled as to the true nature of the landlord, in some way their decision should stand and is a valid decision. I cannot fully understand that argument. In so far as the tribunal were misled by the applicant, that is very pertinent when it comes to a question of exercising discretion whether certiorari should go. The applicant was, to say the least, not helpful or candid in his letters to the tribunal, and I have seriously considered whether we should in our discretion order certiorari to go; but, on the whole, I have come to the conclusion that it should. Mr. Cooper has gone, Mr. Harriott has gone, and the only practical effect of this decision is that there is registered in the register with the local authority a contract relating to this room in the basement in which the two parties to the contract are described as K. Wilson & Sons, Ltd. as the landlords and M. G. Cooper as the lessee. It seems to me that the applicant is entitled, if he can, to have that which is entirely wrong erased from the register and, in my judgment, he has shown that this decision so notified was a decision which the tribunal had no jurisdiction to make and that it should be quashed.

I should only add this, that we have been told that, long after these proceedings commenced, on about Mar. 30, 1961, a revised notification of decision was sent to Mr. Harriott who was, indeed, the true lessor. It is notified to him. The name of the lessor appears in para. (2) of the schedule as Mr. A. Harriott instead of K. Wilson & Sons, Ltd., and the date of notification to the parties is put as Sept. 30, 1960, and this in brackets, "to the lessor—Nov. 30, 1961". I do not think that that notification in any way affects the case. What effect, if any, it had on the register, we do not know. In any event, I ignore that further notification and treat the matter as it was when this motion was served (4).

ASHWORTH, J.: I agree.

VEALE, J.: I also agree.

Order of certiorari granted.

Solicitors: *Solicitor, Ministry of Housing and Local Government* (for the respondents).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(4) The notice of motion for certiorari was dated Feb. 27, 1961.

A

AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMMISSIONER.

[PRIVY COUNCIL (Viscount Kilmuir, L.C., Lord Denning, Lord Morris of Borth-y-Gest, Lord Hodson and Lord Devlin), October 3, 4, 5, November 20, 1961.]

B *Privy Council—New Zealand—Income tax—Mutual life insurance company—Assessment—Reversionary bonuses—Allotment of surplus funds for reversionary bonuses—Declared face value of maturing reversionary bonuses irrelevant—Deduction of income exempt from taxation—Income not "exempt" unless it would be subject to New Zealand taxation but for the exemption—Income from investments in Australian and English companies not therefore* C *"exempt" from taxation and not deductible—Whether income from Australian investments held by branch in New Zealand of Australian life insurance company income "derived from" a business carried on in New Zealand—New Zealand Land and Income Tax Act,* 1954 (*No.* 67), *s.* 149 (2), *s.* 86 (1) (i), *s.* 167 (*a*).

The appellants, a mutual insurance society incorporated in Australia, D carried on the business of life insurance in New Zealand as well as in Australia and the United Kingdom. In common with other life insurance companies the appellants, at the end of each year, calculated their surplus funds and then allocated a large part of the surplus funds for payment of reversionary bonuses to policyholders participating in the company's profits. Under s. 149 of the New Zealand Land and Income Tax Act, 1954, the sum allotted E for any year in respect of policies comprised in the appellants' New Zealand business, after deducting therefrom income of the company "exempt from taxation", was deemed to be profits derived by the company from the New Zealand business in that year and accordingly to be assessable income for the purpose of New Zealand income tax. At the end of 1955 the appellants' total surplus funds were over £11,000,000. Out of this they decided to allot F £8,738,779 for reversionary bonuses for all participating policies thereby providing, as promised in their annual report for 1955, reversionary bonuses of face value of over £14,000,000. The figure of £8,738,779 was the basis of the paragraph in the annual report headed "bonus distribution" and appeared in the statement of surplus and statement of liabilities in the report under the description: "Surplus dividend for year 1955, and allotted as rever- G sionary bonuses to participating policies". The proportion of the allotment of £8,738,779 attributable to the appellants' New Zealand business was £1,736,492. This latter figure was the basis of a return of income for the year ended Dec. 31, 1955, made by the appellants to the New Zealand Commissioner of Inland Revenue on July 18, 1956, and a certificate annexed to the return stated that reversionary bonuses for a total face value of approximately H three million pounds had been allotted to policies in force at Dec. 31, 1955, and that "the cash value of the reversionary bonuses . . . was £1,736,492 at Dec. 31, 1955". In making this return the appellants had calculated under the net premium method of valuation which assumed accumulation of the cash allotment at the rate of 2½ per cent. per annum. The appellants maintained that this was an artificially low rate deliberately selected by I them to provide an additional reserve so that as policies approached maturity the face value of reversionary bonuses need not progressively decrease, the additional reserves being used in subsequent years. The appellants subsequently made an amended return to the commissioner on Jan. 25, 1957, in which they stated the amount of the cash allotment to be £1,393,619, viz., £342,873 less than the amount of £1,736,492 stated in the first return, the calculation being based on an assumed accumulation at 3¾ per cent. per annum and the sum of £342,873 representing the additional reserve. The actual rate of interest earned in 1955 was four per cent. per annum. The

appellants were assessed on their first return in an amount of £1,736,492. They objected that the assessment should be only in the sum of £1,393,619 which in fact would be sufficient to produce reversionary bonuses of the promised face value, and the assessment in £1,736,492 would result in the £342,873 being taxed a second time when in subsequent years further reversionary bonuses, to which it would contribute, were declared. The appellants further contended that under s. 149 (2) the Commissioner should have deducted from the surplus funds allotted for the reversionary bonuses the income derived by the appellants in the year ended Dec. 31, 1955, from their investments in Australian and English companies as being income which was " exempt from taxation (whether by virtue of s. 86 of [the Act of 1954] or otherwise howsoever " within the meaning of s. 149 (2). Alternatively they contended that a sum of £65,063 income derived from shares in Australian companies held in New Zealand was income " derived from " a business carried on in New Zealand within s. 167 (a) and thus was deemed assessable income under s. 165 (2) and was properly described as " exempt " since it would be exempted by s. 86 (1) (i).

Held: (i) the commissioner had properly assessed the appellants on the basis of their first income return since, on the true construction of s. 149 (2)* of the New Zealand Land and Income Tax Act, 1954, the commissioner was solely concerned to ascertain the question of fact, what sum had been allotted from the surplus funds of the company to provide reversionary bonuses, and was not required to ascertain whether the sum so allotted was too much or too little to satisfy the declared face value of the reversionary bonuses; accordingly, there being ample evidence that the amount allotted in respect of the New Zealand business was £1,736,492, that amount was an allotment of surplus funds by way of reversionary bonuses within the meaning, and for the purposes, of s. 149 (2).

(ii) the income derived from the appellants' investments in English and Australian companies was not deductible under s. 149 (2) of the Act of 1954 since

(a) income would not be " exempt from taxation " within the meaning of s. 86 (1) (i)† of the Act of 1954 unless but for the exemption it would have been subject to New Zealand taxation, and

(b) although investments in the Australian companies were kept in New Zealand and their income was appropriated to the New Zealand branch, yet the income was not shown to be " derived from any business carried on in New Zealand " within the meaning of s. 167 (a) of the Act of 1954, because it was not proved that the investments had been purchased out of earnings in New Zealand, and thus the income was not brought within the scope of New Zealand taxation and could not be properly described as " exempt " there.

Appeal dismissed.

[As to taxation of life insurance companies carrying on business in the United Kingdom, see 20 HALSBURY'S LAWS (3rd Edn.) 206, 207, paras. 361-364.]

Case referred to:

Australian Machinery & Investment Co., Ltd. v. *Deputy Commissioner of Taxation* (*W.A.*), (1946), 3 A.I.T.R. 359; [1946] A.L.R.C.N. 572; 20 A.L.J. 234; 8 A.T.D. 81.

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* Section 149 (2) of the New Zealand Land and Income Tax Act, 1954, provides that in the case of every company carrying on in New Zealand life insurance business which makes to its policyholders " an annual allotment of surplus funds by way of reversionary bonuses . . . the residue of the surplus funds so allotted for any year in respect of policies comprised in the New Zealand business of the company ", after deducting therefrom any income of the company exempt from taxation, shall be deemed to be profits of the company for that year.

† The relevant terms of s. 86 (1) (i) are printed at p. 1057, letter F, post.

A **Appeal.**

Appeal by the Australian Mutual Provident Society, Ltd. from a judgment of the Supreme Court of New Zealand, sitting as a full court, delivered on Feb. 21, 1961, dismissing (by the judgments of BARROWCLOUGH, C.J., MCGREGOR and MCCARTHY, JJ.), an appeal by the appellant society from the determination of a stipendiary magistrate (J. S. HANNA, S.M.), dated May 30, 1960, in favour of B the New Zealand Commissioner of Inland Revenue, the respondent, given in respect of a Case Stated by the respondent under reg. 25 of the New Zealand Land and Income Tax Regulations, 1946, following an objection by the appellant society to its assessment to income tax for the year ended Mar. 31, 1956, in respect of which the respondent accepted figures as at the appellant society's balance date of Dec. 31, 1955, for the purposes of the assessment. The appellant society C was a mutual insurance society incorporated in New South Wales, in the Commonwealth of Australia, under the Australian Mutual Provident Society's Act, 1910, as amended by the Act of 1941, having no shareholders, and having its registered office in Sydney. The business of the appellant society, which comprised ordinary life insurance and industrial insurance, was carried on by the society in New Zealand as well as in Australia and the United Kingdom. By the New Zealand Land D and Income Tax Act, 1954, s. 149, every company carrying on in New Zealand the business of life insurance is, for the purposes of the Act, deemed to have derived profits from that business in accordance with the provisions of s. 149, which profits are deemed to be assessable income of the company. By sub-s. (2) of s. 149, in the case of any such company which makes to its policyholders " an annual allotment of surplus funds by way of reversionary bonuses or otherE wise, the residue of the surplus so allotted " for any year in respect of policies comprised in the New Zealand business of the company, after deducting therefrom " any income derived by the company in that year and exempt from taxation (whether by virtue of s. 86 of this Act or otherwise howsoever) " is deemed to be profits derived by the company in that year and as such assessable for income tax.

F The questions for determination in the appeal, as stated in the Case Stated by the respondent, were: (i) Whether the respondent in making the assessment for the income tax year ended Dec. 31, 1955, acted correctly in treating the amount of £1,752,083 as being the surplus allotted for the said year in respect of policies comprised in the New Zealand business of the appellant society and, if not, in what respects such amount should be varied; and (ii) whether the respondent, G in making the said assessment, acted correctly in allowing a deduction against the amount of £1,752,083 only to the extent of the amount of £14,780 12s. and, if not, in what respects the amount of the deduction made should be varied. The remaining relevant facts are set out in the judgment of the Board and the relevant statutory provisions are referred to therein.

H *F. N. Bucher, Q.C.*, and *N. A. Morrison* for the appellant society.

H. R. C. Wild, Q.C. (*Solicitor-General of New Zealand*), and *A. S. Orr* for the respondent.

LORD DEVLIN: This appeal gives rise to two separate questions on the interpretation and application of s. 149 of the Land and Income Tax Act, 1954. I This section provides a short but complete code for the taxation of companies carrying on in New Zealand the business of life insurance. The appellant company is a mutual insurance society (and therefore with no shareholders and paying no dividend) incorporated in Australia and carrying on the business of life insurance principally in Australia but also in New Zealand and the United Kingdom. In common with most companies carrying on this class of business the appellants calculate at the end of each year what are called their " surplus funds ". A life insurance company has surplus funds if and to the extent that its life insurance

fund exceeds the net liability, computed by means of actuarial calculations, under its life policies. A large part of these surplus funds is then commonly allotted for the payment of reversionary bonuses to policyholders participating in profits. The sum so allotted, after deducting therefrom " exempt " income, is under s. 149 deemed to be the profit derived from the business. The first question in dispute in this case is as to the amount of the funds so allotted by the appellants in respect of the year 1955; and the second is as to the amount of the exempt income to be deducted.

The appellants' surplus funds at the end of 1955 were over £11,000,000. Out of this they decided to allot £8,738,779 as reversionary bonuses. The rest of the surplus was put to reserve or used for writing down assets or other similar purposes or left unappropriated. It is not to be supposed that the figure of £8,738,779 was an exact balance down to the last pound after the other purposes had been served. A reversionary bonus is an additional sum promised by way of bonus on the maturity of each policy and it takes the form of a round sum to be added to each £100 of the nominal value of the policy. The immediate cash allotment that has to be made in order to produce this round sum is something that has to be worked out actuarially, for it depends on the time that is likely to elapse between the date of allotment and the date of maturity of each policy and on the rate at which the cash allotment is likely to accumulate during that time. The cash allotment is therefore the present value of the reversionary bonuses; it is a sum calculated as sufficient to provide in due course the " face value " of the reversionary bonuses declared to the policyholders. The amount of the surplus fund available for allotment will tell the company approximately what reversionary bonuses it can declare, that is, to the nearest pound or half-crown or whatever unit it customarily uses as its minimum; and the exact amount of the cash allotment will have to be worked out so as to produce that total.

The directors' report of the appellant company for 1955, dated Apr. 18, 1956, contains the following paragraph under the heading " Bonus Distribution ":

> " On the advice of the chief actuary, your directors have decided to distribute £7,496,295 of surplus funds among the holders of participating ordinary policies, thereby providing reversionary bonuses of more than £12,996,000. The corresponding surplus to be distributed to industrial policy holders is £1,242,484 providing reversionary bonuses amounting to £1,528,000."

The total of the surplus for both classes of policy, ordinary and industrial, is the figure already mentioned of £8,738,779; and that is the figure which appears in the company's statement of surplus and statement of liabilities under the description:—" Surplus divided for year 1955, and allotted as reversionary bonuses to participating policies ". The total of the face value of the reversionary bonuses for both classes of policy is just over £14½ million.

These figures relate to the total business of the appellant company and s. 149 taxes the allotment only in so far as it is " in respect of policies comprised in the New Zealand business of the company " (1). The proportion of the cash allotment of £8,738,779 that is attributable to the New Zealand business of the appellants is £1,736,492. On July 18, 1956, the appellants made a return of income to the respondent in accordance with this figure; and they annexed to it a certificate by their chief actuary which included the following statement:

> " Reversionary bonuses for a total face value of £2,929,285 allotted to policies in force at Dec. 31, 1955. The cash value of the reversionary bonuses of face value £2,929,285 according to the respective bases employed by the society in valuing its policies was £1,736,492 at Dec. 31, 1955."

The case for the respondent is that the appellants quite plainly and according to their own records have made an allotment of surplus funds within the meaning

(1) See s. 149 (2).

A of s. 149 amounting to £1,736,492 and should be assessed accordingly. The case for the appellants is that, notwithstanding what they have said and apparently done, £1,736,492 does not truly represent the sum allotted within the meaning of s. 149, and that the true allotment was £1,393,619. The difference between these two figures is £342,873.

To see how the appellants arrive at their figure of £1,393,619 it is necessary B to consider the actuarial calculations by which the cash allotment is related to the face value of the reversionary bonus. Different actuarial methods can be adopted for this purpose and the one used by the appellants in 1955 is known as the net premium valuation. In this method it is assumed that the cash allotment will accumulate at the rate of 2½ per cent. It is not disputed that 2½ per cent. is a very conservative rate to take: the appellants' case is that it is not C merely a conservative rate but an artificially low rate, deliberately selected as lower than the proper rate, in order to provide an additional and hidden reserve. As a policy advances towards maturity a cash allotment of a given amount would produce a bonus of a continually decreasing face value because, as the policy advances, the period for accumulation continually diminishes. But policyholders, it is said, are interested only in the face value of the bonuses declared D and would not like to feel that that was continually decreasing. The net premium method avoids this undesirable result because the additional reserve which it creates can be used in the later years. There are other methods of achieving the same result without using an artificially low rate of interest; in particular there is one known as the bonus reserve valuation in which the rate taken is 3¾ per cent. It is not disputed that 3¾ per cent. would be a fair rate to take or that E in 1955 it would be closer than is 2½ per cent. to a correct estimate of future interest rates; the rate actually earned by the appellants in 1955 was just over four per cent. If the appellants had used the rate of 3¾ per cent., an allotment of £1,393,619 would have been estimated as sufficient to produce reversionary bonuses of the face value promised in the directors' report. The excess of £342,873 is therefore, the appellants contend, not an allotment by way of reversionary F bonus but an appropriation to an additional or internal reserve. The appellants arrived at this conclusion after they had made their first return showing the larger allotment; and on Jan. 25, 1957, they made an amended return showing the smaller allotment of £1,393,619. The respondent nevertheless assessed the appellants on their first return. Their objection to this assessment was disallowed by the stipendiary magistrate, whose decision was upheld by the Supreme Court, G from whose judgment the appellants now appeal.

Prima facie a question as to the amount of an allotment is a question of fact and the stipendiary magistrate and the Supreme Court so treated it. It is true that there was no physical allotment of cash or securities and no formal appropriation in the appellants' books. But it has not been argued that the Act requires any particular form of allotment: indeed the dispute is solely as to the amount H of an allotment admittedly made. There is ample evidence in the documents from which their Lordships have quoted that the amount actually allotted was £1,736,492 and the only evidence that the appellants ever allotted any smaller sum is their statement in the amended return. It is hopeless for the appellants to contest before the Board the concurrent findings of fact by the courts below unless they can satisfy the Board, as they have tried to do, that those findings I are based on a misconstruction of the statute.

The material words of s. 149 are "allotment of surplus funds by way of reversionary bonuses or otherwise" (2). The appellants say that on the true construction of the statute the allotment contemplated is the allotment of a reversionary

(2) See s. 149 (2), which provides that in the case of a company carrying on in New Zealand the business of life insurance "which makes to its policyholders . . . an annual allotment of surplus funds by way of reversionary bonuses or otherwise, the residue of the surplus funds so allotted" after deducting therefrom any income exempt from taxation, shall be deemed to be profits derived by the company.

bonus. Therefore, they say, in order to ascertain the amount of the allotment, one must begin by ascertaining the face value of the reversionary bonuses declared and from that calculate their present or cash value. It is the duty of the court, they say, to make that calculation for itself; the court is not bound by any calculation made by the taxpayer, whether it be for or against him. They assert that the calculation they made, using what they describe as the "unrealistic" rate of interest of 2½ per cent., was wrong, but as between themselves and the Commissioner of Inland Revenue they are not bound by that. The court should therefore, they contend, disregard their erroneous calculation and make a fresh calculation objectively and using the rate of interest which on the evidence, they claim, is shown to be the correct one, namely 3¾ per cent.

Their Lordships do not pause to inquire whether, if there are two accepted methods of making a calculation and the taxpayer has for his own purposes chosen one rather than the other, it is open to the court to substitute the other, whether at his request or the request of the Commissioner of Inland Revenue; nor to inquire just what is meant by a "true" or a "realistic" rate of interest. Nor need they consider whether, since the appellants have used the rate of 2½ per cent. for two purposes, viz., the calculation of the amount of the surplus funds as well as the calculation of the present value of the reversionary bonuses, it can be changed in the one case and not in the other. Their Lordships deal with this point, in the same way as the Supreme Court dealt with it, by rejecting the proposed construction of the statute. On the plain words of the statute the commissioner is concerned not with the allotment or declaration of a particular reversionary bonus but with the allotment of surplus funds. Once the commissioner has ascertained that a specific sum has been allotted for the provision of reversionary bonuses, his task is concluded. He does not have to know whether or not at the same time a specific reversionary bonus was declared or promised to the shareholders; nor, if such a declaration or promise is made, is he concerned to inquire whether the sum allotted is too much or too little to satisfy the promise. On this point BARROWCLOUGH, C.J., said:

> "The subsection makes no reference either to the face value or the cash value of reversionary bonuses . . . The fact that this allocation may have been the basis for the decision to declare bonuses which on maturity would be worth £2·9 million may have been interesting to policyholders but was not, of course, to the commissioner."

Their Lordships agree with these observations.

Counsel for the appellants pressed very hard on the Board the contention that the construction of the statute adopted by the Supreme Court would lead to double taxation of a part of the allotment, namely, the so-called additional reserve of £342,873. He argued that, so far as can be seen at present, this additional reserve will not be required for the satisfaction of the reversionary bonuses declared, that it will therefore become an unappropriated asset of the company and that before it can reach the policyholders in the form of a reversionary bonus there will have to be a fresh allotment which will attract tax again. Whether or not this sum will have to bear tax again is a matter that is not now in issue and that may have to be decided hereafter. Their Lordships will therefore express no opinion on that question, but, in order to test the construction they have adopted, will assume that counsel for the appellants' reasoning is sound. In their view it does not assist his argument in this case for two reasons. The first is that double taxation does not follow inevitably from the construction that they have placed on the statute and the second that it would not be avoided by the alternative construction proposed. The statute, as their Lordships have said, does not require that the surplus funds should be allotted to the service of a particular bonus. It is true that it is the practice of life insurance companies when they make an allotment also to declare a bonus and it may be that the appellants' rules require them to proceed in the way that they have done. But if this be so,

A the double taxation is a consequence of the practice and the rules, not of the construction of the statute. If it be said that the legislature must be taken to have been aware of the practice and to have legislated in relation to it, the only conclusion that can then fairly be drawn is that the legislature contemplated some degree of double taxation as inherent in the operation of the statute. However "true" and "realistic" the rate of interest adopted, it is impossible to suppose B that it would be so accurate as to produce the exact sum required. The practice of insurance companies being to err in their estimates on the side of caution, it is highly probable that the rate of 3¾ per cent. would produce an excess to be redistributed and taxed again, though not of course so large an excess as that produced by the lower rate of 2½ per cent. The rate chosen by the appellants makes the weight of the double taxation heavier than it need be; but the argument that C in order to reduce this burden the Board should adopt one construction of the statute rather than another is simply a plea ad misericordiam.

Their Lordships turn now to the second matter in dispute. The relevant words of the statute, s. 149 (2), provide that in order to arrive at the profits on which the appellants are to be assessed for 1955, there shall be deducted from "the surplus funds so allotted" "any income derived by the company in that D year and exempt from taxation (whether by virtue of s. 86 of this Act or otherwise howsoever)". There must therefore be ascertained what income the appellants derived in 1955 which was "exempt from taxation", the object of the statute being that where income is so exempted, it shall not be subjected to tax merely because it is distributed by way of reversionary bonus.

In 1955 the appellants had an income from investments of over £540,000. E This income came from securities "held" (their Lordships will comment later on the significance of this word) by all three branches of the appellants. Approximately £80,000 was derived from investments held by the New Zealand branch, £14,780 being derived from shares in companies incorporated in New Zealand whose income had borne New Zealand tax and £65,063 from shares in companies incorporated in Australia whose income had borne Australian tax. The remaining F £460,000 was derived from shares in companies in England and elsewhere.

Section 86 (1) (i) of the Act of 1954 provides as follows:

> "The following incomes shall be exempt from taxation . . . dividends and other profits derived from shares or other rights of membership in companies, other than companies which are exempt from income tax."

It is conceded by the commissioner that the dividends from the New Zealand G companies fall within these words and accordingly are deductible under s. 149. The question is whether the dividends from the English companies and the Australian companies also fall within them. The commissioner does not suggest that the word "company" in s. 86 is restricted to a New Zealand company, for the definition of "company" in s. 2 of the Act extends to all companies wherever incorporated. What the commissioner contends, and what the stipendiary magis- H trate and the Supreme Court have held, is that the words (3) "exempt from taxation" do not cover income which is not within the reach of the New Zealand tax laws. The point is succinctly put by the stipendiary magistrate when he says:—"A company cannot be exempt, unless, but for the exemption, it would have been liable."

The appellants on the other hand contend that "exempt from taxation" I means the same as "not subject to taxation" and that as the New Zealand Act does not touch the income of English and Australian companies which is not derived from New Zealand, such income is "exempt". This is as much as to say that the salary of an Englishman, for example, earned and paid in England, is properly described as exempt from New Zealand taxation. Their Lordships do not consider that that is the natural and primary meaning of the word "exempt". No doubt it can sensibly bear that meaning in some contexts;

(3) In s. 149 (2).

and in the Australian statute which was considered in *Australian Machinery & Investment Co., Ltd.* v. *Deputy Commissioner of Taxation* (*W.A.*) (4) it was held by DIXON, J., (5) to be equivalent to "not subject to tax". Having regard to the definition of "exempt" in s. 6 (1) of that Act and the context in which the word was being used in the section which the High Court of Australia was construing, their Lordships, if they may say so respectfully, see no reason at all to differ from that dictum. But they consider that where, as here, there is nothing in the context to suggest otherwise, the word naturally bears the meaning given to it in the courts below.

Counsel for the appellants relied very strongly on the words "or otherwise howsoever" in s. 149 (2). They show that the source of the exemption need not be s. 86 of the Act of 1954 but that it can be granted "otherwise howsoever". Section 86 (1) (x) itself exempts "income expressly exempted from income tax by any other Act, to the extent of the exemption so provided". What meaning therefore, counsel for the appellant asked, could be given to the words "otherwise howsoever" unless "exempt" was interpreted to cover income that was not within the New Zealand tax laws at all. The Solicitor-General pointed out that the word would be necessary to cover any exempting section (other than s. 86 itself) in the Act of 1954; and he instanced s. 140. But in any event this argument does not impress their Lordships. Phrases such as "or otherwise howsoever" are not uncommonly introduced into a statute without the draftsman having in mind any specific enactment to which they are intended to apply and it would be wrong to put an unnatural construction on the word "exempt" simply in order to supply one.

The appellants advanced an alternative argument in respect of the £65,063 derived from Australian companies whose shares were held by the New Zealand branch. Section 167 (a) of the Act of 1954 declares that "income derived from any business carried on in New Zealand" shall be deemed to be derived from New Zealand; and by s. 165 (2) all income derived from New Zealand is assessable for income tax. The appellants argue that it is part of the business of a life insurance company to invest money, that income from such investments is therefore derived from its business and that if the investments are held in New Zealand, the income is derived from a business carried on in New Zealand. Therefore it is assessable income under s. 165 (2) and but for s. 86 (1) (i) would be taxable, and therefore is "exempt" within the narrower meaning of that word which their Lordships have approved. The soundness of this argument must depend on whether the income from investments "held" in New Zealand is derived not only from the life insurance business but from that business carried on in New Zealand. The evidence in this case does not elucidate what is meant by "held". The investments, of course, belong to the appellants and not to any of their branches. There is evidence that in the appellants' accounts the income from these shares was appropriated to the New Zealand branch and it is said that the securities themselves were kept in New Zealand; there is no evidence to show whether or not the investments had been purchased out of money earned in New Zealand. On these facts their Lordships do not think it can be said that the income from the shares was income derived from the life insurance business which the appellants carried on in New Zealand.

For these reasons, which are altogether in accord with the reasons given by the stipendiary magistrate and in the Supreme Court, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.* (for the appellant society); *MacKrell & Co.* (for the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(4) (1946), 3 A.I.T.R. 359. (5) (1946), 3 A.I.T.R. at p. 383.

A

KIRKE v. KIRKE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Scarman, J.), October 13, 1961.]

Divorce—Maintenance—Wife—Variation of order—Re-marriage of wife—Wife having custody of child—Additional expenditure by wife due to custody of child—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 19 (3), *s.* 28 (3).

B The wife was granted a decree of divorce and custody of the only child, and on Sept. 5, 1955, the husband was ordered to pay to her maintenance at the rate of £350 per annum less tax and for their child, a son, maintenance at the rate of £100 per annum less tax. On Sept. 17, 1960, the wife re-married and the first husband thereupon applied to vary the order of Sept. 5, 1955. On the evidence the first husband and the wife's second husband C had approximately the same financial means. The first husband paid the son's school fees. The registrar ordered the first husband to pay to the wife maintenance for herself at the rate of £100 per annum less tax and for the child 30s. weekly, and to pay maintenance directly for the child of £100 per annum less tax. The wife deposed that she had many expenses referable to the custody of the son and not covered by the sums paid for his maintenance. D The first husband was prepared to submit to an order increasing the maintenance payable direct to the son if the maintenance so far ordered was insufficient.

Held: expenses that the wife had to meet, which she would not have had but for the custody of the son and which were additional to the sums expended directly on the maintenance of the child, afforded ground for ordering E maintenance to be paid to her (notwithstanding her re-marriage) as distinct from maintenance directly for the son; the court would not, in the circumstances, disturb the registrar's order which was in accordance with principle.

Observations of LINDLEY, L.J., in *Wood* v. *Wood* ([1891] P. at p. 276) applied.

Appeal dismissed.

F [As to variation of maintenance orders on ground of re-marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 446, para. 1001, note (l); and for cases on the subject, see 27 DIGEST (Repl.) 624, *5833-5835.*

For the Matrimonial Causes Act, 1950, s. 19 (3), s. 28 (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 407, 415.]

G Cases referred to:

Bellenden (*formerly Satterthwaite*) v. *Satterthwaite,* [1948] 1 All E.R. 343; 27 Digest (Repl.) 624, *5835.*

Wood v. *Wood,* [1891] P. 272; 60 L.J.P. 66; 64 L.T. 586; 27 Digest (Repl.) 625, *5846.*

H **Summons adjourned into open court.**

The husband appealed against an order of Mr. Registrar COMPTON MILLER dated July 10, 1961.

On Sept. 5, 1955, the wife having been granted a decree of divorce and custody of the only child, the husband was ordered to pay maintenance to the wife at the rate of £350 per annum less tax and to the child at the rate of £100 per I annum less tax. On Sept. 17, 1960, the wife re-married and the husband applied to vary the order of Sept. 5, 1955. The husband had always paid and undertook to continue to pay the child's school fees in addition to the maintenance ordered; but he contended that the order in favour of the wife should be nominal. The registrar ordered the husband to pay to the wife maintenance for herself at the rate of £100 per annum less tax and, as from Aug. 1, 1961, for the child at the rate of £1 10s. per week; and also to pay to the child as from Apr. 6, 1961, maintenance at the rate of £100 per annum less tax. The husband now appealed, and the summons was adjourned into open court for judgment.

G. H. Crispin, Q.C., and *C. A. Marshall-Reynolds* for the husband. A
J. G. St. G. Syms for the wife.

Cur. adv. vult.

Oct. 13. **SCARMAN, J.**, read the following judgment: The ground on which the husband applied to the learned registrar to vary the existing order was that on Sept. 17, 1960, the petitioner, his former wife, married again. He contended before the registrar, and now on appeal contends before me, that in B all the circumstances arising as a result of the wife's re-marriage the order in her favour should be nominal only. If it be said, as indeed the wife does say, that the registrar's order in respect of the child does not cover all the expenses to which she is put in respect of him, he, the husband, is ready to submit to an increase of the child's maintenance to £200 a year. He does, however, contend that inadequacy, if there be any, in the provision for the child should be met in C this case by an increase in the child's maintenance and not by an award of maintenance for the wife.

The appeal has been very fully argued before me in chambers and I have acceded to the suggestion of both counsel that I give judgment in open court. It raises the question of the effect of a re-marriage on a woman's rights to maintenance from her former husband from whom she has obtained a divorce. The D principle to be followed is not in doubt, and the statutory provisions governing the matter are clear. Section 19 (3) of the Matrimonial Causes Act, 1950, omitting immaterial words, provides that the court may, if it thinks fit, order the husband to pay to the wife such sum for her maintenance as the court may think reasonable. Section 28 provides for the variation of maintenance orders, sub-s. (3) expressly providing that in exercising its powers of discharge or variation E

> "... the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage."

The court is thus given an unfettered discretion, and it would be contrary to the intent of the statute to attempt to formulate any rules for the exercise of that F discretion. All that can properly be said is that it is the duty of the judge to exercise his discretion according to the particular circumstances of the case. Nevertheless I have, quite rightly, been referred to a number of cases in which the effect of re-marriage on maintenance has been considered. Many of them were decided before the provisions now enacted in the Matrimonial Causes Act, 1950, reached the statute book. Such decisions, to only one of which I propose G to refer, are helpful in so far as they show to what matters the court has regard in the exercise of its discretion. But one must heed the warning (1) of EVERSHED, L.J., in *Bellenden* (*formerly Satterthwaite*) v. *Satterthwaite* (2) that

> "... it is neither necessary nor desirable to attempt any gloss on, or any further definition of, the clear general language of the subsection."

The one case to which I propose to refer is a decision of the Court of Appeal, H *Wood* v. *Wood* (3), given at a time when the relevant statute was s. 1 of the Matrimonial Causes Act, 1866, which empowered the court to order during joint lives such maintenance as the court might think reasonable. In the course of his judgment LINDLEY, L.J., said (4) of a wife's application for maintenance:

> "The circumstances which have to be taken into account are—(1) the conduct of the parties; (2) their position in life, and their ages and their I respective means; (3) the amount of the provision actually made; (4) the existence or non-existence of children, and who is to have the care and custody of them; (5) any other circumstances which may be important in any particular case."

(1) Given in relation to s. 14 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, replaced by s. 28 (3) of the Matrimonial Causes Act, 1950.
(2) [1948] 1 All E.R. at p. 345. (3) [1891] P. 272.
(4) [1891] P. at p. 276.

A The lord justice's words seem, in my respectful judgment, to be as good a guide as any that I have found to the exercise of a discretion which, so long as it be exercised judicially on the particular facts of the case, must remain unfettered.

I turn now to the particular facts of this case. The husband is a lieutenant-colonel in the army who earns £1,875 per annum gross and has an investment income gross of approximately £200 per annum. He, too, has re-married and B receives from army sources in addition to his pay a marriage allowance of £350 per annum, a special London allowance of £180 per annum, and, when not living in barracks, a ration allowance of £100 per annum. He pays and undertakes to continue to pay the school fees of the one child of the marriage, which with extras I find amount to about £400 per annum.

The petitioner, his former wife, has since Sept. 17, 1960, been the wife of a C man who earns a gross salary of £1,875 per annum and has an investment income of about £600 per annum. He has certain standing charges on his income, for life and medical insurance, which total about £161 10s. The wife has no income of her own other than under the current maintenance order of the court. She has the custody of the child of the marriage and deposes to the fact that she has had many expenses referable to the custody of her son over and above the sum D paid by her former husband for his maintenance.

Counsel for the wife submits that his client's former and present husbands are today in approximately the same income bracket, that she is bound to have expenses which are properly hers though she would not incur them but for the fact that she has the custody of her son, that the maintenance paid for him does not cover such expenses, and that in all the circumstances the learned E registrar's order that she should have £100 per annum less tax for herself is right and should not be disturbed.

Counsel for the husband submits that the present husband is better off than his client, who is finding his boy's school fees out of his taxed income in addition to the other calls on his resources. He argues that, if the wife is unable to meet out of her son's maintenance her son's expenses, the difficulty should be met in F this case by increasing the son's maintenance, and not by an award of maintenance to the wife for her benefit.

Were it not for the fact of custody, I would think that on a bare comparison of the resources of the two husbands there would be much force in the submission that the wife's maintenance should be reduced to a nominal figure. I accept, however, the submission that the wife, as a mother having the custody G of her son, has to meet certain expenses which otherwise would not be hers and which are over and above sums directly expended on the maintenance of the child. I think that it is unreasonable to say that such expenses should afford only a ground for increasing the child's maintenance. I think that they are properly her expenses, even though she would never have incurred them but for the custody of her child. LINDLEY, L.J., in the passage quoted lists among H the matters to be considered by the court in ascertaining what is reasonable for the maintenance of a wife under the statutory provisions then in force the existence or non-existence of children, and who is to have the care and custody of them, and I see no reason for disregarding the fact of custody in the exercise of the court's discretion under s. 19 (3) and s. 28 (3) of the Act of 1950.

In all the circumstances, therefore, I am not prepared to disturb the learned I registrar's order which seems to me about right in quantum and in accordance with principle. While in my judgment it is fitting that in her present circumstances the wife should have £100 per annum for herself I recognise that her situation may be very different when the boy is no longer in her custody, although that situation must itself be considered in its own particular circumstances as and when it arises. I therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Callingham, Griffith & Bate* (for the husband); *Eland, Hore & Co.* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

A

LUCY & SUNDERLAND, LTD. *v.* HUNT (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Cross, J.), October 27, 1961.]

Income Tax—Income—Builder—Timber company possessing building powers —Purchase of houses from subsidiary building company—Object to assist managing director to re-start business—Subsequent sale at a profit—Whether investment or adventure in nature of trade—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch. D, Case I, s.* 123, *s.* 526.

B

In 1945 the taxpayer company, a timber company, did not wish its subsidiary building company to resume its business of buying land and building and selling houses which had been interrupted during the war, but, in order to help the managing director of that company to start in the business himself at a time when he could not obtain a licence to build, it sold him its shares in the building company and bought from that company its unsold houses and building plots, leaving the managing director a sufficient balance in the company to commence business. The taxpayer company had power under its memorandum to carry on the trade of builders, but it simply received the rents for the houses and did not set up a selling organisation or put the houses and plots of land in the hands of estate agents or approach prospective purchasers. Following offers for some of the houses, however, it sold all but six over the years 1948 to 1958 at a profit. It was assessed to income tax in respect of the profits and was found by the General Commissioners of Income Tax to have been carrying on a trade or an adventure in the nature of trade and to be assessable in respect of the profits. On appeal,

C

D

E

Held: the taxpayer company was not liable to be assessed to tax in respect of the profits, since it had merely substituted for its shareholding in the building company another investment, viz., the assets of that company which were not stock-in-trade of the taxpayer company even if they were stock-in-trade of the building company (*Glasgow Heritable Trust, Ltd.* v. *Inland Revenue Comrs.* (1954), 35 Tax Cas. 196, applied); and as the taxpayer company had done this in order to help the managing director of the building company there was no evidence on which the commissioners could reasonably have reached the conclusion that the taxpayer company had carried on a trade or an adventure in the nature of a trade.

F

G

Appeal allowed.

[As to the sale of assets constituting trading for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 117-120, paras. 211-213; and for cases on the subject, see 28 DIGEST (Repl.) 50-61, *191-225.*

For the Income Tax Act, 1952, Sch. D, Case I and s. 123, and for the meaning of "trade" in s. 526, see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 490.]

H

Cases referred to:

Glasgow Heritable Trust, Ltd. v. *Inland Revenue Comrs., Inland Revenue Comrs.* v. *Glasgow Heritable Trust, Ltd.*, 1954 S.C. 266; 35 Tax Cas. 196; 47 R. & I.T. 127; 28 Digest (Repl.) 60, *180.*

Rellim, Ltd. v. *Vise*, (1951), 32 Tax Cas. 254; 28 Digest (Repl.) 58, *221.*

I

Case Stated.

The taxpayer company appealed to the General Commissioners of Income Tax for Manchester against assessments to income tax made on it under Sch. D to the Income Tax Act, 1952, in respect of profits arising from transactions in land and property, viz., 1950-51, £1,500; 1951-52, £2,000; 1952-53, £500; 1953-54 £750; 1954-55, £1,000; 1956-57, £2,000; 1957-58, £1,300. The taxpayer company contended that it had not engaged in carrying on the trade of dealing

A in properties nor had it engaged in an adventure in the nature of trade with regard to properties but had merely carried on the trade of timber merchants, and that properties which it had purchased from a building company, formerly its subsidiary company, constituted investments and that profits arising from subsequent realisations thereof were not taxable profits. The Crown contended that the taxpayer company had ample powers under its memorandum B of association to carry on a trade in addition to that of timber merchants, that it had purchased the properties of its subsidiary, the building company, in order to dispose of them at a profit as opportunity arose and not as an investment, and that in purchasing and selling the properties it was carrying on a trade or an adventure in the nature of trade and was assessable under Sch. D in respect of the profits resulting therefrom. The commissioners held that the purchase and C sale of the properties constituted a trade or an adventure in the nature of trade and that the profits arising therefrom were assessable to tax under Case I of Sch. D. The taxpayer company appealed by way of Case Stated to the High Court.

P. M. B. Rowland for the taxpayer company.
Hubert H. Monroe, Q.C., and *A. S. Orr* for the Crown.

D

CROSS, J.: The appellant taxpayer company, Lucy & Sunderland, Ltd., was incorporated in 1903 with the primary object of acquiring and carrying on the business of a timber merchant, but it has power under its memorandum to carry on any other business which may seem to it capable of being conveniently carried on in connexion with the timber merchant's business or calculated, E directly or indirectly, to enhance the value of, or render more profitable, any of the company's properties. In 1932 Hawthorn Hall Estate Co., Ltd., a building company, was incorporated with an issued share capital of 2,250 shares of £1 each. The taxpayer company subscribed for 1,500 of these shares, and the remaining 750 were acquired by a Mr. Henry Anderton, who was a friend of the directors of the taxpayer company and became the managing director of the F building company. The building company traded for several years, buying land, building houses, selling the houses, and paying tax as a trading company. It paid dividends on its shares, and also interest on a loan which the taxpayer company had made to it. As well as its investment in the building company, the 1,500 shares and the loan, the taxpayer company also held at all material times a substantial number of other investments.

G About 1940, no doubt largely because of the war, the building company ceased to trade and the houses which it had on hand were transferred in its balance sheet from stock-in-trade to fixed assets. They were, in fact, let to tenants and the building company received the rents. After the war, in 1945, Mr. Anderton wanted to start up business again, but his friends, who were the directors of the timber company, though they were anxious to help him as far as they could, H did not want the building company to start trading operations again. So, first of all, the suggestion was made that the taxpayer company should purchase Mr. Anderton's minority shareholding in the building company for £1,875, which it was thought would be a sufficient sum to enable him to start building operations on his own account. If that had been done, I think it is clear that the additional shareholding, which would have been added to the existing share- I holding of the taxpayer company in the building company, would simply have been an accretion to the investments of the taxpayer company. But that scheme was not satisfactory because in those days one required a licence to build; Mr. Anderton had not a licence, and so would not have been able to set up building on his own account. On the other hand, if he could be put in control of the building company, he would be able to carry on trade through the medium of the company. So a second scheme was thought out and put into operation. The taxpayer company said: "We will buy from the building company its houses and the plots of land which have not been built on; the loan which we

made shall be repaid; and we will sell our shares in the building company to Mr. Anderton. Then he will be the owner of the shares of the building company, which will have the proceeds of sale of its assets, and he will be able to carry on business through the building company." The finance was arranged in such a way that there would be left available to Mr. Anderton the sum of £1,875, which was what he would have had under the original scheme. I need not go into details. What happened was that in 1945 the taxpayer company took over these houses and the plots of land. For some time it simply received the rents from the houses, and the plots of land remained vacant plots. It did not set up any selling organisation for the purpose of marketing the houses; it did not put them in the hands of estate agents for sale, and it did not directly approach any prospective purchaser; but in time offers were made to it for the purchase of some of these houses, and, starting in 1948 (which was some three years after the transaction in 1945) and going on through the years 1949, 1950, 1951, 1952, 1953, 1955, 1956 and 1958, a number of these houses and also the vacant plots were sold by the taxpayer company at a profit. Six houses were still unsold.

Then came the claim, with which I am concerned, that the taxpayer company had been carrying on as well as its timber business a business of trading in houses and that it was liable to income tax on the profits of those sales. The matter was heard by the Commissioners for the General Purposes of Income Tax for the Manchester Division on Oct. 23, 1958.

It was contended on behalf of the taxpayer company that it had not engaged in carrying on the trade of dealing in properties, nor had it engaged in a venture in the nature of trade in regard to properties, but that it only carried on its trade as timber merchants. It was further contended that the properties purchased from the building company constituted investments and the profits arising from subsequent realisation were not taxable profits. The Crown contended—first that the taxpayer company had ample power under its memorandum to carry on the trade of builders in addition to the trade of timber merchants; second, that the taxpayer company purchased the properties of its subsidiary, the building company, in order to dispose of them at a profit as opportunity arose and not as an investment; and, third, that the taxpayer company, in purchasing and selling the properties, was carrying on a trade or venture in the nature of trade. There is no doubt that the taxpayer company had power to carry on the trade of builders. The commissioners hearing the appeal gave no reasons for their decision, but simply said:

> "The purchase and sale of the properties constituted a trade or an adventure in the nature of trade and the profits arising therefrom are assessable to income tax under Sch. D, Case I."

The commissioners do not say whether they accepted the second contention of the Crown, that the taxpayer company purchased the properties of its subsidiary in order to dispose of them at a profit if opportunity arose. On the facts found it would have been difficult to reach such a conclusion, because it appears clearly that the motive of the taxpayer company was to help Mr. Anderton.

Having obtained that decision that the taxpayer company was trading in the houses and liable to income tax, the Crown not unnaturally then raised profits tax assessments. The taxpayer company disputed its liability to profits tax, and that question came before the Special Commissioners about a year later in October, 1959. The facts found were substantially the same; but the conclusion arrived at by the Special Commissioners was quite different from that of the General Commissioners. They concluded:

> "After considering all the evidence and the arguments before us, we find that the properties in question were investments held by the company and

A that they were not stock-in-trade of the company's trade as timber merchants and that the company did not carry on any trade or business of dealing in property",

and they discharged the assessments.

The taxpayer company asked for a Case to be stated so far as the income tax was concerned, and that is the Case which is now before me. I am told that the B Commissioners of Inland Revenue asked for a Case to be stated in connexion with the profits tax, but later they decided not to proceed with that Case but to acquiesce in the Special Commissioners' decision. Counsel for the Crown says that it is really a question of fact, that in such cases different tribunals may easily arrive at different conclusions; and that here, whether or not I may agree with C the General Commissioners, there was material on which they could come to the conclusion to which they did come, and that I ought not to disturb their decision or be perturbed by the anomaly of the contrary profits tax decision.

He admits that the motive which induced the taxpayer company to take over these houses from the building company was a desire to help Mr. Anderton, and that the original scheme would not have involved it in paying tax, because it D would simply have acquired a larger investment in the form of the additional 750 shares in the building company. But he says that, though the taxpayer company's motive was to help Mr. Anderton, and though if it had carried out the original scheme it would not have subjected itself to tax, having carried through this matter as it did, there was evidence on which it could be held that it had begun to trade in these houses.

E He says that these houses, although in the balance sheet of the building company they appeared as investments and not as stock-in-trade, may very well in fact have been stock-in-trade in the sense that, if the building company had sold some of them itself, it might have been liable to tax as a trader, and counsel for the taxpayer company I think admits that that might have been the case. The position then, says counsel for the Crown, is this: A company takes over F from its subsidiary houses and land which may have been stock-in-trade of the subsidiary. Then, after an interval it is true, but not a very long interval, three years, these houses began to be sold. Although there was admittedly not very much material, he says that there was enough here to make it possible for reasonable men to take the view that the taxpayer company was, as it were, completing the unfinished business of its subsidiary, and so it was liable to tax. In sup- G port of his argument he referred me to *Rellim, Ltd.* v. *Vise* (1), in which there was very little evidence to show whether the company in question was an investment company or a trading company. The commissioners decided it was a trading company. Wynn-Parry, J., clearly indicated he would not have come to the same conclusion, but he did not think that there was no evidence to support it, or that he would be justified in disturbing it, and the Court of Appeal upheld H his view.

Counsel for the taxpayer company submitted that, although there was not very much evidence of trading in *Rellim, Ltd.* v. *Vise* (1), there was more for the commissioners to go on there than there was here. He pointed out that in that case the principal object of the company was to trade in property, and that it purchased some property just before the war. During the war there were not I any sales, but they would not expect any during the war. In 1944 the company purchased a farm. Two years later it sold the farm, and then a year after it began selling the rest of its property. That, he says, was a much stronger case against the taxpayer than this. If the war years were discounted, the facts were that property was acquired and almost immediately sold, and it was easy to infer that it was acquired in order to be sold.

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(1) 32 Tax Cas. 254.

It is essentially, I think, a question of degree. When a judge thinks, as I certainly do, that he himself would not have arrived at the conclusion that the commissioners have arrived at, there is a temptation for him also to think that the conclusion at which the commissioners have arrived must be an unreasonable one. I must guard myself against that. But, putting my own views aside as far as I can, I think that here there was no evidence on which the commissioners could have properly reached the conclusion that they did reach. The taxpayer company, as well as carrying on its business as a timber merchant, at all times held a number of investments, and included in the investments were the shares in this building company. Really, it seems to me what happened in 1945 was that the taxpayer company substituted for its shareholding in the building company another investment in the form of the assets of the building company. While the building company was holding the houses the taxpayer company was receiving dividends paid out of the rents, and when the taxpayer company took over the houses it began to receive the rents direct. Its motive in taking over the houses was to help Mr. Anderton, and, although it was contended by the Crown that it took them over in order to dispose of them at a profit as opportunity arose, there was no evidence to support that view, nor is it suggested that there was any change of mind between 1945 and the time when it began to sell the houses. It is true that these houses may have still been the stock-in-trade of the building company on the realisation of which that company might have had to pay tax, but even if that is so I think that it is clear from the decision of the Court of Session in *Glasgow Heritable Trust, Ltd.* v. *Inland Revenue Comrs.* (2) that it is not a relevant consideration when one comes to consider whether or not they became the stock-in-trade in the hands of the taxpayer company. So, although I appreciate that it is a strong thing to override the decision of the commissioners in a matter of this sort which is so largely a question of fact, I think that here there was no evidence on which they could properly arrive at the conclusion at which they arrived. Therefore, I shall allow the appeal.

Appeal allowed.

Solicitors: *Hewitt, Woollacott & Chown,* agents for *Norton, Youatt & Co.,* Manchester (for the taxpayer company); *Solicitor of Inland Revenue.*

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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(2) 35 Tax Cas. 196.

A

Re PETRIE (*deceased*). LLOYDS BANK, LTD. *v.* ROYAL NATIONAL INSTITUTE FOR THE BLIND AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Donovan and Danckwerts, L.JJ.), October 23, 24, November 9, 1961.]

B

Perpetuities—Rule against perpetuities—Residuary bequest—Direction to realise and divide residue of estate—Legatee to be existing at time of realisation of residuary estate—No express power to postpone realisation—Whether gift referred to end of executor's year—Validity.

By her will dated May 12, 1950, the testatrix gave the residue of her estate on trust, after payment of her debts and funeral and testamentary expenses, for her two brothers absolutely and she directed her trustees, if both brothers should predecease her without leaving issue, to realise and divide the residue of her estate among certain charitable institutions, including, as part thereof, "Any national appeal to the public which may exist in the United Kingdom at the time when the residue of my estate is realised as aforesaid . . ." for contributions for certain research purposes. The will did not contain an express power to postpone conversion. The testatrix' brothers predeceased her without leaving issue and the estate consisted of cash, money on deposit with a building society and investments.

C

D

Held: the words " at the time when the residue of my estate is realised " were to be construed, having regard to the facts as to the testatrix' estate, as referring to the date when the shares of residue should be receivable or de jure receivable on the completion of the administration of the estate or the expiration of the executor's year, whichever should first happen (see p. 1072, letter D, post); and, accordingly, the gift did not infringe the rule against perpetuities.

E

Dictum of SIR GEORGE JESSEL, M.R., in *Johnson* v. *Crook* ((1879), 12 Ch.D. at p. 644), *Re Collison* ((1879), 12 Ch.D. 834) and *Re Wilkins* ((1881), 18 Ch.D. 634) applied.

F

QUAERE: whether, even if the words " when the residue of my estate is realised " ought to be construed as referring to the completion of the last sale or the last statutory appropriation of assets, the date intimated could be held, having regard to the known facts regarding the testatrix' estate, as possibly being so remote as, or more remote than, twenty-one years after her death (see p. 1073, letter D, post).

G

Appeal allowed.

[As to remoteness in events precedent to the interest affected, see 29 HALSBURY'S LAWS (3rd Edn.) 284, 285, para. 575; and for cases on the subject, see 37 DIGEST 66-71, *90-115*, 94, *297-299*.

As to the construction of gifts over before entitlement, see 34 HALSBURY'S LAWS (2nd Edn.) 410, 411, para. 455; and for cases on the subject, see 44 DIGEST 1168-1172, *10,115-10,147*.]

H

Cases referred to:

Arrowsmith's Trust, Re, (1860), 2 De G.F. & J. 474; 30 L.J.Ch. 148; 3 L.T. 635; 45 E.R. 705; *affg.* (1859), 29 L.J.Ch. 774; 44 Digest 1169, *10,123*.

Belfield v. *Booth*, (1893), 63 Conn. Rep. 299.

I

Bewick, Re, Ryle v. *Ryle*, [1911] 1 Ch. 116; 80 L.J.Ch. 47; 103 L.T. 634; 37 Digest 94, *299*.

Brandenberg v. *Thorndike*, (1885), 139 Mass. Rep. 102.

Chaston, Re, Chaston v. *Seago*, (1881), 18 Ch.D. 218; 50 L.J.Ch. 716; 45 L.T. 20; 44 Digest 1186, *10,263*.

Collison, Re, Collison v. *Barber*, (1879), 12 Ch.D. 834; 48 L.J.Ch. 720; 41 L.T. 175; 44 Digest 1172, *10,146*.

Goulder, Re, Goulder v. *Goulder*, [1905] 2 Ch. 100; 74 L.J.Ch. 552; 93 L.T. 163; 44 Digest 444, *2685*.

Johnson v. *Crook*, (1879), 12 Ch.D. 639; 48 L.J.Ch. 777; 41 L.T. 400; 44 Digest 1169, *10,119*. A

Jones, Re, Midland Bank Executor and Trustee Co., Ltd. v. *League of Welldoers*, [1950] 2 All E.R. 239; 2nd Digest Supp.

Minors v. *Battison*, (1876), 1 App. Cas. 428; 46 L.J.Ch. 2; 35 L.T. 1; 44 Digest 1170, *10,125*.

Pearks v. *Moseley, Re Moseley's Trusts*, (1880), 5 App. Cas. 714; 50 L.J. Ch. 57; 43 L.T. 449; 37 Digest 68, *98*. B

Wilkins, Re, Spencer v. *Duckworth*, (1881), 18 Ch.D. 634; 50 L.J.Ch. 774; 45 L.T. 244; 44 Digest 1169, *10,124*.

Wood, Re, Tullett v. *Colville*, [1894] 3 Ch. 381; 63 L.J.Ch. 790; 71 L.T. 413; 37 Digest 94, *297*.

C

Appeals.

These were appeals of the second defendants, the Empire Rheumatism Council, the third defendants, the Charterhouse Clinic Trustees and the fourth defendants, the Family Welfare Association Trustees, Ltd., from part of a judgment of PENNYCUICK, J., dated Feb. 2, 1961, given in proceedings initiated by originating summons dated Feb. 23, 1960, by Lloyds Bank, Ltd. the plaintiffs, to determine D the validity of a provision in the will of Margaret Moir Petrie who died on Jan. 5, 1959. By her will dated May 12, 1950, the testatrix appointed her two brothers, John Moir Petrie and George Ford Petrie, and the plaintiffs to be her trustees and executors, and after providing for the payment of her debts and funeral expenses and expenses connected with the execution of the trust thereby created, directed her trustees to pay the whole residue of her estate to her said brothers as their E absolute property, provided that:

> ". . . if both the said legatees shall predecease me without leaving lawful issue who shall survive me, I direct my trustees to realise and divide the residue of my said estate as follows: To the Royal Medical Benevolent Fund . . . the sum of £200: and to the following charitable institutions or societies the remainder of the said residue equally among them, as follows: (first) The Servers of the Blind League . . ., (second) The British Home and Hospital for Incurables . . ., (third) The Family Welfare Association . . . for the relief of distress among all sections of the community in the London area, (fourth) Any national appeal to the public which may exist in the United Kingdom at the time when the residue of my estate is realised as aforesaid, for contributions for research into substances, such as cortisone, that are essential to the treatment of rheumatoid arthritis, declaring that should no such national appeal for funds then exist this share is to be made over to the said Family Welfare Association and divided equally between the work of family welfare in London and other worthy charitable objects chosen by the association at its discretion."

F G

The testatrix' two brothers predeceased her without leaving issue. Her estate, H amounting to over £40,000, consisted, in addition to cash and deposits with a building society, of government securities or securities for which there was a regular stock exchange quotation, while her debts amounted to little more than £200.

PENNYCUICK, J., held that the fourth disposition was void for remoteness on the ground that, as he construed the provision, the beneficiary, i.e., the national I appeal, might not fall to be ascertained until a date more than twenty-one years after the testatrix' death, and that the disposition to the Family Welfare Association was void as depending on an event that was too remote. HIS LORDSHIP accordingly held that the testatrix died intestate in respect of the fourth share of residue.

The second and third defendants who claimed to satisfy the description of a " national appeal " in the fourth disposition, and the Family Welfare Association appealed to the Court of Appeal.

A *J. H. Hames* for the appellants, the Family Welfare Association Trustees, Ltd., the fourth defendants.

D. A. Thomas for the appellants, the Empire Rheumatism Council, the second defendants.

C. A. J. Bonner for the appellants, the Charterhouse Clinic Trustees, the third defendants.

B *E. Blanshard Stamp* for the Treasury Solicitor.

B. J. H. Clauson for the Attorney-General.

A. L. Price for Lloyds Bank, Ltd., the trustees, plaintiffs.

Cur. adv. vult.

Nov. 9. **LORD EVERSHED, M.R.,** read the following judgment, in which, C after setting out the material provisions of the testatrix' will and stating the facts, he continued: Before PENNYCUICK, J., the point was taken by counsel for the Treasury Solicitor that this final disposition in favour of " any national appeal . . . which may exist . . . at the time when the residue of my estate is realised as aforesaid ", was altogether void since the beneficiary indicated, the " national appeal ", might not have to be ascertained until a date after the expiration D of twenty-one years from the testatrix' death. On that view it was counsel's submission that the gift over in favour of the Family Welfare Association was equally void as being dependent on the happening of too remote an event; so that the fourth share in question would go to Miss Petrie's next of kin. This argument was accepted by the learned judge. Counsel's argument depended on the premise that the phrase " when the residue of my estate is realised as aforesaid " E must be taken to refer to a point of time when the last of the testatrix' estate was in fact converted under the trust for conversion previously contained in the will. Counsel conceded that it was permissible to have regard to the facts in regard to Miss Petrie's estate when she died: and, according to an affidavit which was before us, it is clear that Miss Petrie's property (which amounted in value to over £40,000) consisted, in addition to cash and money on deposit with F a building society, of investments being either government securities or securities for which there was a regular stock exchange quotation; while, on the other hand, her debts amounted to little more than £200, a sum in fact considerably less than the available cash standing to the credit of her estate at the date of the judgment under appeal. It is also to be noted that there was not in Miss Petrie's will, as there was in the will considered by DANCKWERTS, J., in *Re Jones, Midland* G *Bank Executor and Trustee Co., Ltd.* v. *League of Welldoers* (1) (to which I shall later refer), any power in the executors to postpone conversion. Counsel for the Treasury Solicitor nevertheless, contended that, even apart from caprice or dereliction of duty on the part of the executors, some calamity or wholly unpredictable event, such as the outbreak of a war or the loss or destruction of some material records, might hold up completion of the realisation of the testatrix' H estate for an indefinite period: and that on well-established authority, as illustrated, e.g., in *Re Wood, Tullett* v. *Colville* (2), and *Re Bewick, Ryle* v. *Ryle* (3), the court cannot become involved in any estimate of the probabilities in considering the application of the so-called rule against perpetuities. Thus, in the latter of the two cases cited, EVE, J., observed (4):

> ". . . I am not at liberty to speculate about probabilities . . . and unless I I am satisfied that the mortgages must be paid off within the prescribed period I do not see how I can hold the gift to be good."

If, as PENNYCUICK, J., thought, the view put forward by counsel as to the application of the rule should be accepted, then in my judgment the consequences already indicated would follow. Thus, I am unable to accept the contention of counsel for the fourth defendants that the result would or could be affected on

(1) [1950] 2 All E.R. 239.
(2) [1894] 3 Ch. 381.
(3) [1911] 1 Ch. 116.
(4) [1911] 1 Ch. at p. 119.

the ground that in this case there was a general charitable intention which would make effective the gift over in favour of the fourth defendants. At the same time I confess that I share the distaste which the learned judge expressed for having to apply the rule against perpetuities to a case such as the present, particularly having regard to the facts already indicated relating to Miss Petrie's estate.

As I have, however, already observed, the problem of the application, aye or no, of the rule against perpetuities proceeded on the view that the words "when the residue of my estate is realised as aforesaid" must be taken to refer to the point of time when the last of the testatrix' assets was in fact turned into cash. Before this court arguments were put by counsel for the second and the third defendants for the view that the words quoted ought not to be so construed but should rather be interpreted as referring either to the end of the so-called executor's year, or, alternatively, to the date when the administration of the estate was completed in the sense that, all debts, etc., having been discharged, the residue was ascertained and available for distribution. In support of these arguments certain cases were cited which were not in fact before PENNYCUICK, J.

It is not in doubt that, in considering the application of the rule against perpetuities, the first duty of the court is to construe the will without regard to the rule and then, having so construed it, to see whether or no the rule comes into operation. It is sufficient to cite in this regard the language of LORD SELBORNE, L.C., in *Pearks* v. *Moseley, Re Moseley's Trusts* (5):

> "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect . . . if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law."

I turn, accordingly, to the meaning and intention of the essential formula "when the residue of my estate is realised as aforesaid". The last two words, beyond question, relate back to the earlier direction, already quoted, namely, that in the event which happened of both the testatrix' brothers having predeceased her without leaving issue, her trustees were to "realise and divide the residue" of her estate among the charitable institutions named or indicated. It is to be noted that in the earlier part of the will, although there was a "trust" in the first place for payment of debts, etc., there was then no express trust for conversion but a direction to "pay and make over" the whole residue to the testatrix' brothers (or their issue) in unequal shares: and (as earlier noted) there was nowhere any trust or power to postpone realisation. In these circumstances must the court hold that by the relevant formula, the testatrix intended that, in the events which have happened, her executors or trustees were actually to sell every item of her estate and that the identification of the fourth beneficiary should await the last of the actual sales? Or should the court rather treat the formula as intended to be no more than a repetition in different language of her earlier direction to "pay and make over" her residue?

It will be convenient to turn at once to the cases cited by counsel for the second defendants which (as I have said) were not cited to PENNYCUICK, J. They consisted of three cases decided by FRY, J., one decided by SIR GEORGE JESSEL, M.R., very shortly before the first of the cases of FRY, J., and a case decided by

(5) (1880), 5 App. Cas. at p. 719.

A SWINFEN EADY, J. The three cases decided by FRY, J., were *Re Collison, Collison* v. *Barber* (6), *Re Chaston, Chaston* v. *Seago* (7) and *Re Wilkins, Spencer* v. *Duckworth* (8). The first and third of these cases were very similar and the point in each was simple. Both were cases relating to immediate gifts of residue with provision for gifts over or divesting of a share in the event of a legatee's death before a certain event. In the first case the event was (so far as material) stated B as " before the division of my estate ". In the third the event was defined as " before final division ". In neither case was there any special or express power for postponing realisation or distribution. In both cases the learned judge, after considering certain dicta in earlier cases, including *Re Arrowsmith's Trust* (9), and *Minors* v. *Battison* (10), came to the conclusion that the proper and convenient date which should be taken as intended by the formulae there used was C the expiration of the executor's year. The second case (*Re Chaston* (7)) was somewhat more complex. There the testator had bequeathed his residue in favour of nine persons, to eight of them absolutely but in the ninth case on trust to pay the income to the ninth legatee for his life: and these gifts were subject to a prior life interest in favour of the testator's widow. The problem arose on the death of the ninth legatee in relation to the gift over expressed to take effect in D favour of the other eight (or their issue) on his death. In fact all the other eight, save one, had predeceased the life tenant, the ninth, some leaving issue, some without leaving issue. The relevant words in the will were (in one place) " shall not have been paid " and (in another) " shall not have been received ". FRY, J., after referring to the same earlier authorities, adopted the principle and interpretation of convenience adopted by him in *Re Collison* (6) and *Re Wilkins* (8); that is E to say, he held that the relevant formulae did not render the gifts over void for uncertainty but intended a reference to the time when it was the duty of the executors to distribute, namely (in the events which had happened) the date of the widow's death.

In SIR GEORGE JESSEL, M.R.'s case, namely, *Johnson* v. *Crook* (11), the problem also related to the divesting of a share of residue, but the terms of the relevant F formula were much more precise than in any of the cases before FRY, J. The words were " in case K. shall die before he shall have actually received the whole of his share ". In the course of a long judgment SIR GEORGE JESSEL, M.R., was somewhat critical of certain of the dicta in the earlier cases referred to by FRY, J., and of the consequences sought to be derived therefrom. He held that the language in the will before him was so far precise that effect must be given to the G words used so that the gift over took effect if in fact K. had not actually, at his death, received the whole of his share. He did not, however, dissent from the view (12) that other words, less precise, such as " may have received " might well be " equivalent to receivable or de jure receivable "; and he also observed (13):

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> ". . . that a man cannot intend the interest of the legatee to depend on the diligence or want of diligence of the trustees in endeavouring to sell, and the good or bad faith of the purchaser in completing or refusing to complete a sale, or his means, or on an accident . . ."

Johnson v. *Crook* (14) was decided only a week before the decision of FRY, J., in *Re Collison* (6) and was, therefore, not noticed in the latter judgment. But I the decision of SIR GEORGE JESSEL, M.R., was both noticed and approved by FRY, J., in both his later cases and did not deter that learned judge from deciding them both as he did.

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(6) (1879), 12 Ch.D. 834.
(7) (1881), 18 Ch.D. 218.
(8) (1881), 18 Ch.D. 634.
(9) (1859), 29 L.J.Ch. 774.
(10) (1876), 1 App. Cas. 428.
(11) (1879), 12 Ch.D. 639.
(12) (1879), 12 Ch.D. at p. 644.
(13) (1879), 12 Ch.D. at p. 645.
(14) (1879), 12 Ch.D. 639.

There remains finally the decision of SWINFEN EADY, J., in *Re Goulder, Goulder* v. *Goulder* (15). In that case the gift over was expressed to depend on an event in terms similar to that in *Johnson* v. *Crook* (16), namely, prior to "*actual* payment"; and SWINFEN EADY, J., decided that the words must mean what they literally said. The learned judge, however, cast no doubt on the validity of any of the decisions of FRY, J.

In the light, then, of the law as expounded in these decisions, what is the true construction of the formula used by Miss Petrie? In my judgment the words which are plainly far less precise than those in *Johnson* v. *Crook* (16) and *Re Goulder* (15) do not require the court to introduce the inconvenience of such a so-called "literal" construction as would attribute to the testatrix the intention to postpone the relevant date until in fact the sale of the last asset of her estate had been completed. Counsel for the third defendants suggested that the true point of time intended was the completion of the administration of the estate in the ordinary sense of that phrase. In the case of a divesting provision it may well be that the correct point of time intended would be the completion of the administration or the expiration of the executor's year, whichever should first happen, i.e., in the phrase of SIR GEORGE JESSEL, M.R., when the legacy or share should be "receivable or de jure receivable". The present case is not one of divesting. Still, the testatrix must, in my judgment, have intended a certain event and I would apply a similar principle here—that is, construe the words as referring to the date when the shares of residue should be "receivable or de jure receivable"; in other words, on the completion in fact of the administration of the estate in the ordinary course or the expiration of the executor's year, whichever should first happen. In the events which have occurred, including particularly the initiation and pendency of the present proceedings, it appears to me that the administration cannot be considered as having yet been finished so that the relevant date must be the second alternative, namely, the completion of the executor's year. The "executor's year" is one well established and understood in authority and usage and is now mentioned in s. 44 of the Administration of Estates Act, 1925, (17). In the present case it will be necessary to refer the summons back to the Chancery Division for determination whether, in the circumstances proved or to be proved, either the second or third defendants (or perhaps some other body) satisfy the description in the will of a national appeal existing at the date indicated: and it is therefore highly desirable that we should now, if we properly can, fix that date. In my judgment, and for the reasons which I have given, I think that the date which the testatrix' language must, in the events which have happened and on its fair, sensible and true interpretation, be taken to have intended is (like that in *Re Collison* (18) and *Re Wilkins* (19)) one year from her death, namely, Jan. 5, 1960.

It follows, accordingly, that the necessary premise for application of the rule against perpetuities disappears. It is, therefore, unnecessary for us to express any concluded view whether, in circumstances such as subsist in the present case—including the facts as to the testatrix' estate at her death—there is in any event any room for the application of the rule. We were referred in the course of the argument of counsel for the fourth defendants to two American decisions in support of the contention that a negative answer to the question ought to be given. The cases were *Brandenberg* v. *Thorndike* (20), and *Belfield* v. *Booth* (21), being decisions of the Supreme Courts of Massachusetts and Connecticut, respectively. Both cases are referred to in GRAY ON PERPETUITIES (4th Edn.) at pp. 211 and

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(15) [1905] 2 Ch. 100.
(16) (1879), 12 Ch.D. 639.
(17) Section 44, so far as material, reads ". . . a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death."
(18) (1879), 12 Ch.D. 834.
(19) (1881), 18 Ch.D. 634.
(20) (1885), 139 Mass. Rep. 102.
(21) (1893), 63 Conn. Rep. 299.

A 212, where the second is somewhat criticised. Of the Massachusetts case, however, the learned author says that

> "The decision . . . seems correct. A fair construction of the will was that the testator by the expression 'at the expiration of three years from the death of my wife, or at such time, whether earlier or later, as may, in the discretion of the trustees, be found expedient and practicable' meant 'at such time, about three years, as the trustees may determine', and certainly a period exceeding twenty-one years is not 'about three years'."

B

In *Re Jones* (22) before DANCKWERTS, J., the facts were clearly special. For one thing there was an express power of postponement of conversion. For another, the estate included certain assets in Uruguay which it had not in fact been possible to realise nearly fourteen years after the testator's death when the case came before the court; and, as the learned judge observed, the realisation of the testator's foreign estate might take a very long time. In the circumstances the learned judge decided that gifts expressed to take effect "on the realisation" of these foreign assets were avoided by the uncertainty and consequent application of the perpetuity rule. I see no reason to doubt the correctness of the decision, but it does not seem to me that the case constitutes an authority for a similar conclusion in the present case. Without, therefore, saying more I should prefer to leave open the question whether, even if the words in Miss Petrie's will "at the time when the residue of my estate is realised as aforesaid" ought to be taken to refer to the date of the completion of the last sale (or the last statutory appropriation) of assets, the court ought to hold, having regard to the known facts as regards the testatrix' estate, that the date intimated is one possibly as remote as, or more remote than, twenty-one years from the date of death.

C

D

E

The result will be that the appeal will be allowed.

DONOVAN, L.J.: I agree: there is nothing that I desire to add.

DANCKWERTS, L.J.: I agree. I have nothing to add.

Appeal allowed.

Solicitors: *Lovell, Son & Pitfield* (for the Family Welfare Association Trustees, Ltd., the fourth defendants); *Hempsons* (for the Empire Rheumatism Council, the second defendants); *Evill & Coleman* (for the Charterhouse Clinic Trustees, the third defendants); *Treasury Solicitor*; *Torr & Co.* (for Lloyds Bank, Ltd., the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(22) [1950] 2 All E.R. 239.

A

ABBOTT *v.* REFUGE ASSURANCE CO., LTD.

[Court of Appeal (Ormerod, Upjohn and Davies, L.JJ.), July 7, 10, 11, 12, 13, 14, 17, 18, 19, 28, October 31, 1961.]

Malicious Prosecution—Reasonable and probable cause for prosecution—Need to take steps to obtain information—Admissible evidence only to be considered—Need for legal advice—Weight to be attributed to counsel's opinion—Subsequent stages of trial—Resisting submission of no case to answer—Contesting successful appeal against conviction.

B

Malicious Prosecution—Malice—Motive—Recovery of sum of which prosecutor had been defrauded the ultimate aim—Prosecution for felony before civil action a duty imposed by law—Whether malice established.

C

Following an inquiry as to the surrender value of a life insurance policy taken out by the plaintiff's wife with the defendants, an insurance company, but on which the premiums were paid by the plaintiff, a representative of the defendants telephoned the plaintiff's house and spoke to a woman whom he believed to be the daily help, who was known to him, and who put him on to a man whom she described as the plaintiff. He informed the man that the surrender value of the insurance policy was £2,415 12s. and that it could be paid in cash. He was told the plaintiff's wife was away and would be back at the week-end. The plaintiff was at that time separated from his wife. Eight days later the representative telephoned the house again and arranged with the woman who answered the telephone to pay the sum in cash at the plaintiff's house two days later. He attended on that day and paid the sum to a woman who led him to believe she was the plaintiff's wife, and signed in the wife's name a receipt and a statement that the policy was free from any charge and handed them over with the policy in return. The woman was in fact the plaintiff's secretary; she subsequently confessed to forging the two signatures and said that she did it at the plaintiff's request and paid the money to him (she had meanwhile been dismissed for an alleged deficiency in her accounts). On the facts being placed before them the Director of Public Prosecutions and the police both decided not to prosecute either the secretary or the plaintiff, and the senior legal adviser of the defendants, a solicitor, prepared a memorandum advising against a prosecution of the plaintiff. However, at a conference with experienced Manchester counsel to settle informations against the secretary all the information and documents were laid before him except the senior legal adviser's memorandum but including a statement by the daily help that she remembered a telephone call by the defendants' representative to the plaintiff's house and handing the telephone to the plaintiff. Counsel advised a prosecution of the plaintiff, pointing out that the money could be recovered from him alone and then only if he had been prosecuted. After consideration of the matter by the general manager and managing director, and in the honest belief that the plaintiff was guilty (as was found by the judge), the defendants, though they knew that the plaintiff had from the beginning denied all knowledge of the fraud, preferred charges of forgery, false pretences and conspiracy against him and charges against the secretary. After it had been proved at the trial that both the plaintiff and the daily help were away at the time of the telephone call first mentioned above and could not have answered it, the prosecution successfully opposed a submission that there was no case to go to the jury, and, following the plaintiff's conviction, resisted an appeal brought on the ground that there was no evidence on which the jury could convict. The Court of Criminal Appeal held that the case against the plaintiff should not have been allowed to go to the jury. The plaintiff was discharged after four months' imprisonment. He brought an action for damages for malicious prosecution against the defendants.

D E F G H I

A **Held:** the action failed for the following reasons—

(i) (a) (DAVIES, L.J., dissenting) taking into consideration all the factors which prudently should have been considered by the defendants when deciding whether to prosecute the plaintiff, and among them counsel's opinion which, though oral, was given by experienced counsel after the facts had been put fairly and fully before him, and was thus a potent though not a conclusive factor (see p. 1084, letter G, post), the plaintiff had not discharged the B onus of proving that the defendants had not reasonable and probable cause to initiate a prosecution against him (see p. 1084, letters A to E, p. 1085, letter F, and p. 1090, letters C to E, post).

Ravenga v. *Mackintosh* ((1824), 2 B. & C. 693) considered.

Abrath v. *North Eastern Ry. Co.* ((1883), 11 Q.B.D. 440); *Meering* v. C *Grahame-White Aviation Co., Ltd.* ((1919), 122 L.T. 44) and the test approved in *Herniman* v. *Smith* ([1938] 1 All E.R. at p. 8) applied.

(b) prosecuting counsel, when conducting a prosecution, were acting for the Crown and owed a duty to the court, if satisfied that there was no evidence against an accused, to ask leave to withdraw the prosecution, and, this course not having been taken by the experienced counsel in the present case, D the court would not find that there had not been reasonable and probable cause for resisting the submission that there was no case for the plaintiff to answer or for contesting the plaintiff's appeal (see p. 1085, letter E, p. 1090, letter E, and p. 1095, letter I, to p. 1096, letter A, post).

(ii) the fact that the defendants were concerned to recover the money of which they had been defrauded did not constitute an improper motive or E show malice on the part of the defendants in prosecuting, because the law imposed a duty to prosecute for felony, viz., the forgery, before civil proceedings might be instituted (see p. 1086, letter C, p. 1091, letter I, and p. 1096, letter D, post).

Smith v. *Selwyn* ([1914] 3 K.B. 98) applied.

Per UPJOHN, L.J.: the objective element in the test approved in *Herniman* F v. *Smith* ([1938] 1 All E.R. at p. 8), viz., whether there were reasonable grounds for belief in the accused's guilt, introduced the test of the reasonable man's belief, and the following propositions were clearly settled—(i) that the reasonable man or his advisers would take reasonable steps to inform himself of the true state of the case; (ii) that he or his advisers would finally consider the matter on admissible evidence only; and (iii) that in all but the plainest cases G he would lay the facts fully and fairly before counsel of standing and experience in the relevant branch of the law and receive the advice that a prosecution was justified (see p. 1087, letters A to D, post; cf., p. 1081, letters E to H, post).

Appeal dismissed.

[As to reasonable and probable cause and malice in an action for malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 358, 359, paras. 699, 700, H and 356, para. 696; and for cases on the subject, see 33 DIGEST 492-502, *319-431*, 485-491, *230-308*.

As to civil actions in respect of felonious torts, see 1 HALSBURY'S LAWS (3rd Edn.) 11-14, para. 16.]

Cases referred to:

I *Abrath* v. *North Eastern Ry. Co.*, (1883), 11 Q.B.D. 440; 52 L.J.Q.B. 620; 49 L.T. 618; 47 J.P. 692; *affd.* H.L., (1886), 11 App. Cas. 247; 33 Digest 500, *418*.

Ball, Ex p., Re Shepherd, (1879), 10 Ch.D. 667; 48 L.J.Bcy. 57; 40 L.T. 141; 4 Digest (Repl.) 361, *3282*.

Bostock v. *Ramsey Urban District Council*, (1899), 63 J.P. 728; 16 T.L.R. 18; 33 Digest 512, *574*.

Bradshaw v. *Waterlow & Sons, Ltd.*, [1915] 3 K.B. 527; 85 L.J.K.B. 318; 113 L.T. 1101; 33 Digest 506, *493*.

Broad v. *Ham*, (1839), 5 Bing. N.C. 722; 8 Scott, 40; 8 L.J.C.P. 357; 132 E.R. 1278; 33 Digest 495, *362*. A

Brown v. *Hawkes*, [1891] 2 Q.B. 718; 60 L.J.Q.B. 332; *affd.* C.A., [1891] 2 Q.B. 725; 33 Digest 487, *246*.

Glenister v. *McIver*, (Feb. 6, 1960), unreported.

Herniman v. *Smith*, [1938] 1 All E.R. 1; [1938] A.C. 305; 107 L.J.K.B. 225; Digest Supp. B

Hewlett v. *Cruchley*, (1813), 5 Taunt. 277; 128 E.R. 696; 33 Digest 512, *571*.

Hicks v. *Faulkner*, (1881), 8 Q.B.D. 167; 51 L.J.Q.B. 268; 46 L.T. 127; 46 J.P. 420; *affd.* C.A., (1882), 46 L.T. 130; 33 Digest 467, *18*.

Meering v. *Grahame-White Aviation Co., Ltd.*, (1919), 122 L.T. 44; 33 Digest 492, *317*.

R. v. *Abbott*, [1955] 2 All E.R. 899; [1955] 2 Q.B. 497; 119 J.P. 526; 39 Cr. App. Rep. 141; [1955] 3 W.L.R. 369; 14 Digest (Repl.) 253, *2199*. C

R. v. *Thursfield*, (1838), 8 C. & P. 269; 173 E.R. 490; 14 Digest (Repl.) 304, *2864*.

Ravenga v. *Mackintosh*, (1824), 2 B. & C. 693; 4 Dow. & Ry. K.B. 187; 2 L.J.O.S.K.B. 137; 107 E.R. 541; 33 Digest 496, *374*.

Smith v. *Selwyn*, [1914] 3 K.B. 98; 83 L.J.K.B. 1339; 111 L.T. 195; 1 Digest (Repl.) 77, *575*. D

Stone v. *Marsh, Stracey and Graham*, (1827), 6 B. & C. 551; 9 Dow. & Ry. K.B. 643; Ry. & M. 364; 5 L.J.O.S.K.B. 201; 108 E.R. 554; 1 Digest (Repl.) 454, *1053*.

Tempest v. *Snowden*, [1952] 1 All E.R. 1; [1952] 1 K.B. 130; 116 J.P. 28; 3rd Digest Supp. E

Tims v. *John Lewis & Co., Ltd.*, [1951] 1 All E.R. 814; [1951] 2 K.B. 459; 115 J.P. 265; *revsd.* H.L. sub nom. *John Lewis & Co., Ltd.* v. *Tims*, [1952] 1 All E.R. 1203; [1952] A.C. 676; 116 J.P. 275; 3rd Digest Supp.

Wells v. *Abrahams*, (1872), L.R. 7 Q.B. 554; 41 L.J.Q.B. 306; 26 L.T. 433; 36 J.P. 710; 1 Digest (Repl.) 76, *565*.

F

Appeal.

The plaintiff appealed against an order of SALMON, J., made at Liverpool Assizes on Nov. 14, 1960, dismissing an action for damages for malicious prosecution. The grounds of appeal were:—(i) that the judge misdirected himself and was wrong in his finding that the defendants had reasonable and probable cause for prosecuting the plaintiff on charges of forgery, false pretences and conspiracy, when it was established at the trial, (a) that they had no evidence to support their charges against the plaintiff; (b) that they knew, before they launched the prosecution, that the Director of Public Prosecutions had refused to prosecute; that they had been advised in a full and detailed written memorandum prepared by a Mr. Harrison, the head of their legal department and a solicitor, that the plaintiff ought not to be prosecuted, that the evidence was flimsy and insufficient to justify either a prosecution or civil proceedings; and that the plaintiff had an equitable charge on the policy of insurance involved in respect of three annual premiums paid by him to the defendants amounting to £2,994, which greatly exceeded the surrender value thereof, £2,415 12s., which he was alleged to have stolen; (c) that the defendants were actuated by malice, i.e., by an indirect motive, in launching the prosecution in that they were only concerned in recovering from him moneys of which they had been defrauded, and were not genuinely concerned in bringing him to justice: (ii) that the judge was wrong in finding that the defendants had reasonable and probable cause for the prosecution merely because they had obtained some advice from a junior counsel which had been given verbally at his private house at a time when owing to recent illness he was not fully or completely informed as to all the relevant facts and circumstances and particularly as to the detailed memorandum of the head of the defendants' legal department: (iii) that the judge was wrong in his findings

G H I

A that the defendants had reasonable and probable cause and were justified in continuing and pressing their charges at the trial and subsequently in the Court of Criminal Appeal, and particularly when the evidence called by the defendants completely broke down in the course of the trial and it became apparent that there was no case or evidence justifying the continuation of the prosecution.

The defendants served a cross-notice contending that the decision of SALMON, J., B should be affirmed on grounds other than those relied on by him in that he should have held that the defendants had not been actuated by malice or alternatively that malice had not been proved against them. They submitted inter alia that, in deciding that there was malice, the judge proposed to himself the test: would the defendants have prosecuted if the plaintiff had been a pauper, and that that was not the correct test, and if it were the correct test the judge misdirected C himself in failing to take into account the fact that the defendants, in addition to prosecuting the plaintiff, also prosecuted Ruth Wales, who was in effect a pauper and whom the defendants had decided to prosecute before deciding to prosecute the plaintiff also. The defendants also contended that, if the appeal were allowed, the damages of £12,500 assessed by the judge should be reduced.

Edward Wooll, Q.C., and *E. E. Youds* for the plaintiff.

D *T. G. Roche, Q.C.*, and *R. Castle-Miller* for the defendants.

Cur. adv. vult.

Oct. 31. The following judgments were read.

ORMEROD, L.J.: The court has stated already that the appeal should be dismissed but did not at the time give reasons for its decision. The appeal E is against a decision of SALMON, J., given at Liverpool Assizes on Nov. 14, 1960, dismissing a claim by the plaintiff, Mr. Abbott, for damages for malicious prosecution against the defendants, the Refuge Assurance Co., Ltd. The relevant facts are as follows: The plaintiff carries on business as a herbalist on premises at Station Road, Leigh, Lancashire. He lives in a house called "Lingards", standing in its own grounds, a few miles outside Leigh, and in the summer of F 1948 his second wife, Alys Mary Abbott, who was then living with him, was assisting him in his business. At that time the plaintiff and his wife thought it advisable for Mrs. Abbott to go to Australia to investigate the possibility of setting up a herbalist business there and in consequence a policy of insurance on the life of Mrs. Abbott was taken out (1) for £10,000 with the defendants. The official of the insurance company in Leigh was called Mr. Smethurst and the G plaintiff was well known to him. The premium was a little less than £1,000 per annum and the plaintiff was appointed an agent of the company on July 20, 1948, so that he might get whatever small advantage there was to be had in the payment of premiums. Mrs. Abbott went to Australia but came back having formed the view that the prospects of opening up business there were not good. Nevertheless, the policy was kept up and the plaintiff himself paid premiums H amounting to a little less than £3,000 over a period of three years. On Sept. 25, 1951, the plaintiff having decided that no useful purpose would be served in continuing the policy, went with his wife to see Mr. Smethurst and the sum assured by the policy was in due course reduced to £3,120 on the basis that no further premiums were to be paid, the money to be payable at the end of ten years or on the death of Mrs. Abbott whichever was the earlier time. Soon after I this the plaintiff obtained the services of a married woman of the name of Ruth Wales, who was first a packer at his business premises and later became his secretary. In 1953, Mr. Smethurst retired from the insurance company and was succeeded by Mr. Burns, and it should be noted that Mr. Burns did not know the plaintiff either by sight or by voice.

(1) SALMON J., found that this policy was taken out by Mrs. Abbott, and it was originally arranged that the premiums were to be paid by Mrs. Abbott out of her own moneys; but she did not pay them and, as the defendant insurance company knew, they were in fact paid by the plaintiff.

In February, 1954, the plaintiff's wife left him and went to live in Jersey. Some divorce proceedings were initiated and there were a petition and cross-petition filed but no further steps were taken in the proceedings at that time. On June 18, 1954, a woman who has not been identified rang up to the Leigh office of the defendants saying that she was Mrs. Abbott and asking for the surrender value of the policy and whether the sum could be paid in cash. So far as is known Mrs. Abbott at that time was in Jersey and she was the only person entitled to the surrender value of the policy. Be that as it may, the inquiry was passed on to Mr. Burns, who made the necessary investigation and in due course was informed by his head office that the surrender value of the policy was £2,415 12s. Mr. Burns learnt this on June 26, 1954. He was also told that the money could be paid in cash. On June 29, 1954, Mr. Burns rang up the plaintiff's house and spoke to a woman there who was apparently a daily help. Her name was Mrs. Warburton and during the telephone conversation it emerged that Mr. Burns had known her when he was an agent for the defendants at Leeds, as he used to collect insurance premiums from her mother and was acquainted with various members of the family. He told her that he knew the surrender value of the policy and was prepared to communicate it to the persons entitled to know. In 1954 the town of Leigh had a fortnight's holiday when all the mills were closed and many of the shops and professional offices as well. In that particular year the holiday period was from June 26 to July 10. The plaintiff closed his business premises and went on a tour to the West of England and returned to Leigh about July 12, 1954. Mrs. Warburton, the daily help, also went away at that time. She went to Ilfracombe on July 3, 1954, and remained there until July 10, 1954.

On July 5, 1954, according to the evidence Mr. Burns spoke again on the telephone to "Lingards" and again a woman answered the telephone believed then to be Mrs. Warburton and Mr. Burns seems to have accepted that she was. She said that she would put him on to speak to the plaintiff who was then just coming down the stairs and a man believed by Mr. Burns to be the plaintiff then spoke to him (Mr. Burns) on the telephone. Mr. Burns said that the surrender value of the policy was £2,415 12s., and could be paid in cash; Mr. Burns was told that Mrs. Abbott was away but would be back at the weekend. On July 13, i.e., the day after the plaintiff had returned from his holiday, Mr. Burns made another telephone call to "Lingards" and arranged with the woman who answered the telephone to pay the money in cash on July 15. According to the evidence of Mr. Burns, this woman who he supposed was Mrs. Abbott said: "I'll come to your office and collect it". Mr. Burns said: "Don't do that, I'll come to the house". That was agreed, and on July 15 Mr. Burns and his assistant Mr. Lowe went to "Lingards" with the money in £5 notes. There were three men working in the garden, one of the name of Mr. Murray, when Mr. Burns and Mr. Lowe arrived. Mr. Burns asked Mr. Murray if Mrs. Abbott was in the house. He said that she was. They rang the bell and were admitted by a woman who led them to believe that she was Mrs. Abbott but who was in fact Ruth Wales. Mr. Burns and his assistant brought with them two documents, one a receipt for the money and another form stating that the policy was free from any charge of any kind. She produced the policy and they produced the money. She then wrote the signature Alys Mary Abbott on the two documents and gave them and the policy to Mr. Burns who paid her the money. This woman then gave the men each a £5 note and a drink and they went away. It was conceded at the trial that the plaintiff could not possibly have been in the house at that time as he was busy with appointments in his office, and it was proved beyond doubt in the criminal proceedings and conceded in these proceedings that on July 5, 1954, the plaintiff was away in Torquay, and had no reason to believe that the policy was not in the safe in his office, and it is not suggested now that he knew anything of the surrender.

A It appears that on Aug. 16, 1954, a safe in the plaintiff's office was found open and the contents were stolen but there was only £30 in that safe. The police did not discover who was responsible for the breaking open of the safe. On Sept. 18, 1954, Ruth Wales was discharged by the plaintiff because she would not or could not explain a deficiency of £1,322 9s. 7d. in the accounts which she was supposed to keep. It was conceded at the trial that the plaintiff had lent B Ruth Wales and her husband a sum of £1,700 to enable them to buy some premises to start up a business. In September, 1954, after Ruth Wales had been discharged, the plaintiff reported her alleged deficiency of money to the Leigh police.

On Oct. 18, 1954, Ruth Wales confessed to her solicitor, Mr. Cyril Morris, that she had forged the two documents and a firm of Manchester solicitors, Messrs. Leigh & Johnson, who were then acting for Mrs. Abbott, were informed C of this. The plaintiff himself was not informed. Ruth Wales said that she forged the receipts at the request of the plaintiff and gave the money to him. It appears from the evidence that Mrs. Abbott's solicitor arranged a meeting with Ruth Wales, her solicitor and a friend and also a Mr. Harrison and Mr. Keaveny from the legal department of the defendants and Mr. Burns, and this meeting was held on Oct. 28, 1954. Ruth Wales then confessed that she had D committed forgeries, and then Mrs. Abbott revealed herself. Mr. Burns realised that she was a different person from the one to whom he had given the money and Mrs. Abbott said: "How dare you pay that money". On Nov. 12, 1954, the defendants were served with a writ and statement of claim issued on behalf of Mrs. Abbott for the delivery up of the policy of insurance, and on Mar. 19, 1955, the defendants consented to judgment for the surrender value of the E policy. This was after the plaintiff and Ruth Wales had been convicted at Manchester Assizes and sentenced to terms of imprisonment in connexion with the policy, for reasons which will afterwards appear. On Mar. 29, 1955, the defendants obtained an order joining the plaintiff and Mrs. Wales as third parties in the action against them brought by Mrs. Abbott.

To go back a little in point of time, soon after Oct. 28, 1954, a statement given F by Ruth Wales and the whole of the documents were placed by the defendants in the hands of Mr. Harrison, the senior legal adviser to the company. The facts were also put in the hands of the police, who consulted the Director of Public Prosecutions on the matter, and it is well to note that in January, 1955, the Director of Public Prosecutions and the police both decided not to prosecute either the plaintiff or Ruth Wales. The police also decided not to prose- G cute Ruth Wales at the instance of the plaintiff for her alleged embezzlement.

The matter was, however, considered carefully by the legal department of the defendants and on Jan. 24, 1955, a memorandum was prepared by Mr. Harrison which went into the matter in some detail and expressed grave doubts of the likelihood of the success of the proceedings against the plaintiff. It was then decided on the advice of Mr. Harrison to prosecute Ruth Wales only and Mr. H Keaveny, a member of Mr. Harrison's staff, who was called to the Bar in 1948 but had not practised, was instructed to prepare the necessary informations. Mr. Keaveny drafted the informations against Ruth Wales but decided to have them settled by counsel and fixed a conference with Mr. C. T. B. Leigh, a well-known barrister in practice in Manchester, on Feb. 3, 1955. Mr. Leigh, who had previously advised the defendants in the civil proceedings in this matter, was I not in his chambers as he was recovering from illness in his own house and Mr. Keaveny went to see him to discuss the matter with him, taking the whole of the statements which had been prepared and were available for the use of counsel, but not showing to counsel the memorandum of Mr. Harrison with its definite recommendations. Counsel considered the matter very carefully, and in addition to discussing the advisability of the prosecution of Ruth Wales had a general discussion about the whole matter. This appears from the evidence both of Mr. Keaveny and of Mr. Leigh. Counsel then advised that the plaintiff should be prosecuted as well as Mrs. Wales, and that there was a reasonable chance of

such a prosecution being successful. He pointed out that the only person from whom the money could be recovered was the plaintiff and it could not be recovered until the plaintiff had been prosecuted. He therefore drafted there and then an information against the plaintiff for conspiracy with Ruth Wales in relation to obtaining the surrender value of the policy. The evidence shows that this opinion was communicated to Mr. Harrison after the conference with counsel. He seems to have taken the view that, as counsel had advised criminal proceedings to be taken against the plaintiff, that should be done and accordingly, with the consent of the general manager and managing director of the defendants, the informations were sworn on Feb. 4, 1955, and the criminal proceedings were thereby duly launched. The case came before the justices at Leigh and on Feb. 14, 1955, the plaintiff and Ruth Wales were committed for trial to Manchester Assizes. The counts in the indictment affecting the plaintiff were (ii) forging the receipt, (v) obtaining the sum of £2,415 12s. by false pretences and (vi) conspiracy to obtain money by false pretences.

The case came on for trial at Manchester Assizes before GLYN-JONES, J., and lasted from Mar. 8 to Mar. 15, 1955. The late Sir Godfrey Russell Vick, Q.C., and Mr. Leigh appeared to prosecute and the plaintiff was represented by Mr. Neville Laski, Q.C., and Mr. R. Lambert. The case turned to a considerable extent on a telephone conversation Mr. Burns was alleged to have had with the plaintiff on July 5 or 6, 1954. Mrs. Warburton, the daily worker had on Nov. 22, 1954, given to Mr. Burns a short statement about this which says:

> "This is to certify that I answered the 'phone at Lingards, Astley, on two occasions when I spoke to Mr. J. W. Burns who was inquiring for Mrs. Abbott. On the first occasion there was only myself present, on the second, I handed the 'phone over to [the plaintiff], who then had conversation, and I left the hall."

In cross-examination by Mr. Laski, Mrs. Warburton agreed that on July 5 she was away on holiday and the alleged conversation could not therefore have taken place on or about that day. She agreed too that the plaintiff was not in Leigh at that time but was away on holiday. Mr. Laski submitted at the close of the case for the prosecution that there was no case to go to the jury. The basis of his submission was that the only evidence connecting the plaintiff with the fraud was that relating to the telephone conversation and that was no longer of assistance to the prosecution having regard to the answers of Mrs. Warburton in cross-examination. Counsel for the prosecution deemed it their duty to oppose this submission and the judge ruled against it but said at the end of the evidence that the trial should proceed only on the charge of forgery. In due course the jury found both the plaintiff and Ruth Wales guilty on this charge, and the plaintiff was sentenced to two years' imprisonment and ordered to pay £250 towards the costs of the prosecution. The plaintiff appealed to the Court of Criminal Appeal and that court, consisting of LORD GODDARD, C.J., FINNEMORE and DEVLIN, JJ., allowed the appeal and quashed the conviction on the ground that the case against the plaintiff should not have been allowed to go to the jury (2). The plaintiff was ordered to be released immediately, but he had in the meantime served four months of the sentence of imprisonment, and it is for that reason that the learned judge assessed damages at so high a figure.

The writ in this action was issued on Oct. 6, 1958, and the case came on for hearing at Liverpool Assizes before SALMON, J., in November, 1960, judgment for the defendants being given on Nov. 14, 1960. SALMON, J., has set out the matters which a plaintiff must prove on p. 6 of the transcript of his judgment in a way which has not been challenged. He says:

> "In order to succeed in an action for malicious prosecution, it is necessary for the plaintiff to prove, first, that the defendants had no reasonable and probable cause to prosecute, and, secondly, that they acted maliciously."

(2) See *R.* v. *Abbott*, [1955] 2 All E.R. 899; [1955] 2 Q.B. 497.

A The judge found that there was no absence of reasonable and probable cause for the prosecution, but that there was malice in that the defendants had acted from an "indirect motive". On these findings he gave judgment for the defendants but at the request of the parties made a provisional assessment of damages in the event of a successful appeal in the sum of £12,500.

The appeal comes before this court in the form of an appeal by the plaintiff B against the finding of reasonable and probable cause. The defendants by their cross-notice seek to challenge the finding of malice and contend that the sum of damages provisionally assessed is excessive. However, counsel for the defendants has developed no argument on the issue of quantum but wishes the matter to remain open. The two questions therefore to be considered by this court are: (i) was there reasonable and probable cause for instituting the prosecution? C (ii) were the defendants actuated by an improper motive, and therefore, guilty of malice?

I will deal first with the question whether there was reasonable and probable cause for the prosecution. The learned judge in dealing with this matter on p. 6 of the transcript of his judgment says this:

> "Reasonable and probable cause has been defined by LORD ATKIN in his D speech in the well-known case of *Herniman* v. *Smith* (3). It is to be observed that the other Lords of Appeal agreed with the speech delivered by LORD ATKIN. He adopted part of the definition given by HAWKINS, J., in *Hicks* v. *Faulkner* (4) when he said this (5): 'I know of no better statement of the issue than that in the words of HAWKINS, J., . . . "... I should define reasonable and probable cause to be, an honest belief in the guilt of the E accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" '."

F The learned judge accepted that test as being the proper one in this case, but he did go on to say this:

> "In some cases on some facts there may be exceptions to that rule but they do not seem to me to be material in this case. There is however one addition to the rule which to my mind is material in this case and that is this: that in addition to the state of mind adumbrated by LORD ATKIN it is in my G judgment necessary for the person instituting the prosecution to believe that he has evidence which would, if accepted by the jury, establish the guilt of the accused. It would be manifestly wrong and I think no one could say that a prosecutor had reasonable and probable cause to prosecute if he believed that the accused was guilty but nevertheless knew that he had not the evidence to establish his guilt. *Meering* v. *Grahame-White Aviation* H *Co., Ltd.* (6); *Tims* v. *John Lewis & Co., Ltd.* (7), per LORD GODDARD, C.J."

It is necessary, therefore, to see how the learned judge applied the test that he formulated to the facts in this case. He dealt first with those facts and said at p. 8:

> "Moreover, if there were these statements to which I have already referred and if in those circumstances the manager of an insurance company with I that information and knowledge before him had instituted a private prosecution, I would have had no hesitation in saying that he had reasonable and probable cause. It is in the highest degree likely that he would have believed in the guilt of the plaintiff and thought he could prove it; I think any layman in his position might well have so believed."

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(3) [1938] 1 All E.R. 1; [1938] A.C. 305.
(4) (1881), 8 Q.B.D. 167.
(5) [1938] 1 All E.R. at p. 8; [1938] A.C. at p. 316.
(6) (1919), 122 L.T. 44.
(7) [1951] 2 K.B. at p. 474.

The learned judge, however, then goes on to consider the position having regard to the complication provided by the fact that the defendants have their own legal department presided over by Mr. Harrison. As we know, the matter was referred to Mr. Harrison probably as a matter of routine but certainly very wisely. Mr. Harrison himself considered the matter and forwarded a memorandum to Mr. Almond, the general manager of the defendants, who appears to have had considered this with Mr. Holgate, the managing director. The effect of that memorandum was that Mr. Harrison did not advise a prosecution. He dealt with the fact that the papers had been sent to the Director of Public Prosecutions and said:

> "I cannot advise the company to undertake a private prosecution. Assuming we obtained a conviction against Mrs. Wales, we would be no better off unless she has money. There is insufficient evidence against [the plaintiff] for a criminal prosecution."

On the second page of his memorandum he deals with the various procedures which might be adopted by the defendants to recover the money which they had paid or would have to pay to Mrs. Abbott, but it is clear that the memorandum is dealing with the question of civil proceedings and that any question of a criminal prosecution is secondary. Although Mr. Harrison gives no detailed reasons for his view, he seems to have regarded the evidence as insufficient to sustain a prosecution with any certainty of a conviction. Indeed, when Mr. Harrison was in the witness-box, he stated that his reason for advising against proceedings criminal or civil against the plaintiff was that he did not regard one telephone conversation as being sufficient to sustain a prosecution. The learned judge appears to have regarded Mr. Harrison's memorandum with favour as he says on p. 9:

> "May I say that for myself I agree with every word written in Mr. Harrison's memorandum. I think it was plainly right. He could have taken the view that it was worth pursuing the matter further by making further inquiries from Mr. Burns and from Mrs. Warburton, but he did not do that. It is to be observed that, if he had made further inquiries from Mr. Burns and asked him the date of the crucial conversation, it seems that Mr. Burns, who apparently kept a diary, would have put the crucial conversation at July 5 or 6. They would have then been able to go to Mrs. Warburton and ask for a fuller statement from her on the basis of the information from Mr. Burns and it would then have been immediately apparent to them that the conversation on which they were relying in their case against the plaintiff could not have taken place with the plaintiff and, therefore, they had no case against him."

The learned judge took the view that the prosecution hung by a flimsy thread, as it depended on the evidence of Mrs. Warburton to associate the plaintiff with the telephone call of July 5 or 6. We know now that this thread snapped in the process of Mr. Laski's cross-examination, when Mrs. Warburton agreed that she was away from Leigh on July 5 or 6 and the telephone conversation could not have taken place at that time. Be that as it may, it is to be noted that the statement of Mrs. Warburton had been taken, and there was no reason to doubt her word. It had been taken by Mr. Burns, who was a man of good repute in the defendant company and a man of experience and there seemed no reason on the face of it why the statement should not be accepted as showing that at some time, not expressed in the statement, a conversation had taken place between Mr. Burns and the plaintiff. The learned judge then went on to deal with the visit made by Mr. Keaveny to Mr. Leigh to settle the informations against Mrs. Ruth Wales and it is clear from the evidence of Mr. Leigh, and I think of Mr. Keaveny, that there was a discussion, lasting about two hours, of the whole case. It is clear because Mr. Leigh has said so in evidence that at that interview he told Mr. Keaveny that there was sufficient evidence to sustain a

A prosecution against the plaintiff and he believed and at the time of the hearing of this action before SALMON, J., still believed that the prosecution could be sustained. It must be borne in mind that on Feb. 3 when this conference with counsel took place no particular significance was being attached to the date of July 5 or 6. It appears that Mr. Keaveny, having had his conference with counsel, reported the result of the conference to Mr. Harrison who in turn reported to Mr. Holgate B and Mr. Almond who appear to have taken the view that, if counsel advised a course of procedure, it should be adopted. Mr. Harrison appears also to have taken the view that, if it was the view of counsel that a prosecution should be launched against the plaintiff, then it was proper to launch it. The learned judge on p. 10 of his judgment says this:

C "I find that the defendants believed in the plaintiff's guilt and after they took Mr. Leigh's opinion believed they had evidence which if accepted would establish guilt, but I think they were perfectly bona fide and genuine in accepting counsel's opinion. In those circumstances it seems to me quite impossible to say that they had no reasonable and probable cause for launching the prosecution. In my judgment any company or any manager or managing director of a company be it an insurance company or not in similar D circumstances would have acted as they did."

Then he says on p. 11:

"whether counsel's opinion is reasonable and probable cause for founding a prosecution is a matter which has not been recently considered by the courts, but the case of *Ravenga* v. *Mackintosh* (8) decided a very long time E ago is authority, if authority be needed, in favour of the view which I have pronounced."

It would appear from the language used by the learned judge and particularly from the paragraph which I have just read that he has formed the view that the opinion of counsel is of such weight as to be almost if not entirely conclusive. But the burden of proof in every case is on the plaintiff and in every case it is his duty F to satisfy the court on all the matters which it is necessary for him to prove; see *Abrath* v. *North Eastern Ry. Co.* (9). It may be that there is a number of cases where the opinion of counsel is conclusive, but in my view this is not one of them. Each case must be considered on its own facts. The variations in the circumstances of the cases are almost infinite. Clearly the view of counsel who is not experienced in work of this kind would not be of any great value to persons G seeking his advice; neither would that advice be of any great value, however experienced the counsel, if the whole of the facts were not put before him. Neither of those considerations applies in this case. The counsel who was consulted was a barrister practising in Manchester who was well established and well experienced in work of this type. He had acted for the defendants on previous occasions and had considerable experience in advising in criminal prosecutions and indeed in H acting for the prosecution and for the defence. It is not suggested here that any of the relevant documents were concealed from him. The evidence is that all the statements were put before him and the only document of any moment which was not offered for his consideration was the memorandum of Mr. Harrison to which I have already referred. As I pointed out, the memorandum concerned itself mainly with the prospect of civil action and in any event was nothing I other than the opinion of Mr. Harrison himself.

It follows, I think, from this that any prudent and cautious man in these circumstances before launching a prosecution would take legal advice. He would consult his solicitor. Or he would in a case of this kind, where the company proposing to launch the prosecution has its own legal department, submit the matter to the legal department. The solicitor or legal department as the case may be would probably take the opinion of counsel. That having been done, it is of course

(8) (1824), 2 B. & C. 693. (9) (1883), 11 Q.B.D. 440.

the responsibility of, in this case the defendant company, but in any case the person or company considering launching a prosecution, to consider the whole of the evidence and the opinions obtained and decide whether in the circumstances a prosecution should be launched. It therefore becomes necessary in this case to consider the factors which were, or might have been, in the mind of Mr. Holgate and Mr. Almond after the conference of Feb. 3, 1955, when they received the information that counsel had advised that a prosecution should be commenced against the plaintiff. The matters for consideration were these:

(1) The company had been swindled out of a large sum of money by means of a forgery, described by the learned judge in his judgment as a very clever forgery. Mrs. Wales had confessed already to the defendants that she had forged those documents although she said she did not do it with intent to defraud but that at the request of the plaintiff she handed over all the proceeds of the forgery to him.

(2) The forgery and the handing over of the money took place at the house of the plaintiff, and the arrangements for doing this were carried out on the telephone at the plaintiff's house by Mr. Burns who spoke to Mrs. Warburton as he thought on two different occasions.

(3) Mrs. Warburton herself said in a statement that on one occasion when Mr. Burns telephoned and asked for Mrs. Abbott, she said that the plaintiff was just coming down the stairs and handed the telephone over to him. It is true that no date was given of the conversation.

(4) Mr. Harrison, as head of the department, had advised that there was not in his opinion sufficient evidence on which to found civil or criminal proceedings and the Director of Public Prosecutions and the police had declined to prosecute.

(5) Counsel had advised in conference that the plaintiff should be prosecuted and had settled an information against him preferring a charge of conspiracy.

In considering these matters, it is to be remembered that it was within the knowledge of the defendants that the plaintiff had from the beginning denied all knowledge of the fraud. It is true, of course, that any experienced person examining the facts would realise that the only piece of evidence connecting the plaintiff with the fraud was the statement of Mrs. Warburton about the telephone conversation. But was there any reason to doubt the truth of this statement? The date of the telephone conversation did not then appear to be crucial. It had not then occurred to the persons considering the matter that the date of the Leigh holidays might be material. Taking all these matters into account, in my judgment the defendants had reasonable and probable cause to initiate the prosecution of the plaintiff. I regard the opinion of counsel as a factor, in this case a potent one, which those concerned must take into account when deciding whether to prosecute. It is not, however, conclusive.

Counsel for the plaintiff has urged that in any event the prosecution acted without reasonable and probable cause at different stages. He submitted: (a) that, when it became clear that Mrs. Warburton's statement could not be relied on, counsel for the prosecution resisted a submission that there was no case to answer with the result that the trial continued and the plaintiff was convicted and sentenced, and (b) that the defendants by their counsel and otherwise resisted the submission in the Court of Criminal Appeal that the conviction should be quashed. The views of the learned judge on this topic are set out on p. 12 of the transcript:

"This prosecution was being conducted on the instructions of the defendants by the late Sir Godfrey Russell Vick, Q.C., leading Mr. Christopher Leigh. It is a long established practice that, if counsel in charge of a prosecution at any stage is convinced that there is no evidence against the defendant, or so little evidence that it would not be safe to leave the case to the jury,

A it is then the duty of counsel to acquaint the court with his views and to ask for leave to withdraw the prosecution. I certainly have never known such an application to be refused. As I say, that is well established as being the duty of counsel and it does not depend on any instructions at all. Whoever is instructing counsel, whether it be a private person or the Director of Public Prosecutions, may violently disagree with counsel's view, for as a matter B of courtesy the prosecutor would naturally be informed by counsel of what he proposed to do—but it would be quite wrong of counsel to accept any instructions to go on with a prosecution once he had formed a view that the prosecution should not continue.

"I think it is obvious from the fact that Sir Godfrey Russell Vick and Mr. Christopher Leigh continued with the case that they—mistakenly as it C turned out—took the view that it was a case which was fit to leave to the jury and that there was evidence against the plaintiff. There is nothing to suggest that anybody on behalf of the defendants at any stage urged them to go on against their better judgment and I am sure nothing of the kind took place. They both thought there was a case and I fancy that junior counsel to this day remains convinced of it. The learned judge apparently thought D there was a case but, according to the Court of Criminal Appeal, both learned counsel and the learned judge were mistaken. In circumstances such as those I cannot believe that the prosecutor, relying on not only a very experienced junior counsel but also a well-known and experienced leader who were in charge of the prosecution, had no reasonable and probable cause for continuing the prosecution."

E It is, I think, unnecessary for me to say more than that I agree with the view expressed by the learned judge, but we were reminded by counsel for the defendants that counsel engaged to prosecute are acting for the Crown, and not for the party initiating the prosecution, and in any event owe a duty to the court for the proper conduct of the case; see *R.* v. *Thursfield* (10).

It follows from what I have said that this appeal must fail on the ground that F the plaintiff has not discharged the burden of proving that there was no reasonable and probable cause for the prosecution, but it appears to me that the defendants' cross-notice must succeed to the extent that there was no sufficient evidence of malice on the part of the defendants. The learned judge, taking the view, rightly, that the word "malice" must be construed widely so as to include indirect motive, came to the conclusion that there was sufficient evidence. At G p. 13 of the transcript he said this:

"I think that in this case what was really exercising the minds of the defendants was to get their money back, and a very important matter on this aspect of the case is that the Director of Public Prosecutions had refused to prosecute. I ask myself the question: If the plaintiff were a pauper, would this prosecution ever have been brought? Rightly or wrongly, I H unhesitatingly answer No. Nor do I believe—I do not think anyone is criticising the defendants about this—I do not think any company in the circumstances, if the plaintiff were a pauper, would have prosecuted. That does not mean that they did not believe in his guilt and that does not mean that they did not believe they had plenty of evidence against him—they did, after Mr. Christopher Leigh's opinion, as I have already indicated."

I The learned judge has assumed that at the time counsel was considering this case in conference he had in mind the decision in *Smith* v. *Selwyn* (11). The effect of this case was that an action for damages flowing from a felonious act committed by a defendant on a plaintiff should be stayed until the defendant was prosecuted for the offence or sufficient reason given for not prosecuting him.

It has been argued, and this I think is the view underlying the learned judge's decision, that the only concern of the defendants was to get their money back.

(10) (1838), 8 C. & P. 269. (11) [1914] 3 K.B. 98.

They could not do this as there had been no prosecution of the plaintiff and therefore no compliance with the rule laid down in *Smith* v. *Selwyn* (12). It was urged by counsel for the plaintiff that *Smith* v. *Selwyn* (12) did not decide that the proposed plaintiff should be the prosecutor, and that in this case the Director of Public Prosecutions and the police had declined to prosecute. This, however, does not appear from the judgment to have been argued in the court below.

The submission of counsel for the defendants was that it could not be the effect of *Smith* v. *Selwyn* (12) that, if there was a prosecution in order to make possible a civil action, then the proposed plaintiff was actuated by malice, thereby rendering himself liable to an action for damages for malicious prosecution. With this submission I feel that I must agree. It may well be that the definition of malice in an action of this kind is wide enough to cover an "improper or indirect motive", but I cannot accept that an indirect motive includes doing something which the law has said must be done before civil proceedings may be instituted.

The question of the amount of damages provisionally fixed by the learned judge in the event of an appeal being successful was not argued before us. I express no opinion on it.

UPJOHN, L.J.: I agree that this appeal must be dismissed. It is well settled that for the plaintiff to succeed in a malicious prosecution action, he must establish each of the following propositions: (i) that he is innocent of the crime charged against him; (ii) that there was an absence of reasonable and probable cause; (iii) that the defendant was actuated by malice; meaning by the use of that word the presence in the mind of the defendant of some indirect or improper or unlawful motive in instituting the criminal proceedings.

The onus is on the plaintiff to establish each and every part of these propositions; see *Abrath* v. *North Eastern Ry. Co.* (13). But the absence of reasonable and probable cause for instituting proceedings may be evidence of malice; see *Broad* v. *Ham* (14) and *Brown* v. *Hawkes* (15). The innocence of the plaintiff has been established and is not in doubt, and that matter passes from the picture.

The second proposition formed, in point of time, the major argument before us and I deal with it now. An elaborate and all-embracing definition of absence of reasonable and probable cause was given by HAWKINS, J., in *Hicks* v. *Faulkner* (16), which received the unanimous approval of the House of Lords in *Herniman* v. *Smith* (17). That definition is, however, unnecessarily elaborate for the particular facts of this case and I propose only to consider its two main elements.

First, a subjective element which I shall refer to as the "subjective test", i.e., an honest belief in the guilt of the accused based on an honest belief in the existence of circumstances justifying belief in guilt. Those are the first and second points in the judgment of HAWKINS, J. In fact, how far an honest belief on the part of the defendant in the guilt of the plaintiff when he brings proceedings is an essential ingredient in all cases may be doubted; see, e.g., *Tempest* v. *Snowden* (18), especially the judgment of DENNING, L.J. (19). If a man is advised that the admissible evidence establishes a clear case of guilt, his own belief would seem to be irrelevant when considering whether he has a reasonable and probable cause for instituting proceedings, although his own belief will be relevant on malice. It is, however, unnecessary to pursue this matter further, for the judge found as a fact that the defendants had an honest belief in the guilt of the plaintiff and there was ample evidence on which the learned judge could so find, and I entirely agree with his judgment.

The second element in the definition, namely, the third and fourth points in the judgment of HAWKINS, J., is purely objective, and I shall refer to it in the

(12) [1914] 3 K.B. 98.
(13) (1883), 11 Q.B.D. 440.
(14) (1839), 5 Bing. N.C. 722.
(15) [1891] 2 Q.B. 718.
(16) (1881), 8 Q.B.D. at p. 171.
(17) [1938] 1 All E.R. 1; [1938] A.C. 305.
(18) [1952] 1 All E.R. 1; [1952] 1 K.B. 130.
(19) [1952] 1 All E.R. at p. 5; [1952] 1 K.B. at p. 139.

A rest of this judgment as the " objective test ". Were there reasonable grounds for belief in the guilt of the accused? This introduces the test of the reasonable man; would a reasonable man on the available facts before him reasonably believe in the guilt of the accused? See *Tims* v. *John Lewis & Co., Ltd.* (20), per LORD GODDARD, C.J., and *Tempest* v. *Snowden* (21). It is a question of fact in each case but for the judge and not the jury; see per LORD ATKIN in *Herniman* v. B *Smith* (22).

The following propositions are now clearly settled: The reasonable man would take the following steps:—(i) He or his advisers would take reasonable steps to inform himself of the true state of the case; *Abrath* v. *North Eastern Ry. Co.* (23). (ii) He or his advisers would finally consider the matter on admissible evidence only, *Meering* v. *Grahame-White Aviation Co., Ltd.* (24). (iii) In all but the plainest C cases, he would lay the facts fully and fairly before counsel of standing and experience in the relevant branch of the law and receive the advice that a prosecution is justified. This is implicit in the several cases which I shall mention in a moment. In addition, of course, the defendant must bona fide accept and act on the advice and, though that is part of the subjective test, it cannot be wholly removed from consideration at this stage.

D If the plaintiff can prove that the defendants have failed to take any of these steps, then that will be evidence from which the judge may infer absence of reasonable and probable cause. So far I think the law is clear, but there has been much argument before us in reference to step No. (iii), how far the defendants can rely on an opinion of counsel in favour of a prosecution, though the defendants' solicitor expressed a contrary opinion which, as the learned judge thought in this E case, was plainly right and which he preferred to that of counsel.

We were referred to a number of authorities on this point. The case most favourable to the defendants is the authority on which the learned judge relied, *Ravenga* v. *Mackintosh* (25), decided as long ago as 1824. In that case BAYLEY, J., delivering the leading judgment, said (26):

> " I accede to the proposition, that if a party lays all the facts of his case F fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description."

HOLROYD, J., however, in that case, found it unnecessary to pronounce on that proposition and left the matter open. It is to be observed that the observations of BAYLEY, J., were obiter, for the jury came to the conclusion that the defendant G in that case did not believe that he had any cause of action whatever and did not bona fide act on the opinion of counsel. In the earlier case of *Hewlett* v. *Cruchley* (27), a rather different opinion was expressed. In the headnote it was stated:

> " In an action for a malicious prosecution, it is no answer that the defendant was encouraged in what he did by the opinion of counsel, if the statement H of facts was incorrect, or the opinion ill-founded."

That statement must I think be in reliance on the judgment of HEATH, J., who said (28):

> " It would, however, be a most pernicious practice, if we were to introduce the principle that a man, by obtaining an opinion of a counsel, by applying to a weak man, or an ignorant man, may shelter his malice in bringing an I unfounded prosecution."

We were also referred to the much later cases of *Bostock* v. *Ramsey Urban District Council* (29) and *Bradshaw* v. *Waterlow & Sons, Ltd.* (30) (a case approved in the

(20) [1951] 2 K.B. at p. 472.
(21) [1952] 1 All E.R. 1; [1952] 1 K.B. 130.
(22) [1938] 1 All E.R. at p. 9; [1938] A.C. at p. 317.
(23) (1883), 11 Q.B.D. 440.
(24) (1919), 122 L.T. 44.
(25) (1824), 2 B. & C. 693.
(26) (1824), 2 B. & C. at p. 697.
(27) (1813), 5 Taunt. 277.
(28) (1813), 5 Taunt. at p. 283.
(29) (1899), 63 J.P. 728.
(30) [1915] 3 K.B. 527.

House of Lords in *Herniman* v. *Smith* (31)), which perhaps, in effect, support the views of BAYLEY, J., rather than of HEATH, J. A

On the other hand in CLERK & LINDSELL ON TORTS (11th Edn. at p. 867) this observation is made:

> "Acting under legal advice. It has been said that if a prosecutor fairly takes competent legal advice he is in all events justified in acting upon it. This, however, appears to be extremely doubtful, for if there is no reasonable and probable cause it is difficult to see how the mistaken opinion of a solicitor or counsel can alter the fact. That a man has taken pains to form an opinion is no proof that the opinion is sound, though it may tend to show that it is honest and therefore have a bearing on the issue of malice." B

The law may have been too widely stated by BAYLEY, J., in *Ravenga* v. *Mackintosh* (32) on the one hand and in CLERK & LINDSELL ON TORTS on the other. I doubt if it is possible to lay down any general principle, for, as LORD ATKIN pointed out in *Herniman* v. *Smith* (31) in this branch of the law so much depends on the facts of each particular case it is impossible to lay down a general rule. It is necessarily a question of degree in every case. In so many cases counsel may disagree. A bold counsel might advise a prosecution; a more cautious one might take a contrary view; a third might advise making further inquiries before deciding on a prosecution. Again counsel may have to advise on a difficult question of law; it would be hard if a prosecutor acting on his advice was held to have acted without reasonable and probable cause because after much conflict of judicial opinion the advice of counsel is held to be wrong. Then there may be cases where a wise solicitor would take a second opinion, and so on. However, on the facts of this case, no attempt at the formulation of any rule, even if possible, is necessary, because in my judgment, for the reasons which I shall express later, it has not been shown that the opinion of Mr. Leigh is wrong, though in this difficult matter other counsel might have advised in an opposite sense. C D E

Mr. Wooll has in effect challenged the conduct of the defendants in every one of the objective tests except (ii) (see p. 1087, letters B and C, ante). Very properly he did not suggest Mr. Leigh, when advising, took into account as part of the evidence available against the plaintiff the confession of Mrs. Wales. Summarising his arguments, he has submitted that the defendants failed to inform themselves of the true state of the case in that they failed to give due weight to the financial standing and position of the plaintiff and then never put the matter fairly and squarely before him even on Nov. 22, 1954; that when the matter was submitted to counsel on Feb. 3, 1955, the statements put before him were not obtained by a competent solicitor, but only by the defendants' local manager, Mr. Burns. He further complained that, although the vital date (as it turned out) July 5, 1954, was known to Mr. Burns some time before Feb. 3, that date was never put to Mrs. Warburton. F G H

He further rightly relies on the fact that the defendants knew that the Director of Public Prosecutions had decided not to prosecute and he draws attention to the fact that there was never any opinion by Mr. Christopher Leigh in writing. He points out that Mr. Keaveny went to Mr. Leigh merely to settle informations against Mrs. Wales and it was Mr. Leigh who expressed the view that there was sufficient evidence to prosecute the plaintiff as well. He naturally relies on the fact, and strongly, that the powerful memorandum of Mr. Harrison of Jan. 24 expressing the view that there was insufficient evidence against the plaintiff for a criminal prosecution was never shown to Mr. Leigh, although it is fair to say that the latter certainly understood that Mr. Harrison was against a prosecution of the plaintiff. So it is said that the defendants never really took steps properly to inquire into the true state of the evidence against the plaintiff and they never I

(31) [1938] 1 All E.R. 1; [1938] A.C. 305. (32) (1824), 2 B. & C. 693.

A fairly considered the matter, and should in any event have had the written considered opinion of counsel so that they might consider the pros and cons.

Speaking for myself, I think there is much force in all these contentions put before us so attractively by Mr. Wooll. However, ultimately, looking at all the relevant facts, one has to reach a conclusion on two matters; first, did the defendants or their advisers make a proper inquiry as to the true state of affairs B and, secondly, if they did, then did counsel reach a reasonable opinion on the whole matter; thirdly (though part of the subjective test), did they bona fide act on the advice?

With regard to the first, my mind has fluctuated in a very great degree from time to time during the argument. It is perfectly true that the Director of Public Prosecutions decided not to prosecute; Mr. Harrison, too, was against it. On the C other hand one has to consider whether, had further inquiries been made, they would have produced any further evidence. It is perfectly true that we now know that, had the date July 5, known to Mr. Burns before Feb. 3, 1955, been put to Mrs. Warburton, it is possible that she might have said that it could not have been that date, and the prosecution might not have been launched. Mrs. Warburton herself was not able to put a date to it when she was pressed by Detective-Inspector D Lee, because this was an entirely trivial and utterly unimportant telephone conversation as it appeared at that time. She would do no more than say that it was the end of June or beginning of July, and, though this does not lead to the necessary inference that had the specific date been put to her she would not have recalled her absence from Leigh at that time, it seems likely. However, what is important to consider is whether in the minds of the defendants and their advisers the specific E date should have had any vital significance in considering these matters on Feb. 3, 1955. I cannot see that it should. The holidays of the town of Leigh would seem far removed from all relevant consideration. Apart from this, I do not think that any other investigations would have produced any evidence which would throw any light on the alleged felony

The next and crucial question on this part of the case is whether the advice F of Mr. Leigh was wrong. Mr. Leigh is a counsel of great experience in this branch of the law and he had before him all the relevant statements which had been obtained by Mr. Burns. True he had not before him the opinion of Mr. Harrison. In view of its importance, I make no apology for setting out the statement which he had before him by Mrs. Warburton:

G "This is to certify that I answered the 'phone at Lingards, Astley, on two occasions when I spoke to Mr. J. W. Burns who was inquiring for Mrs. Abbott. On the first occasion there was only myself present, on the second, I handed the 'phone over to [the plaintiff], who then had conversation, and I left the hall."

The subsequent conversation between Mr. Burns and the voice at the other end H was to the effect that, when Mr. Burns mentioned the amount of the surrender value, he was pleased to hear it, and said that his wife would be pleased to hear it but she would not be home until the following Saturday or Sunday. As was pointed out in the Court of Criminal Appeal, the vital question in this case was whether there was evidence to connect the plaintiff with the interview between Mrs. Wales and Mr. Burns when the money changed hands; this was ample evidence I to connect the plaintiff with the fraud *if* it was his voice.

The question is was Mr. Leigh wrong in accepting Mrs. Warburton's evidence as being a sufficient connecting link to connect the plaintiff with the swindle or not? The judge formed the view that it was clearly insufficient and he preferred Mr. Harrison's advice, but in reliance on the view of BAYLEY, J., in *Ravenga* v. *Mackintosh* (33), he held that counsel's opinion protected the defendants. Speaking for my part, I am unable to agree with the judge that Mr. Leigh was wrong.

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(33) (1824), 2 B. & C. 693.

I think the problem before Mr. Leigh was one on which different minds might come to different conclusions. Certainly the evidence was not strong as I have already said, but I cannot myself think it can be said that his advice was wrong. Though many counsel on the brief evidence of Mrs. Warburton might have advised against a prosecution or advised further inquiries, I do not think that Mr. Leigh is to be unduly criticised for giving bolder advice.

One has to bear in mind what in fact happened. The prosecution broke down solely because it was established beyond doubt that the conversation could not have taken place on the date on which the prosecution said that it did take place, i.e., July 5 or 6, and on that the Court of Criminal Appeal said there was no evidence to go before the jury. As I have already pointed out, the date was vital only because of the local holiday season; it was otherwise without significance. It seems clear from the course of the appeal before the Court of Criminal Appeal that, apart from that fact, the substance of the conversation (which plainly was believed by the jury) would have been treated as ample evidence to connect the plaintiff with the crime.

Accordingly I have come to the conclusion, first, that it has not been established that the defendants failed to inform themselves of the true state of affairs, and, secondly, that the opinion of counsel has not been shown to be wrong.

Finally the judge held, and in my judgment rightly, that Mr. Holgate and Mr. Almond, and indeed Mr. Harrison himself (notwithstanding his previously expressed contrary opinion), bona fide accepted and acted on Mr. Leigh's advice. Therefore, finally I reach the conclusion, though by a rather different route from the judge, that the plaintiff has failed to show a breach of any part of the objective test and that the judge was right in holding that there was a reasonable and probable cause for instituting the prosecution.

ORMEROD, L.J., has dealt fully with the contention of counsel for the plaintiff that the defendants' continued presentation of the prosecution in spite of the submission of no case to answer, and later resistance to the plaintiff's submission to the Court of Criminal Appeal, established that they acted without reasonable and probable cause. I agree entirely with his observations on these points and desire to add nothing thereto.

I turn then to the third question, that of malice. Counsel for the plaintiff has submitted that the defendants did not make proper inquiries and therefore could have had no genuine belief in the honesty of their case. This goes to malice as much as to reasonable and probable cause. The judge, however, negatived that view and reached the conclusion that the defendants honestly thought that he was guilty, and in my view there was ample evidence on which the judge could come to that conclusion. Apart from this, the only evidence of malice that was argued before us was the question whether the defendants launched the prosecution with an indirect or an improper motive. The judge dealt with the matter quite shortly. He said this:

> "I think the real reason why they decided to go on, believing quite genuinely that they had a case, was because they thought that only if they went on could they recover the money from the plaintiff. If the plaintiff had not had money they would have said to themselves 'No doubt he is guilty, no doubt we can prove it, but why should we pull the chestnuts out of the fire when the Director of Public Prosecutions has refused to do so?' Therefore, had the point arisen, I should have found there was malice here in the sense that the defendants had the indirect motive to which I have referred. I do not think this reflects any discredit on the defendant company."

Counsel for the defendants urged on us strongly that the judge's finding of fact which I have just quoted was wrong, and that in launching the proceedings the defendants were not actuated by any indirect motive. With all respect to that submission I am quite unable to accept it. There was abundant evidence on which the learned judge was entitled to come to the conclusion that he did,

A and indeed, speaking for myself, I think it was the only possible conclusion. In saying that, however, I only desire to reiterate what the judge said, that the defendants in having the indirect motive of desiring to obtain the money of which they had been defrauded, as they believed by the plaintiff, reflects no discredit on them. In the circumstances of the case it was a perfectly reasonable and fair attitude to take up.

B The whole question, therefore, on the footing that from start to finish the defendants, in launching the prosecution, were actuated by a desire to recover their money at law from the plaintiff, and in the belief that they could only do so if they first prosecuted him, is whether that is an improper motive for the purposes of malice in a malicious prosecution. The point really is a very short one. As appears so clearly from the judgment of SWINFEN EADY, L.J., in *Smith* v. *Selwyn* C (34), quoting LORD TENTERDEN in *Stone* v. *Marsh, Stracey and Graham* (35):

> ". . . 'public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose '."

D

It seems to me, however, clear that this rule of policy only suspends the right of the defendant to bring his action at law against the plaintiff. In *Ex p. Ball, Re Shepherd* (36), BAGGALLAY, L.J., set out certain principles:

> " (i) that a felonious act may give rise to a maintainable action; (ii) that the cause of action arises upon the commission of the offence; (iii) that, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice . . ."

E

It is unnecessary to quote the further principles that he enumerated. In *Wells* v. *Abrahams* (37) COCKBURN, C.J., said:

F

> " No doubt it has been long established as the law of England, that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted."

This was quoted with approval by SWINFEN EADY, L.J., in *Smith* v. *Selwyn* (34). G That being the law and the reason for it, I do not see how it can be said to be malicious to prosecute a person in order to pave the way to a civil action. The civil right is only postponed until after prosecution, which incidentally need not be successful. If the view held by the judge is right, then it would necessarily seem to follow that everyone who prosecuted with a view to recovery of his property at law must at once establish that he is acting maliciously, although H it may be that he could defend an action for malicious prosecution on the ground that he had reasonable and probable cause. I do not think that can be the law. I venture to think that the judge looked at the matter from the wrong point of view. Every man is entitled to recover property which has been wrongfully taken from him by another by suit and it cannot possibly be said that he is acting maliciously in doing so. It is, however, the policy of the law that, if the property I was taken feloniously, then the defendant is under a public duty to prosecute the offender before he can recover his property at law. Having done so, he is free to bring his action. In instituting a prosecution he is not acting maliciously, he is not acting from an indirect or improper motive, he is acting because the law of England compels him so to act before he can pursue his own remedy at law. In my judgment the plaintiff wholly fails to establish a case of malice in these

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(34) [1914] 3 K.B. at p. 105.
(35) (1827), 6 B. & C. at p. 564.
(36) (1879), 10 Ch.D. at p. 673.
(37) (1872), L.R. 7 Q.B. at p. 557.

proceedings and on that short ground alone it seems to me that the plaintiff's action must necessarily fail. A

On the whole of this matter, therefore, I reach the conclusion that the plaintiff fails to establish either of the necessary ingredients of his action and the appeal must be dismissed.

DAVIES, L.J.: Of the three major points which were discussed in the argument in this appeal, the first, viz., the relevance or otherwise of an honest belief on the part of the defendants in the guilt of the plaintiff, does not in my judgment call for any detailed examination. Numerous authorities were cited to this court on what may be called the subjective aspect of this somewhat difficult branch of the law. These authorities were recently fully considered in the unreported case of *Glenister* v. *McIver* (38); and, for myself, I should not wish to add anything on the subject save to say with respect that I agree with the observations on the point made by DENNING, L.J., in *Tempest* v. *Snowden* (39). But on the facts of this case no question of that sort can arise. For SALMON, J., expressly found that everyone in the defendant company, including their legal department, honestly believed that the plaintiff was implicated in the fraud. And it is clear that that finding on the evidence was plainly right; so that it is necessary to approach the next and most difficult question, viz., that of reasonable and probable cause, on that footing. B C D

No fault can be found with the test which the judge applies as to what constitutes reasonable and probable cause, basing himself, as he did, on the observations of LORD ATKIN in *Herniman* v. *Smith* (40) and *Meering* v. *Grahame-White Aviation Co., Ltd.* (41). So far as concerns the law, the only other authority to which I think it necessary at this stage to refer is *Abrath* v. *North Eastern Ry. Co.* (42), where SIR WILLIAM BRETT, M.R., said: E

> "But it signifies not what statements were laid before those who instituted the prosecution, if they received them carelessly, or if they did not take reasonable care to inform themselves of other facts with which they might have made themselves acquainted."

F

The question for decision, therefore, is whether the materials which the defendants had available were such as would in the circumstances reasonably induce reasonable men to believe in the guilt of the plaintiff and to believe that such materials were sufficient, if accepted by the jury, to prove such guilt. One has, of course, to bear in mind throughout that the onus of proof is on the plaintiff. It is not for the defendants to prove that they had reasonable and probable cause; it is for the plaintiff to establish that they had not. G

I think that all the members of this court have found this question a very difficult one on the facts of this case. Certainly I have myself. In the result I find myself in the melancholy position of having arrived at a view different from that formed both by my Lords and by the trial judge. It was urged on us by counsel for the defendants that to say that the defendants had no reasonable and probable cause would also be to differ not only from GLYN-JONES, J., who presided at the criminal trial at Manchester, but also in effect from the view expressed by the Court of Criminal Appeal. But the materials before GLYN-JONES, J., and the Court of Criminal Appeal were not the same as those before the defendants on Feb. 4, 1955, the crucial date when the prosecution was instituted. My Lords have set out the facts and the matters which have led them to reach their conclusion that the decision of the judge on this part of the case was correct. Obviously it is desirable, so far as possible, to avoid repetition. I shall therefore endeavour to limit my references to those matters which have led me to the opposite conclusion. H I

(38) (Feb. 6, 1960), unreported.
(39) [1952] 1 All E.R. at p. 5; [1952] 1 K.B. at pp. 139, 140.
(40) [1938] 1 All E.R. at p. 8; [1938] A.C. at p. 316.
(41) (1919), 122 L.T. at p. 55.
(42) (1883), 11 Q.B.D. at p. 450.

A The fraud on the defendants which was undoubtedly committed commenced when a woman purporting to be the plaintiff's wife telephoned, it would seem on June 18, 1954, to the defendants' Leigh office and made inquiries of Mr. Lowe as to the surrender value of the policy. There followed the telephone conversation of June 29 between Mr. Burns and Mrs. Warburton, and the vital telephone conversation said to have taken place on July 5 between Mr. Burns and Mrs. War-
B burton—who was not in fact there on that date—and between Mr. Burns and a false plaintiff. There followed the later conversation on July 13 between Mr. Burns and a false Mrs. Abbott. The first and fourth of these conversations are, in my opinion, most important. There is in exhibit 19, the copy of Mrs. Wales' statement which was sent to the defendants shortly after Oct. 28, no mention of any such conversations. According to her account of the matter, it would seem
C that the first that she knew of the proposed surrender was on July 15, the date when the money was paid. It seems to me quite remarkable that the defendants made no inquiries of Mrs. Wales, through her solicitors, as to these two earlier telephone conversations though, of course, one has no idea what, if any, answer would have been forthcoming.

Again in that same statement of Mrs. Wales there appears the phrase: "They
D also produced two forms which I signed in my ordinary handwriting 'Alys Mary Abbott'." With regard to this the judge said:

> "If you compare the signatures on the receipt with other signatures which are admittedly those of the then Mrs. Abbott, the similarity is striking indeed. It was a very clever forgery carried out under the eyes of Mr. Burns."

E The defendants had in their possession the proposal form signed by the real Mrs. Abbott, and, if they had taken the trouble to compare that signature with the signatures which Mrs. Wales had admitted making, it could not, I should have thought, have failed to strike them that a good deal of practice might well have been necessary before such a clever forgery could have been perpetrated. The defendants might, I suppose, have asked Mrs. Wales' solicitors for a specimen
F of her ordinary handwriting. This would not, of course, necessarily have exculpated the plaintiff. But it might well have gone some way to convince the defendants that Mrs. Wales' story was such a pack of lies that it should be entirely disregarded. In any event, of course, if she herself were going to be prosecuted, her evidence so far as it affected the plaintiff would be so suspect as to be well nigh worthless.

G I turn now to Mr. Burns' statement made to Mr. Keaveny on Oct. 23 (exhibit 23) shortly after the receipt by the defendants of a letter of Oct. 20 from Mrs. Abbott's solicitors stating that she had had no part in the surrender. That statement was, of course, one of the most important matters on which the defendants decided to prosecute. Indeed, that statement, when coupled with Mrs. Warburton's statement, was the only evidence against the plaintiff. A
H most remarkable feature of it is the absence of dates. It refers to times, days of the week and so on; but with one exception it contains no dates. One would have thought that before launching a criminal prosecution it might have been useful and wise to have tried to obtain a greater degree of precision. The exception is in itself remarkable. At the bottom of the statement are the words: "On referring to his diary, Mr. Burns saw an entry against the date July 15, 1954".
I What that entry was, the statement does not specify. And, so far as I am aware, there is up to this moment no evidence before the court as to what that entry was. For aught we know, it might have been a reference to St. Swithin's Day.

That Mr. Burns had some means of identifying dates seems plain. For by Dec. 11, the police, in the person of Detective-Inspector Lee, interviewed the plaintiff and asked him about the telephone conversation which it was suggested that he had had with Mr. Burns and suggested to him that that conversation had taken place on July 5. The defendants, of course, had no statements from Detective-Inspector Lee until after they had commenced the prosecution. But

the point is that at any rate as early as Dec. 11 the defendants knew that Mr. Burns was saying that his crucial conversation with the plaintiff had taken place on July 5. For Detective-Inspector Lee could have got the date only from the defendants, and the defendants could have got it only from Mr. Burns. And that date was never at any time put to Mrs. Warburton by the defendants. A

What had happened in the meantime was this. After the meeting of Oct. 28 and the receipt by the defendants of the copy of Mrs. Wales' statement (exhibit 19), a writ was issued on Nov. 12 by Mrs. Abbott against the defendants. Ten days later, on Nov. 22, the plaintiff was interviewed by Mr. Burns and Mr. Keaveny and denied all knowledge of the fraud. On the same day Mr. Burns interviewed Mrs. Warburton and obtained from her the short statement (exhibit 83) which has already been read. What completely baffles me is that never at any time before the commencement of the prosecution was Mrs. Warburton interviewed by Mr. Keaveny or by any other member of the defendants' experienced legal department. They relied entirely on this short statement obtained by Mr. Burns. There was never at any time any suggestion that Mrs. Warburton could identify the topic of the alleged conversation between Mr. Burns and the plaintiff or that Mr. Burns could recognise the plaintiff's voice. When once the defendants knew that Mr. Burns was putting the vital telephone conversation as on July 5, it is almost certain that if they had asked Mrs. Warburton about that date she would have told them that she was not in Leigh at that time. B C D

On Nov. 30 the defendants put the papers before the police who made inquiries and consulted the Director of Public Prosecutions. By Jan. 24, 1955, the defendants knew that it had been decided by the Director of Public Prosecutions and the police not to prosecute either the plaintiff or Mrs. Wales. On Jan. 24 Mr. Harrison, the head of the defendants' legal department, wrote his most important memorandum of that date. SALMON, J., said he agreed with every word of it and that it was plainly right. It is not necessary to quote from it. The substance of it was that in Mr. Harrison's opinion there was insufficient evidence on which to prosecute the plaintiff and that so far as concerned civil proceedings the evidence against him was very flimsy and that the prospects of success were very remote. It is, perhaps, not unimportant to note that also in his memorandum Mr. Harrison emphasised the high reputation enjoyed by the plaintiff in South Lancashire. E F

On the strength of this memorandum, the defendants decided not to take any proceedings against the plaintiff but to prosecute Mrs. Wales who, if by any stretch of imagination her story had been true, was a completely innocent party. It is quite obvious that the object of this prosecution was not to punish Mrs. Wales but to obtain, if possible, some material which might justify the taking of civil proceedings against the plaintiff for the recovery of the money (see para. (1) on p. 2 of the memorandum). G

Counsel for the defendants argued before this court that on Mr. Harrison's evidence the ground on which he based his opinion was not the lack of identification of the Burns-Warburton-plaintiff telephone conversation of July 5 but what he considered the inadequacy of a single such conversation to prove the case. The memorandum, however, did not so state. And it was a very strong one. Mr. Harrison was, as I have said, the head of the defendants' legal department; and although, no doubt, he was primarily a conveyancer, his department was accustomed from time to time to initiate and conduct prosecutions. H

Mr. Keaveny proceeded to draft an information against Mrs. Wales. Ten days after Mr. Harrison's memorandum, on Feb. 3, 1955, Mr. Keaveny had a long conference with Mr. Christopher Leigh, of counsel, with a view to having this information settled in conference. Mr. Leigh is, of course, a most experienced member of the Bar in common law and criminal matters. He had advised and appeared for the defendants on many occasions and had been advising them in connexion with the affair of the surrender of this policy. After a full discussion, Mr. Leigh orally advised Mr. Keaveny that there was sufficient evidence to justify a prosecution not only of Mrs. Wales but also of the plaintiff and settled I

A an information accordingly on a charge of conspiracy. According to Mr. Keaveny's evidence, the danger of a claim for damages for malicious prosecution was discussed; but for some reason Mr. Leigh was not shown Mr. Harrison's memorandum or informed of its contents or its reasoning. He was left to infer from the fact that the information drafted by Mr. Keaveny was against Mrs. Wales alone that Mr. Harrison had advised against prosecuting the plaintiff.

B One can well understand that in many cases a client may wish to have the opinion of counsel unaffected and untrammelled by any other or previous expressions of opinions by other persons. But in a matter as serious as this, when Mr. Harrison's opinion had been so strong, and in view of the decision of the Director of Public Prosecutions, it was, in my opinion, quite unreasonable to act on the oral opinion of counsel in the circumstances. After Mr. Leigh's C advice to Mr. Keaveny, either Mr. Harrison should have gone to see counsel and put forward his views for consideration, or Mr. Leigh should have had Mr. Harrison's memorandum put before him and have been asked to give a considered opinion in writing. I am unable to accept that a reasonable man, still less a reasonable general manager or managing director of an insurance company, would have acted as these people did. What in fact they did was to act on Mr. Leigh's opinion D and to institute proceedings against both the plaintiff and Mrs. Wales within twenty-four hours.

So far as concerns the effect of counsel's opinion in such a matter, I agree with what has been said by my Lords. We were referred in this connexion to *Hewlett* v. *Cruchley* (43), *Ravenga* v. *Mackintosh* (44), *Bostock* v. *Ramsey Urban District Council* (45), and other cases. But in my judgment the true view is that there is E no magic in the opinion of counsel, even though the counsel concerned is experienced in the particular class of work. The contemporaneous opinion of counsel based on full information and instructions is a factor, and no doubt an important factor, to be taken into account when considering whether there was reasonable and probable cause for a prosecution. But there may be cases, and in my opinion for the reasons I have indicated this is one of them, where the prudent and F reasonable man ought to take a further opinion, either from the same or some other, perhaps leading counsel, with instructions specifically to consider and deal with matters which had previously tended to point to a conclusion opposite to that reached by counsel.

To sum up, therefore, while I am fully conscious of the weight of the considerations advanced by my Lords and the judge, I would find that the plaintiff here G succeeded in establishing that on Feb. 4, 1955, the defendants had no reasonable and probable cause for initiating this prosecution, in that: (a) They failed to make any inquiry as to the telephone conversations of June 18 and July 13. (b) They failed to pay any attention to the skilfulness of the forgeries of Mrs. Wales and to the contrast between that skilfulness and her account in exhibit 19 of how she came to write them. (c) They failed to pin down Mr. Burns to any dates, and H in particular, after having ascertained that Mr. Burns was placing the vital telephone conversation as being on July 5, they failed to put that date to Mrs. Warburton either by a representative of their legal department or at all. (d) They failed to put before Mr. Leigh Mr. Harrison's memorandum of Jan. 24 or to communicate its substance to him either before he gave his opinion of Feb. 3 or subsequently, before acting on his opinion. In these respects their conduct I is aptly described in the words of SIR WILLIAM BRETT, M.R., quoted earlier (46). In my opinion they did not take reasonable care to inform themselves of other facts with which they might have made themselves acquainted and therefore they failed to put full or proper instructions before their counsel.

So far as concerns the submission by counsel for the plaintiff that there was an absence of reasonable and probable cause on the part of the defendants in (a)

(43) (1813), 5 Taunt. 277. (44) (1824), 2 B. & C. 693.
(45) (1899), 63 J.P. 728.
(46) *Abrath* v. *North Eastern Ry. Co.*, (1883), 11 Q.B.D. at p. 450.

resisting the submission of no case before GLYN-JONES, J., at Manchester Assizes, and (b) in contesting the plaintiff's appeal in the Court of Criminal Appeal, I agree entirely with what ORMEROD, L.J., has said. A

On the question of malice I agree with what has been said by ORMEROD and UPJOHN, L.JJ., in their judgments and would only desire to add something as to one aspect of the argument of counsel for the plaintiff on this part of the case. The rule in *Smith* v. *Selwyn* (47) is conveniently summarised in the headnote of that case: B

> "An action for damages based upon a felonious act on the part of the defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted, and the proper course for the court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted." C

This rule must, in my judgment, be taken to apply if the facts on which the action is based disclose an allegation of felony even if they are also capable of supporting a charge of mere misdemeanour. It is to be observed that in the present case the charge laid in the original information was one of misdemeanour only, viz., conspiracy. But the indictment included a count for felony, viz., forgery; and it was on that count that the plaintiff was convicted. However that may be, I entirely agree with my Lords that, even though—as was obviously the fact in the present case—the ultimate object of the prosecution was not to punish the guilty but to recoup themselves, it is quite impossible to say that they were guilty of malice in performing the duty of prosecuting which was incumbent on them as a condition precedent to pursuing the civil remedy to which they conceived themselves to be entitled. D E

But counsel for the plaintiff argued that in the circumstances of the present case there was plainly a reasonable excuse for not prosecuting. The facts had been laid before the police and the Director of Public Prosecutions and those authorities had decided not to prosecute. Plainly, it is said, that fact would constitute a reasonable excuse for not prosecuting. There was therefore no duty to prosecute and so there would have been no ban to a civil action. This argument appealed to the judge. He says: F

> "I should have thought that if the Director of Public Prosecutions had carefully considered the case for weeks and had decided that it was not necessary in the public interest to prosecute, that, if anything, would be a reasonable excuse for not prosecuting." G

It may very well be, and I am prepared, without deciding, to assume that in the circumstances the defendants would have been able to show a reasonable excuse for not prosecuting and so could have sued the plaintiff without any prior prosecution. But it is, in my judgment, quite impossible to say that the fact that they might have been able to put forward a reasonable excuse for not prosecuting but chose instead to prosecute turned what would otherwise have been a non-malicious prosecution into a malicious one. H

In the result, therefore, the plaintiff in my judgment fails. For although in my view he did succeed in proving an absence of reasonable and probable cause, I agree with my Lords that he failed to prove malice.

Appeal dismissed with costs, to be taxed in Manchester (48). I

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *G. H. Stock & Co.*, Liverpool (for the plaintiff); *Hopwood, Hilbery, Mote & Leedham-Green*, agents for *Cyril C. Harrison*, Manchester (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(47) [1914] 3 K.B. 98.
(48) The case had proceeded throughout in the Manchester District registry.

A

NATIONAL BENZOLE CO., LTD. v. GOOCH.

[COURT OF APPEAL (Sellers, Upjohn and Diplock, L.JJ.), October 23, 24, 1961.]

Court of Appeal—Appeal—Consent to dismissal without costs—Consent initialled by president of court—No order drawn up or entered—Compromise for good consideration—No ground for setting it aside—Appeal not allowed to proceed.

B

The defendant's appeal against a decision of the High Court having been set down for hearing, his then solicitors drew up and signed a document requesting that the appeal be dismissed and struck out of the list with no order as to costs. On this document the plaintiffs' consent, by their solicitors, was indorsed. The document was initialled by the president of the division of the Court of Appeal to which the appeal lay. The defendant later changed his legal advisers and applied to the Court of Appeal that no order be drawn up or entered in the appeal until further order of the Court of Appeal, and that the appeal be heard.

C

Held: although an appeal was not determined until a formal order had been drawn up and entered, yet in the present case there was an agreement, by way of compromise, between the parties for good consideration to terminate the appeal and, there being no ground for setting that contract aside, the court would not, in the exercise of its discretion, allow the appeal to proceed.

D

Re Samuel ([1945] 2 All E.R. 319) and *James Lamont & Co., Ltd.* v. *Hyland, Ltd. (No. 1)* ([1950] 1 All E.R. 341) considered and distinguished.

E

[**Editorial Note.** For an example of a case in which the Court of Appeal allowed an appeal which had been dismissed to be reinstated, the order not having been drawn up and entered, and allowed the appeal, see *Bastow* v. *Bagley & Co., Ltd.*, p. 1101, post.

As to dismissal of appeals to the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 467, 468, para. 883; and for cases on the subject, see DIGEST (Practice) 815-817, *3759-3777*.]

F

Cases referred to:

Harrison's Share under a settlement, Re, Harrison v. *Harrison, Re Ropner's Settlement Trusts, Ropner* v. *Ropner*, [1954] 2 All E.R. 453; [1955] Ch. 260; [1954] 3 W.L.R. 156; *affd.* C.A., [1955] 1 All E.R. 185; [1955] Ch. 272; [1955] 2 W.L.R. 256; 3rd Digest Supp.

G

Lamont (James) & Co., Ltd. v. *Hyland, Ltd. (No. 1)*, [1950] 1 All E.R. 341; [1950] 1 K.B. 585; 2nd Digest Supp.

Samuel, Re, Trustee v. *Kerman (No. 2)*, [1945] 2 All E.R. 319; [1945] Ch. 364; 114 L.J.Ch. 337; 173 L.T. 278; 2nd Digest Supp.

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Application to the Court of Appeal.

This was an application to the Court of Appeal by the defendant who had previously, with the plaintiffs' consent, requested that his appeal against an order giving the plaintiffs leave to sign final judgment be dismissed and struck out of the list without costs. The defendant now applied that no order be drawn up or entered in the appeal until further order of the Court of Appeal, and that the appeal be heard.

I

Ian Percival for the defendant.

A. R. Campbell for the plaintiffs.

SELLERS, L.J.: By a writ dated July 19, 1961, the plaintiffs claimed against the defendant on a guarantee the sum of £11,562 10s. On Aug. 30 they applied for leave to enter judgment for that amount and were successful, being given leave by Master LAWRENCE. The defendant appealed on Sept. 5, 1961, to PLOWMAN, J., who dismissed the defendant's appeal against the decision of

Master LAWRENCE, thereby leaving the plaintiffs at liberty to sign final judgment for the amount claimed. On Sept. 18 the defendant gave notice of appeal from that decision, setting out the grounds on which he relied. That was set down for hearing on Sept. 22. On Oct. 3 the defendant's then solicitors drew up and signed this document:

> "We Messrs. Pettitt & Westlake do hereby certify that the appellant is sui juris and we request that the appeal in this action set down to be heard before the Court of Appeal be dismissed and struck out of the list."

That being typed, there was then added in writing in ink, "with no order as to costs". There was indorsed on that document: "We consent. Bird & Bird, solicitors for the plaintiffs who are sui juris". It would appear on the face of that document that the plaintiffs' solicitors were prepared to abandon their claim for costs on the dismissal of the action in order to get finality in this appeal. That document, according to the usual practice, came before me as president of this court and was initialled by me on Oct. 4. The agreement (for such it became) was not only for the appeal in the action to be dismissed but to be struck out of the list. It was struck out, and was removed from the list before there occurred the next matters to which I must make some reference. By a notice dated Oct. 17, the defendant gave notice that he would move this court on Oct. 23 (which was yesterday) for various orders, the first being "That no order or orders be drawn up or entered in this appeal until further order of the Court of Appeal". The matter was fought before us on this application to direct that no order should be drawn up with a view to this court giving authority to the defendant as an appellant to proceed with his appeal notwithstanding what had taken place before. It appears that no order was drawn up. It was not contemplated that it would be, because the agreement was that the appeal should be "dismissed and struck out of the list", as, indeed, it was, and there would be no occasion, apart from complete finality to these proceedings, to draw up an order, no taxation being contemplated or being even possible.

The application was supported by learned counsel for the defendant by observations of TUCKER, L.J., in the Court of Appeal in *James Lamont & Co., Ltd.* v. *Hyland, Ltd.* (*No. 1*) (1), where the learned lord justice said:

> "It is clear that the appeal is not dismissed until an order has been drawn up and entered. The signing of the consent and the initialling by the president of the court is all preliminary machinery leading up to the drawing up and entry of the order. Frequently no order is drawn up unless the taxation of costs is required, but, if an order is not drawn up and entered, a respondent may find himself in a difficulty. In the present case, the consent having been initialled by the president of this court, the matter is on the same footing as if an application had been made in open court and dealt with. The procedure of initialling these consents is merely to save time and expense, and it affords exactly the same authority to the officials who draw up the formal order as an order made in court. Accordingly, where this court has, under that procedure, in effect made an order which has not been drawn up, the court has power to refuse to allow the matter to be proceeded with by a fresh notice of appeal or by the party seeking to rely on the original notice of appeal."

Notwithstanding the submission of learned counsel for the plaintiffs that, in this case, the circumstances are different from *James Lamont & Co., Ltd.* v. *Hyland, Ltd.* (*No. 1*) (2)—and, indeed, also from the earlier authority to which reference was made by TUCKER, L.J., in his judgment in that case, *Re Samuel, Trustee* v.

(1) [1950] 1 All E.R. at p. 343; [1950] 1 K.B. at p. 587.
(2) [1950] 1 All E.R. 341; [1950] 1 K.B. 585.

A *Kerman (No. 2)* (3)—I think that what was there said by this court does cover this case, that there has been no order drawn up and that, therefore, this matter is open for consideration before this court, which is not deprived of jurisdiction. However, the two cases to which I have just referred lend no support to the defendant's application. In those two cases (and I do not refer to them further), the situation was different because there was nothing in the nature of an agree-
B ment; it was in both cases an application that the action should be dismissed, in one expressly with costs, in the other with no mention of costs. The effect is just the same; the application would be dismissed with costs. That, it was said, in those cases did not amount to an agreement; it could be unilateral or it could have the consent of the other party, but it was not an agreement for consideration. Here the situation is different. This amounts to an agreement
C —an agreement which terminates the appeal between the parties. In those circumstances, the court has to look at what there is on which it can exercise its discretion, as asked to do by the defendant.

If this had been a case where the defendant could have advanced that he wished to impeach that agreement on some recognised grounds, this court might have thought some steps could be taken to leave open the appeal until that
D matter had been adjudicated on; but learned counsel advanced no such claim and no such evidence. All that could be said was that, at a later date, after this agreement to having the proceedings dismissed and struck out had passed between the parties, the defendant changed his solicitor and, perhaps, his counsel and got further advice, and it was then thought that it had been improvident
E to enter into this agreement of withdrawal. That is not a sufficient ground on which this court could interfere, and, in my view, there is no evidence and no ground at all on which it would be proper for this court to exercise its discretion in favour of the defendant.

This application must be dismissed with costs.

F **UPJOHN, L.J.:** I agree. [HIS LORDSHIP stated the facts, and continued:] Two questions arise. First: is the appeal still on foot or has it come to an end just as though a formal order had been drawn up so that this court is without any further jurisdiction to entertain any application in the appeal? Secondly: if it has not come to an end and is still on foot, ought the defendant, in the circumstances of this case, to be allowed to continue his appeal?

G On the first point, I am of opinion that the appeal remains on foot until a formal order is drawn up and entered. It is clear that that is so in the High Court; the action remains on foot and the court can entertain applications therein even after judgment and until an order is perfected in accordance with R.S.C., Ord. 41, r. 1. For example, a judgment or order can be recalled: see *Re Harrison's Share under a settlement, Harrison* v. *Harrison* (4). In my judgment
H the position is the same in this court. That seems to me plain from the cases to which we were referred: *Re Samuel, Trustee* v. *Kerman (No. 2)* (3) and *James Lamont & Co., Ltd.* v. *Hyland, Ltd. (No. 1)* (5). As the relevant passage in the judgment of TUCKER, L.J., in the latter case has just been read by SELLERS, L.J., I will refrain from repeating it. We remain the masters of this appeal and can
I still entertain applications in it. The fact that the rather unusual words "and struck out of the list" appear at the end of the document does not add anything. Striking out of the list, whether it be in the High Court or in this court, does not thereby bring an action or an appeal to an end; an order is required. Accordingly, we can entertain this application.

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(3) [1945] 2 All E.R. 319; [1945] Ch. 364.
(4) [1954] 2 All E.R. 453; [1955] Ch. 260.
(5) [1950] 1 All E.R. 341; [1950] 1 K.B. 585.

On the second point I only desire to say this. As was explained by LORD GREENE, M.R., in *Re Samuel* (6), an appellant may, by unilateral action in his appeal, bring his appeal to an end by signing a document requesting that his appeal be dismissed, and that, when signed by the president of the court, will be an authority to draw up a formal order. If a respondent signs that request by way of consent, that does not constitute a contract, for in agreeing to a mere dismissal of the appeal he gives no consideration because he is automatically entitled to tax his costs of the abandoned appeal. In such cases, the court exercises its discretion whether to allow the appeal to continue or not: and, in proper cases, if the respondent has not altered his position and is not embarrassed the court may in its discretion permit the appeal to proceed. The court has a general, though judicial, discretion in the matter.

However, this, as SELLERS, L.J., has pointed out, is quite a different case. The consent of the plaintiffs' solicitors was required to the document of Oct. 3 before the president would initial it, because it was not a mere dismissal, it was a dismissal in which the respondent-plaintiffs waived their right to costs of an abandoned appeal. This was a perfect example of an ordinary compromise. Nothing is commoner in these courts—especially at first instance—than for an action to terminate by consent in an order dismissing the plaintiff's action without costs. That is plainly a compromise; and so was this. A compromise, like any other agreement, can only be set aside on certain grounds which are familiar to all. In this case, no grounds whatever are advanced for setting aside this compromise. We have no evidence whatever before us on that point. All that is said is that there has been a change of solicitor and counsel and, consequentially, a change of mind on the part of the defendant. But that is no ground for setting aside an agreement. That only means that the defendant has repented of his bargain. It would be quite wrong if, in such circumstances, we permitted this appeal to continue, in face of the plain agreement which the defendant and the plaintiffs have reached. I would dismiss this application.

DIPLOCK, L.J.: I agree. In my view, *Re Samuel, Trustee* v. *Kerman (No. 2)* (7) and *James Lamont & Co., Ltd.* v. *Hyland, Ltd. (No. 1)* (8) establish that, once an appeal has been set down, it is technically determined only when a formal order disposing of it has been drawn up by the appropriate officers of the court, and that, until that point is reached, this court has a discretion to withdraw its previous instructions in relation to the order and to make all such orders as it thinks fit.

In the two cases referred to, in which, despite an earlier request for the dismissal of the appeal, the Court of Appeal went on to hear it, the request had been for the dismissal of the appeal and, either expressly or in effect, *with costs*. It is true that the consent of the respondent had in each case been obtained, but the consent was otiose because the appellant could have obtained the same dismissal without any consent by the other side. There was, therefore, no consideration sufficient to support a contractual relationship between the appellant and the respondent with regard to the dismissal of the appeal. This is a different case. Here, as my Lords have pointed out, there was an agreement entered into between the parties for good consideration similar to an agreement compromising an action. It was conceded by counsel for the defendant that there were no grounds on which it could be alleged that that agreement was either void or voidable. It was one which would stand.

While I agree with my Lords that this court has a full discretion what it will do until the final order is drawn up, I find it difficult to conceive of any case where

(6) [1945] 2 All E.R. at p. 322; [1945] Ch. at p. 369.
(7) [1945] 2 All E.R. 319; [1945] Ch. 364.
(8) [1950] 1 All E.R. 341; [1950] 1 K.B. 585.

A it would be a judicial exercise of that discretion to allow a party to go on with an appeal after having entered into a binding contract for good consideration not to do so. That is this case; and I agree that this application should be dismissed.

Application dismissed.

B Solicitors: *Constant & Constant* (for the defendant); *Bird & Bird* (for the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

C

BASTOW *v.* BAGLEY & CO., LTD.

[COURT OF APPEAL (Sellers, Upjohn and Diplock, L.JJ.), October 10, 27, 1961.]

D *Court of Appeal—Damages—Assessment by judge alone—Test for intervention by appellate court—Disparity with assessment in similar case by another Division of Court of Appeal.*

Court of Appeal—Reinstatement of dismissed appeal—Final judgment not entered—Appeal as to damages—Disparity with subsequent assessment in similar case by Court of Appeal.

E The plaintiff, a fitter, lost all useful vision in his right eye as a result of an accident while employed by the defendants. He suffered pain and had to have in-patient hospital treatment for about two weeks, but within two months of the accident he was back at work. He suffered no immediate loss of earnings, and there was no risk of future pain or discomfort or of sympathetic ophthalmia of the other eye. He was able to continue to play football F properly, but could no longer play a fast game of table tennis. The trial judge held that the accident was due to the defendants' negligence, and assessed the plaintiff's general damages at £1,150. On appeal by the plaintiff, the Court of Appeal held that this assessment, although less than that which the Court of Appeal would have made, was not so low as to justify the intervention of that court. The appeal was, therefore, dismissed, but before final G judgment had been entered in the appeal, another Division of the Court of Appeal increased to £2,000 an award of £850 general damages for loss of an eye with broadly similar consequences.

Held: the disparity between the two awards was too great to be just and fair to the plaintiff in all the circumstances and, accordingly, the assessment in the present case would be increased to £1,800.

H Appeal allowed.

[**Editorial Note.** On the aspect of the reinstatement of the appeal, compare *National Benzole Co., Ltd.* v. *Gooch*, p. 1097, ante.

As to variation by the Court of Appeal of an award of damages by a judge alone, see 11 HALSBURY'S LAWS (3rd Edn.) 312, para. 508; and for cases on the I subject, see 17 DIGEST (Repl.) 193, 194, *913-916.*

As to principles on which the Court of Appeal acts on hearing appeals, see 30 HALSBURY'S LAWS (3rd Edn.) 470, 471, para. 886; and for cases on the subject, see DIGEST (Practice) 769-771, *3348-3362.*]

Cases referred to:

Bloomfield v. *British Transport Commission*, [1960] 2 All E.R. 54; [1960] 2 Q.B. 86; [1960] 2 W.L.R. 693; 3rd Digest Supp.

Wharton v. *Sweeney* (Oct. 12, 1961, C.A.), unreported.

Appeal.

On Dec. 8, 1960, HINCHCLIFFE, J., sitting at Leeds Assizes, held that an accident which the plaintiff had sustained at work, and as a result of which he lost all useful vision in his right eye, was due to the negligence of his employers, the defendants, but that the plaintiff was guilty of fifty per cent. contributory negligence. The plaintiff suffered £5 special damages. HINCHCLIFFE, J., assessed the plaintiff's general damages at £1,150, and, accordingly, awarded him £577 10s. damages. The plaintiff now appealed, contending that his general damages should be assessed at a higher figure, and the award increased accordingly. The facts are stated in the judgment of SELLERS, L.J.

Marven Everett, Q.C., and *S. E. Brodie* for the plaintiff.

P. Stanley Price, Q.C., and *D. Herrod* for the defendants.

Oct. 10. **SELLERS, L.J.:** The plaintiff was awarded damages for the loss of " all useful vision " in his right eye and his situation is, perhaps, as favourable as anyone's could be with that particular loss. The defendants were held liable to compensate the plaintiff, who was employed with them as a fitter, on account of an accident at a grinding machine which caused this disability and the learned judge assessed the general damages at £1,150. The question on this appeal is whether that sum is one which ought to be increased having regard to the nature and the extent of the disability. The plaintiff was not taken at once to hospital. He visited it once or twice in the few days after the accident, which was as far back as Jan. 30, 1959. He said that he had severe pain over the weekend and went specially on the Sunday to the hospital and on the following Tuesday was taken in as an in-patient; but he was only there another week or two and was back at work in March, 1959. It is in his favour very strongly and should not (as learned counsel submitted) prejudice his damages that he adapted himself rapidly to his monocular vision. The disability in that respect, whilst taking him (in his discretion on this matter) from his old work, where there was, perhaps, more risk of further injury, did not deprive him of work. He adapted himself to other work at which he has been earning as much as he would have done, at any rate up to the present time, at his pre-accident work. There is no suggestion—except of course always a remote possibility—that he will not be able to carry on work in the future as a fitter.

Learned counsel for the defendants set out some six different matters which call for consideration in eye cases, and submitted that, in each one of these, no answers favourable to the plaintiff's claim could be given. As regards the usefulness of the eye, he submitted that this was not an eye which was wholly deprived of sight; it had some slight and not altogether inappreciable advantage of being able to detect some sort of movement—as it was said, some " guiding vision "—and he contrasted it with the case where there was no vision at all. There is, I think, clearly here no risk of future trouble in the sense of any sympathetic ophthalmia of the other eye or of pain or discomfort. On the other hand, it was pointed out that if, in fact, the good eye was affected (and that eye has exceptionally good vision at the moment), then, of course, his situation would be serious, and that is a factor to be taken into consideration. With regard to disfigurement, it was submitted on behalf of the defendants that that did not arise here, that the eye was intact, although limited in vision, and that there was nothing repellent about the appearance. No reference is made to that in the learned judge's judgment. With regard to the future prospects of earning capacity, there is really no evidence which indicates that there should be any great compensation for that, although there is a slight factor of risk of loss of earnings to be taken into consideration. The other ingredient was the general effect on his enjoyment of life. As it happens, the plaintiff, who used to play football, has gone back to playing football and does not complain that he cannot

A do it properly. One other recreation that he mentioned was table tennis; he finds that he is under a disability to play a fast game now.

My own view is that this figure is less than I would, myself, have awarded for the injury, but we have set out in a recent judgment of this court, in *Bloomfield* v. *British Transport Commission* (1), the principles on which we act and are guided to act by authority. I do not repeat what was said there but must apply B it. Notwithstanding the submission of learned counsel for the plaintiff that the assessment of damages in these cases should be uniform and to some degree consistent, there is such a variety of facts and circumstances that that possibly desirable end cannot be achieved. After consulting with my colleagues on it, and having given the best consideration we all can to this matter, we have not come to the conclusion that this is a case where we should intervene. It is the C assessment of an experienced, learned judge who had before him the plaintiff with this very unfortunate eye injury but one which did not entail anything more than a minimum of unfavourable consequences having regard to that injury. Therefore, with some regret, I feel that this appeal must be dismissed.

UPJOHN, L.J.: I agree, and do not desire to add anything.

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DIPLOCK, L.J.: I agree. I think that the damages here were low, and very close to the border-line at which the court would feel entitled to interfere; but, for the reasons given by SELLERS, L.J., I think that "very close" is not the right test.

Appeal dismissed. Leave to appeal to the House of Lords refused.

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Oct. 27. **SELLERS, L.J.:** Final judgment had not been entered in this appeal when another Division of this court had occasion to hear and determine an appeal relating to the loss of an eye with broadly similar consequences to those affecting the plaintiff here. In that case, *Wharton* v. *Sweeney* (2), the damages awarded by the trial judge were only £850, which, no doubt, was so F low a sum as clearly to require the court to intervene and to substitute its own assessment on the evidence before it. The other Division awarded £2,000. In the present case, the trial judge's award was £1,150. Having regard to established principles which guide this court in reviewing damages, it left a doubt in the court's mind whether it would be proper to disturb it, but, as three of our G brethren in the other Division have assessed the damages for the loss of an eye in their case at £2,000, we are now satisfied that the disparity between that and the award here under review is too great to be just and fair to the plaintiff in all the circumstances. On the other hand, there is no statutory schedule, and there can never be a sum which can be said to be established as the right sum to be awarded for the loss of an eye or a limb or any other bodily injury. There is a H considerable latitude in an assessment according to all the circumstances and according to a judge's view of the nature and extent of the injury. In the present appeal, we find the plaintiff's position to be somewhat better than that of the plaintiff in the recent case in the other court and, making allowance for the more favourable conditions, we would award £1,800 damages and vary the learned judge's order accordingly. We, therefore, allow the appeal.

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UPJOHN, L.J.: I agree.

DIPLOCK, L.J.: I agree. In awarding damages for any physical injury, the court is attempting to equate incommensurables. No purely logical process

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(1) [1960] 2 All E.R. 54; [1960] 2 Q.B. 86 (reported on another point).

(2) Unreported, Court of Appeal (ORMEROD, HARMAN and PEARSON, L.JJ.), Oct. 12, 1961; on appeal from LLOYD-JACOB, J., July 5, 1960, at Manchester.

can lead to the conclusion that, for the loss of the sight of one eye, the right sum of compensation which will be just as between the victim and the tortfeasor is in the region of £2,000 rather than in the region of £1,000 or of £10,000. The choice of the right order of figure is empirical and, in practice, results from a general consensus of opinion of damage-awarding tribunals—juries, judges and appellate courts. What can be said, however, if justice is to be done as between one victim and another and one tortfeasor and another, is that, when all proper allowance has been made for what may be widely differing circumstances of the individual victims, the sum awarded to one should not be out of all proportion to the sum awarded to another in respect of similar physical injuries.

When this case was first argued, I expressed my own view that it was very close to the border-line at which an appellate court feels entitled to interfere with an estimate of damages made by a very experienced judge who had seen the victim and formed an obviously careful opinion as to the extent to which he, as an individual, would be handicapped by the disability of monocular vision. In the light of the almost contemporaneous award of £2,000 by another Division of this court for a very similar injury to a plaintiff in broadly similar circumstances to those of the plaintiff in this case, I, like my Lords, have reached the conclusion that I was mistaken, and that the present case, although border-line, is, nevertheless, one in which we can and should interfere with the award made by the trial judge. This *is* a case in which the loss of the sight of one of his eyes will have less serious consequences to the plaintiff than in the great majority of cases of similar injuries and, I think, somewhat less, so far as possible risk to future earning capacity is concerned, than in the similar case decided by the other Division of this court.

I agree that, in the circumstances of this case, £1,800 is the appropriate sum to be awarded as compensation.

Appeal allowed.

Solicitors: *W. H. Thompson* (for the plaintiff); *G. A. Herbert*, agent for *Willey, Hargrave & Co.*, Leeds (for the defendants).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

A

CHAPMAN *v.* CHAPMAN (by his Guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), October 23, 27, 1961.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years immediately preceding the presentation of the petition—Respondent husband left hospital on discharge less than twenty-eight days before presentation of the petition—Care and treatment ended—Interval before presentation of a petition not an "interruption" in care and treatment—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 1 (1) (*d*)—*Divorce* (*Insanity and Desertion*) *Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 54), *s.* 1 (3).

B

From Sept. 28, 1952, until Nov. 7, 1959, the husband was continuously under care and treatment in a hospital first as a certified patient and later as a voluntary patient. On Nov. 7, 1959, however, he left the hospital, the doctors being of the opinion that he was well enough to be discharged if he continued to take a drug. He went to live in a hostel, found employment as a labourer and continued thus until Sept. 8, 1960. On Sept. 8, 1960, he was re-admitted to hospital as a voluntary patient but he left again on Apr. 8, 1961, and returned again to the hostel where he continued to live and earn wages. On Nov. 28, 1959, the wife presented a petition for divorce founded on s. 1 (1) (d)* of the Matrimonial Causes Act, 1950, alleging that the husband was incurably of unsound mind and had been continuously under care and treatment from Sept. 28, 1952, until Nov. 7, 1959, "being a date less than twenty-eight days before the presentation of this petition"; she contended that the period from Nov. 7 to Nov. 28 could, by virtue of s. 1 (3)† of the Divorce (Insanity and Desertion) Act, 1958, be disregarded when determining the period of five years continuous care and treatment for the purpose of s. 1 (1) (d)*.

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Held: the petition would be dismissed since the husband's treatment ceased on Nov. 7, 1959, and, never being resumed, the period from that date until the presentation of the petition was not an "interruption" of a period of care and treatment; accordingly the period of care and treatment had not continued to a date immediately preceding the presentation of the wife's petition.

F

[As to the need for continuity in care and treatment for the purpose of divorce on the ground of incurable unsoundness of mind, see 12 HALSBURY'S LAWS (3rd Edn.) 279, 280, para. 538; and for cases on the subject, see 27 DIGEST (Repl.) 282, *2264*, 368-371, *3048*, *3049*, *3057-3068*, and 3rd DIGEST SUPP.

For the Matrimonial Causes Act, 1950, s. 1 (1) (d), see 29 HALSBURY'S STATUTES (2nd Edn.) 390.

For the Divorce (Insanity and Desertion) Act, 1958, s. 1 (3), see 38 HALSBURY'S STATUTES (2nd Edn.) 485.]

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Case referred to:

Whysall v. *Whysall*, [1959] 3 All E.R. 389; [1960] P. 52; [1959] 3 W.L.R. 592; 3rd Digest Supp.

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* The Matrimonial Causes Act, 1950, s. 1, so far as material, provides—"(1) . . . a petition for divorce may be presented to the court . . . on the ground that the respondent . . . (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; . . .

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"(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment . . . (d) while he is receiving treatment as a voluntary patient . . . being treatment which follows without any interval a period during which he was detained . . .". The amendments by the Mental Health Act, 1959, s. 149 (2) and Sch. 7, Sch. 8, Part 1, do not amend the words extracted above.

† Section 1 (3) of the Divorce (Insanity and Desertion) Act, 1958, provides—"In determining for the purposes of [s. 1 of the Act of 1950] whether any period of care and treatment has been continuous, any interruption of such a period for twenty-eight days or less shall be disregarded."

Petition.

In this case the wife petitioned for divorce on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

The parties were married in August, 1944, and there were three children born in 1945, 1952, and 1953. On July 25, 1950, the husband was admitted to Carlton Hayes Hospital, Narborough, Leicestershire, as a certified patient pursuant to a reception order of the same date. On Jan. 2, 1951, he was discharged but on Sept. 21, 1952, he was again admitted to the same hospital as a voluntary patient and on Sept. 28, 1952, re-graded as a certified patient. On July 15, 1959, he was discharged as relieved but was re-admitted on the same date as a voluntary patient and remained there until Nov. 7, 1959. On that date he left the hospital and went to live in a Church Army hostel until Sept. 8, 1960. During that period he was employed as a labourer, but he did not return to his wife and family. On Sept. 8, 1960, he was re-admitted to the same hospital as a voluntary patient but on Apr. 8, 1961, he left the hospital and returned to the hostel. He has continued to live there, earning wages from his employment and fending for himself.

By her petition dated Nov. 28, 1959, the wife alleged

> " that the [husband] is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of this petition, in that from Sept. 28, 1952, until Nov. 7, 1959, being a date less than twenty-eight days before the presentation of this petition he was detained in Carlton Hayes Hospital . . . Such detention was from Sept. 28, 1952, until July 15, 1959, pursuant to a reception order under the Lunacy Act, 1890, and immediately thereafter as a voluntary patient under the Mental Treatment Act, 1930."

By his answer the husband, by his guardian ad litem denied that he was incurably of unsound mind or that he had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The case is reported on the question whether or not by reason of the provisions of s. 1 (3) of the Divorce (Insanity and Desertion) Act, 1958, the period from Nov. 7, 1959, until Nov. 28, 1959 (the date of presentation of the petition) being less than twenty-eight days, could be disregarded when considering the requirement of s. 1 (1) (d) of the Matrimonial Causes Act, 1950, that is to say that the husband had been continuously under care and treatment for a period of at least five years " immediately preceding the presentation of the petition ".

T. R. Heald for the wife.

Bruce Holroyd Pearce for the Official Solicitor, as guardian ad litem for the husband.

Cur. adv. vult.

Oct. 27. **MARSHALL, J.,** read the following judgment in which, having stated the facts and considered the medical evidence, he continued: This being the state of the evidence called on behalf of the wife the first question to which I have to address my mind is whether it has been proved that the husband is today " incurably of unsound mind " within the meaning of s. 1 (1) (d) of the Matrimonial Causes Act, 1950. The burden of proof is on the wife. The position as I see it is that the husband, who I accept is suffering from paranoid schizophrenia, (i) is no longer subject to any reception order; (ii) is no longer under medical treatment or care; (iii) is able substantially to control his condition by the taking of drugs; (iv) is able to work and earn wages and is capable of securing work; (v) is living normally at a Church Army hostel without any special supervision or care. The fact that he has not returned to live with his wife can equally well be explained by a lack of any desire to do so. I am not satisfied that he is

A incapable of living or is not fit to live with his wife, assuming the desire to do so exists.

It seems to me in the light of all these factors that the wife has failed to establish that the husband is incapable of managing himself or his affairs, bearing in mind that affairs must be held to include the problem of work, society and of marriage. Adopting the test applied by PHILLIMORE, J., in *Whysall* v. *Whysall* (1), on the B facts of the present case I am not satisfied that the husband is now suffering from incurable unsoundness of mind within the meaning of s. 1 (1) (d) of the Matrimonial Causes Act, 1950.

I think, however, that this petition should be dismissed for another reason. To come within the section the husband must be proved to have been continuously under care and treatment for a period of at least five years immediately before the presentation of the petition. C It is clear that from Sept. 28, 1952, to July 15, 1959, the husband was continuously under care and treatment and detained under certification. On July 15, 1959, his status changed. He was discharged from being detained in hospital under certification and continued thereafter as a voluntary patient under care and treatment at the same hospital. There is no doubt that he has been under care and treatment for a continuous D period of more than five years.

On Nov. 7, 1959, he left the hospital altogether. Subject to giving seventy-two hours' notice he could as a voluntary patient have left the hospital if need be against the advice of the doctors. In fact, on that day he was discharged because in the opinion of the doctors he was well enough to leave and from that date his treatment ceased. He lived without supervision in a Church Army hostel, E secured a job, went to work and earned wages. In my view from that day care and treatment ceased. To describe the mere fact that periodical medical examination or checkups were advised as a continuation of care and treatment within the meaning of the section is quite unjustified.

The period from Nov. 7, 1959, when he left the hospital to Nov. 28, 1959, when the wife presented her petition, though a period of less than twenty-eight days F was not a period of "interruption" in the care and treatment. The treatment ceased and was never resumed and thereafter no care was exercised over him. In those circumstances the wife cannot call to her aid the provisions of s. 1 (3) of the Divorce (Insanity and Desertion) Act, 1958. The continuity was broken and the period of continuous care and treatment, albeit more than five years, did not continue to a date immediately before the presentation of the petition. G Though I entertain a real sympathy for the wife in her misfortune I cannot do other than dismiss her petition.

Petition dismissed.

Solicitors: *Kinch & Richardson* (for the wife); *Official Solicitor* (as guardian ad litem for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(1) [1959] 3 All E.R. 389; [1960] P. 52.

RIDGE NOMINEES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

A

[COURT OF APPEAL (Lord Evershed, M.R., Donovan and Danckwerts, L.JJ.), November 7, 8, 9, 1961.]

Stamp Duty—Conveyance on sale—Transfer of stock—Compulsory transfer under statutory provision—Company acquiring nine-tenths of other company's stock—Transfers of dissenting shareholder's stock executed by nominee—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 209—*Whether transfer on sale—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54, *Sch.* 1.

B

A company's offer to acquire the stock of another company was accepted by more than nine-tenths in value of the stockholders and in pursuance of powers conferred by s. 209 of the Companies Act, 1948, the offering company then caused a transfer to be executed by its nominee on behalf of a stockholder who had not accepted the offer, the transfer being of her stock and to the offering company.

C

Held: the transfer was a " transfer on sale " within s. 54 of and Sch. 1 to the Stamp Act, 1891, notwithstanding that the transferor was compelled to sell against her will (see p. 1117, letter C, post), her dissent being overridden by the assent imposed by the Companies Act, 1948, s. 209 (see p. 1116, letter I, post), which had brought about a transfer having on its face all the essential characteristics of a sale and had conferred authority for its execution which the transferor could not revoke (see p. 1115, letter E, and p. 1116, letter A, post); accordingly the transfer was liable to ad valorem duty under the head of " conveyance or transfer on sale " in Sch. 1 to the Stamp Act, 1891.

D

E

Furness Ry. Co. v. *Inland Revenue Comrs.* ((1864), 33 L.J.Ex. 173), *John Foster & Sons, Ltd.* v. *Inland Revenue Comrs.* ([1894] 1 Q.B. 516), *Great Western Ry. Co.* v. *Inland Revenue Comrs.* ([1894] 1 Q.B. 507), and *A.-G.* v. *Felixstowe Gas Light Co.* ([1907] 2 K.B. 984) applied.

Kirkness v. *John Hudson & Co., Ltd.* ([1955] 2 All E.R. 345) considered.

F

Decision of BUCKLEY, J. ([1961] 2 All E.R. 354) on this point reversed.

[As to the meaning of " conveyance or transfer on sale " for the purposes of the Stamp Act, 1891, see 28 HALSBURY'S LAWS (2nd Edn.) 458, para. 973; and for cases on the subject, see 39 DIGEST 278-285, *621-671.*

For the Stamp Act, 1891, s. 54 and Sch. 1 (" Conveyance or transfer on sale "), see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 667.

G

For the Companies Act, 1948, s. 209, see 3 HALSBURY'S STATUTES (2nd Edn.) 628.]

Cases referred to:

A.-G. v. *Felixstowe Gas Light Co.*, [1907] 2 K.B. 984; 76 L.J.K.B. 1107; 97 L.T. 340; 39 Digest 281, *650.*

H

Eastbourne Corpn. v. *A.-G.*, [1904] A.C. 155; 73 L.J.K.B. 259; 90 L.T. 99; 68 J.P. 393; 11 Digest (Repl.) 249, *1187.*

Foster (John) & Sons, Ltd. v. *Inland Revenue Comrs.*, [1894] 1 Q.B. 516; 63 L.J.Q.B. 173; 69 L.T. 817; 58 J.P. 444; 39 Digest 281, *648.*

Great Western Ry. Co. v. *Inland Revenue Comrs.*, [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 39 Digest 280, *646.*

I

Kirkness v. *John Hudson & Co., Ltd.*, [1955] 2 All E.R. 345; [1955] A.C. 696; 36 Tax Cas. 28, 57; [1955] 2 W.L.R. 1135; 28 Digest (Repl.) 310, *1356.*

Newcastle Breweries, Ltd. v. *Inland Revenue Comrs.*, [1927] All E.R. Rep. 287; 96 L.J.K.B. 735; 137 L.T. 426; sub nom. *Inland Revenue Comrs.* v. *Newcastle Breweries, Ltd.*, 12 Tax Cas. 927; 28 Digest (Repl.) 413, *1833.*

Ulverston & Lancaster Ry. Co. v. *Inland Revenue Comrs.*, (1864), 2 H. & C. 855; 159 E.R. 354; sub nom. *Furness Ry. Co.* v. *Inland Revenue Comrs.*, 33 L.J.Ex. 173; 10 L.T. 161; 39 Digest 280, *645.*

A **Appeal.**

The respondent company presented three instruments of transfer to the Commissioners of Inland Revenue for their opinion as to the stamp duty chargeable under the Stamp Act, 1891. The instruments were transfers of stock units in Gresham Trust, Ltd. The commissioners were of opinion that each of the instruments was a "conveyance or transfer on sale" for the purposes of the B Stamp Act, 1891, and was accordingly chargeable with ad valorem duty. The respondent company appealed by way of Case Stated to the High Court. On Mar. 23, 1961, as reported at [1961] 2 All E.R. 354, BUCKLEY, J., held that each of the first two instruments was a "conveyance or transfer on sale" within s. 54 of, and Sch. 1 to, the Stamp Act, 1891, and was liable to ad valorem duty, but that the third instrument was liable only to 10s. duty and not to ad valorem C duty as a "conveyance or transfer on sale" under Sch. 1, on the ground that sale there connoted a contractual sale involving consensus ad idem and not a transfer made under compulsion by virtue of an enactment such as s. 209 of the Companies Act, 1948, under which the third transfer had been executed. The Crown appealed against the decision so far as relating to the third instrument only.

D *H. B. Magnus, Q.C.*, and *E. Blanshard Stamp* for the Crown.

K. W. Mackinnon, Q.C., and *J. G. Monroe* for the respondent company.

LORD EVERSHED, M.R.: The question raised in this appeal, which was in fact only one of the points raised before the judge at first instance, relates to the question whether ad valorem stamp duty is leviable in respect of or on a E certain document, being a transfer of 440 shares in a company originally known as Gresham Trust, Ltd., to another company called Ridge Nominees, Ltd., which is the respondent in this court. Gresham Trust, Ltd. subsequently changed its name, but I shall continue, for convenience, to refer to the company as "the Gresham" company. There is also a further slight complication, that the offer to purchase shares in the Gresham company, out of which this matter F arose, was made, not by the appellant company, but by another company of a similar name, of which the respondent company is a wholly controlled subsidiary, as I understand.

The document purports on the face of it to be a transfer by Mrs. Rita Bell, of an address given, in consideration of £891 paid by the respondent company, of 440 shares in the Gresham company, and the document is expressed to be G executed as follows: "As witness our hands and seals", and the date is stated, "signed, sealed and delivered by Norman Frank Baldock on behalf of Mrs. Rita Bell", and then the common seal of the respondent company is duly affixed in the presence of a director and secretary. It is, in other words, a perfectly common form transfer of shares purporting on the face of it to be obviously a transfer on the sale by Mrs. Bell to the respondent company of 440 shares, H subject only to this, that not she, but someone expressed as her agent, executed it on her behalf.

I have deliberately opened my judgment by referring to the document of transfer because the problem arises under the terms of Sch. 1 to the Stamp Act, 1891, and is whether the document is properly described as a "conveyance or transfer on sale of any property". The exception stated in Sch. 1 need not be I referred to. Some further assistance in answering the question posed is given by s. 54 of the Act:

> "For the purposes of this Act the expression 'conveyance on sale' includes every instrument . . . whereby any property . . . upon the sale thereof is transferred to . . . a purchaser, or any other person on his behalf or by his direction."

So the question for us is whether this transfer falls within the definition which I have indicated and the terms in Sch. 1,

The respondent company made an offer for purchase from all the stockholders of their stock in the Gresham company. That offer was made in November, 1958. The offer was at the price of 40s. 6d. per unit of stock and there were in fact £600,000 worth of issued ordinary stock in the Gresham company. The offer was accompanied by a circular letter and also by a form of transfer, and the stockholders, if they chose to accept the offer, were invited so to indicate and to execute a transfer accordingly. As is common in such circumstances, the offer was made conditional on its acceptance by not less than ninety per cent. in value of the stock held by the stockholders. In fact, we were informed that more than ninety per cent. in value did accept the offer, but Mrs. Rita Bell was one of those who did not think fit to accept it. Thereupon, as they were entitled to do, the respondent company invoked the powers given by s. 209 of the Companies Act, 1948. The whole problem turns on this, whether the instrument which came into being as a result of that can properly be called a transfer, on sale within Sch. 1—a point which may be shortly stated, but which has presented considerable difficulty and led to much interesting argument on both sides.

Section 209 (1) of the Companies Act, 1948, provides:

> " Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as ' the transferor company ') to another company, whether a company within the meaning of this Act or not (in this section referred to as ' the transferee company '), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiration of [the period earlier mentioned] give notice in the prescribed manner [nothing turns on the form] to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company . . ."

I can pass over the next subsection. Subsection (3) provides:

> " Where a notice has been given by the transferee company under sub-s. (1) of this section and the court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares."

Subsection (5) defines a dissenting shareholder thus:

> ". . . the expression ' dissenting shareholder ' includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract."

A Now in this case, as I have said, ninety odd per cent. in value of the stockholders of the Gresham company did assent, and, following the invitation of the respondent company, executed forms of transfer of the stock, of which they were registered holders. Ex facie those transfers would be the same in form and in effect precisely as the instrument of transfer now before us, with the one exception that in the case of Mrs. Bell's stock the transfer was not executed by B her but, pursuant to the powers given by s. 209, by Mr. Norman Frank Baldock expressly on her behalf. So far it would, I confess, be strange and anomalous if the whole of the transfers executed by assenting stockholders were liable to ad valorem duty in the hands of the transferee company but that Mrs. Bell's transfer was not, owing to the circumstance that she was not herself an assenting shareholder but was a dissenting shareholder and, therefore, transferred (and C indeed had to transfer) her shares by virtue of the powers given to the respondent company by the Act. But it is notorious that stamp duty legislation does sometimes produce anomalies, and our duty is to see whether, as we read the language used, it can fairly be said that this document is properly speaking a conveyance or transfer on sale within the language of Sch. 1 as expanded by s. 54.

D The precise point has not before come before the court but we have been referred to some authorities to which I shall make some allusion. Before doing so, I will refer to another piece of legislation, because counsel for the Crown proffered an alternative argument based on s. 12 of the Finance Act, 1895, which provides:

> "Where after the passing of this Act, by virtue of any Act, whether E passed before or after this Act, either—(a) any property is vested by way of sale in any person; or (b) any person is authorised to purchase property; such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some F instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the ad valorem duty payable upon a conveyance on sale of the property; and in default of such production . . ."

certain consequences follow.

G A case came before this court in 1894 not under this section but under another earlier Act, on which much of the argument has hinged, *Great Western Ry. Co.* v. *Inland Revenue Comrs.* (1). It arose under a special Act of the Great Western Railway Co. called the Great Western Railway Act, 1892, of which the purpose was the amalgamation with the larger Great Western Railway of two smaller railway concerns. The question turned on s. 32, which provided:

> H ". . . a Queen's printer's copy of this Act shall be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act with reference to each of the amalgamated companies were a transaction effected by an executed instrument in writing, and the copy were the instrument."

The copy is a copy of the Act. It was suggested that the case there fell outside I the scope of the stamp duty legislation, because it could not be said that there was, strictly speaking, a sale—that the necessary ingredients which make up a sale were there absent. LORD ESHER, M.R., said this (2):

> "If that transaction had taken place between private persons or private companies without an Act of Parliament, supposing that were possible, how would it be done, and what would be the substance of the transaction? It would be done by an instrument, which, as regards its legal effect, would be,

(1) [1894] 1 Q.B. 507. (2) [1894] 1 Q.B. at p. 512.

in part at all events, a transfer of the property of the one company to the other for the consideration I have just described. That might or might not be in virtue of a contract of purchase and sale, but it would have precisely the same effect as if it were a conveyance, the consequence of a contract of purchase and sale. The substance of such a transaction, then, would be a transfer of property for a consideration, as if it were upon a contract of purchase and sale."

The Master of the Rolls turned to the Stamp Act and to the formula "a conveyance on sale" and came to the conclusion (and the other learned lords justices agreed with him) that in the circumstances a Queen's printer's copy of the Great Western Railway Act, 1892, must be produced with an ad valorem stamp attached to it. At the conclusion of the judgment of KAY, L.J. (he had followed the general reasoning of the Master of the Rolls) LORD ESHER is reported to have said this (3):

"I ought to have said that we cannot distinguish this case from the case of *Furness Ry. Co.* v. *Inland Revenue Comrs.* (4)."

As BUCKLEY, J., pointed out, that case has this difference on its facts from the *Great Western Ry.* case (5) and I read from his judgment citing the headnote (6):

"The consideration for the transfer of the whole undertaking of one railway company to another consisted of the purchasing company taking on themselves the liabilities of the vendors, and creating and allotting to the shareholders of the selling company preference stock of the purchasing company equal in amount to the capital of the other, which was to be extinguished: *Held*, that this preference stock was to be stock within the meaning of the schedule, and therefore liable to pay duty on its market value."

That was a case, beyond question, where there was a contractual sale, the parties to it having deliberately contracted to the effect of the instrument, whereas in the *Great Western Ry.* case (5) the whole suggestion for avoiding duty had rested on this, that in that case it was the imposition of a statute and that one essential element of a sale was, therefore, absent. As I have indicated, LORD ESHER, M.R., said at the end of his judgment that the two cases could not be distinguished (3). So it was suggested on behalf of the respondent company here that what the Master of the Rolls must have had in his mind was this, that the parties, the amalgamating company and the amalgamated companies, must all of them have agreed to the promotion of the necessary Act which produced a transfer, so that there was present the essential element of mutual assent which, it is said, must be found in any so-called sale. It is plain in this case that Mrs. Bell must be taken never to have assented; she falls within the definition of "dissenting shareholder". The burden of the argument on the respondent company's behalf is therefore that there cannot here be a sale, because the essential element of mutual assent is absent. Counsel for the respondent company made it clear that he was not suggesting that there had to be some pre-existing contract, but he said that there must be in truth and in fact assent when the necessary time came, i.e., when the transfer is executed, and, as he observed, the price, which is an essential part of the transaction of sale, itself was never agreed: Mrs. Bell agreed to nothing.

One other case, decided by BRAY, J., in 1907, did turn on the section of the Act of 1895 which I have read, *A.-G.* v. *Felixstowe Gas Light Co.* (7). By a special Act of Parliament one gas company was dissolved and another was created, phoenix-like out of the ashes of the first, and the assets of the first gas company were by the statute vested in the new and enlarged company. It was a question, therefore, whether in that case the section from the Act of 1895

(3) [1894] 1 Q.B. at p. 516.
(4) (1864), 33 L.J.Ex. 173.
(5) [1894] 1 Q.B. 507.
(6) [1961] 2 All E.R. at p. 360.
(7) [1907] 2 K.B. 984.

A applied so as to render necessary the stamping of a Queen's printer's copy of the necessary statute as falling within the terms of s. 12. There was reference to what had been said in the *Great Western Ry.* case (8) and also to another case immediately following it in the 1894 report, *John Foster & Sons, Ltd.* v. *Inland Revenue Comrs.* (9). Be it observed that the case came, if at all, within para. (a) of s. 12 of the Act of 1895. The question was: was there here a vesting B by way of sale in this new company? The judge thus posed the question (10):

> "What is necessary to constitute a sale? No doubt as a general rule it is necessary that there should be two parties; there must be a consensus between those parties; there must be a consideration and a transfer of the property. The difficulty suggested here is that the two parties were never C in existence at the same time, and consequently there could be no consensus, no mutual assent of two persons meeting and agreeing together. I think, however, that the want of a consensus may be supplied by the Act of Parliament. If there was a real intention on the part of the old company to transfer the property and on the part of the new company to acquire it for consideration, and if that intention was expressed, not in an ordinary contract inter partes, but in an Act of Parliament, then the fact that the D two companies were not existing at the same moment was immaterial; the Act enabled them to do that which without it they could not have done."

Now counsel for the Crown relied on those words in that passage, and, particularly, on the judge's phrase "the want of a consensus may be supplied by the Act of E Parliament". As counsel for the respondent company pointed out, however, the judge inferred clearly that there had been there a real intention on the part of the old company to transfer the property and a real intention on the part of the new company to take it. The trouble arose from the fact that, unfortunately, there was no point of time when both companies were existing so that the intentions could be properly described as mutual. But the judge held that in the F circumstances the statute should be taken to supply the possible omission and so he held the case to be within the scope of s. 12 of the Act of 1895. Of course, the decision of BRAY, J., is not binding on this court but it has stood since 1907 and it therefore deserves to have some weight given to it.

Junior counsel for the respondent company drew our attention to a third, and very recent, case to which I must direct a little time. The case is *Kirkness* v. G *John Hudson & Co., Ltd.* (11). As counsel freely conceded, the point there was a different one; it was not a question whether some instrument required to be stamped ad valorem but whether certain provisions of the Income Tax Act, 1945, applied, and the terms of that section would apply if the transaction, which was there in question, was properly to be described as a sale. The transaction was this. By virtue of s. 29 of the Transport Act, 1947, certain property, viz., H goods wagons, which had belonged to a railway company, became vested in the British Transport Commission. The relevant terms of that section are set out in VISCOUNT SIMONDS' speech (12):

> "Where, immediately before the date of transfer, any privately owned railway wagon is under requisition by virtue of an exercise of the powers in that behalf conferred by reg. 53 of the Defence (General) Regulations, 1939— I (a) the property in that wagon shall vest in the commission on the date of transfer . . ."

There was further provision in the Act for payment to the previous private owner of compensation for that transfer. So it was that the House had to consider whether the transfer in question amounted to a "sale" so that the

(8) [1894] 1 Q.B. 507. (9) [1894] 1 Q.B. 516.
(10) [1907] 2 K.B. at p. 990. (11) [1955] 2 All E.R. 345; [1955] A.C. 696.
(12) [1955] 2 All E.R. at p. 347; [1955] A.C. at p. 706.

compensation should be taxable under the Income Tax Act, 1945, as being proceeds of the sale. VISCOUNT SIMONDS, in characteristically forceful language, rejected the idea that the transaction could properly and sensibly be referred to as a sale. As junior counsel for the respondent company pointed out, the noble Lord referred to the passage in BENJAMIN ON SALE (8th Edn.), at p. 2, to which I must allude, as indicating the necessity of mutual assent and also to a title in the INSTITUTES OF JUSTINIAN (3rd Book), which also laid down the proposition that there must, at any rate, be agreement as to price. I find this passage (13):

> "There are aspects of a so-called compulsory sale which clearly distinguish it from a sale stricto sensu, and I am not satisfied that, without some context to aid it, the word 'sale' in an Act of Parliament should be held to include a transaction which is more accurately and, I think now more commonly, described as a compulsory acquisition."

At the same time the noble Lord cast no doubt on the decision in *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (14), in which apparently there had been a compulsory acquisition of a certain quantity of rum for the consideration of a figure to be paid by way of compensation, and in that case it was held (and VISCOUNT SIMONDS cast no doubt on it) that on the facts of that case there had been a sale of the rum. He cited with approval (15) what had been said by ROWLATT, J., at first instance (16): "Now what is that except a compulsory sale of the rum?" And, following immediately on that reference, the noble Lord then referred to the stamp duty cases. He said (15):

> "Nor . . . do I get any assistance in the construction of this Act from the numerous cases decided under the Stamp Acts to which we were referred. In one of them (*John Foster & Sons, Ltd.* v. *Inland Revenue Comrs.* (17)), on which the Crown chiefly relied, LINDLEY, L.J., used language which, taken out of its context, would support the view that any transfer of A's property to B for a consideration in money or money's worth could be regarded as a sale. In *Great Western Ry. Co.* v. *Inland Revenue Comrs.* (18), similar language was used by LORD ESHER, M.R. But, assuming, as I do, that these cases were rightly decided for the purpose of determining what sort of instrument is a 'conveyance on sale' within the meaning of the Stamp Act, [1891,] I must repeat that in them, no more than in the *Newcastle Breweries* case (14), do I find authority to support the Crown's wide proposition in the present case."

The wide proposition really was this, that if one had a vesting on the one side and a payment of compensation on the other, that is without more a sale. I should perhaps allude to, though I shall not take time to read, a passage in LORD REID'S speech (19) where, as VISCOUNT SIMONDS had done, he does draw attention to the use, common enough today, of the phrases "compulsory purchase" and "compulsory sale", and LORD REID points out that "sale" in such instances is made properly intelligible by reason of the epithet "compulsory".

It was therefore much pressed on us by junior counsel for the respondent company that, in light of the observations of the noble Lords in the *Kirkness* case (20), we could not here say that Mrs. Rita Bell had sold her shares to the respondent company. I should at this stage refer to the celebrated passage in BENJAMIN ON SALE (8th Edn.), at p. 2:

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(13) [1955] 2 All E.R. at p. 349; [1955] A.C. at p. 709.
(14) [1927] All E.R. Rep. 287; 12 Tax Cas. 927.
(15) [1955] 2 All E.R. at p. 350; [1955] A.C. at p. 710.
(16) 12 Tax Cas. at p. 937.
(17) [1894] 1 Q.B. 516.
(18) [1894] 1 Q.B. 507.
(19) [1955] 2 All E.R. at p. 361; [1955] A.C. at p. 728.
(20) [1955] 2 All E.R. 345; [1955] A.C. 696.

A "By the common law a sale of personal property was usually termed a 'bargain and sale of goods'. It may be defined to be a transfer of the absolute or general property in a thing for a price in money."

So far, that statement would cover, I would have thought, the present case. However, the author goes on:

B "Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.:—(1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised. That it requires parties competent to contract, and mutual assent, in order to effect a sale, is manifest from the general principles C which govern all contracts."

The nub of the case here really is: Was there here anything which could possibly be described as mutual assent? Now I would observe that this passage which I have read is intended to cover sales not merely evidenced by instrument but also sales in the ordinary course by delivery of the goods and nothing to record the transaction; and "mutual assent" is a useful phrase which would cover D both types of transaction. Still, it is here a question whether the essential elements are present.

At this stage I come back to the point from which I started. As VISCOUNT SIMONDS observed in the *Kirkness* case (21), we are here concerned, in the stamp duty question, with the problem: Was this instrument a transfer on sale? That it came into existence as the result of the invocation of the statutory power E in s. 209 is not in doubt, but, as I venture to think, that statute by its machinery is directed to producing a transaction evidenced by an instrument which has on its face all the essential characteristics of a sale. As I said when I read it, it is on its face an instrument executed inter partes. By statute a person, Mr. Baldock, was appointed an agent with authority to execute this document on behalf of Mrs. Bell, and that he did, and Mrs. Bell by statute could not deny his F authority so to execute it. It seems to me, therefore, that what Parliament by this section envisages and has brought into being is an instrument which has on its face all the attributes of a transfer on sale and takes effect as such. Given the authority of Mr. Baldock so to execute, every other element is present, including the price and the specific property.

After consideration, and paying, I hope, due attention to the very formidable G points put forward on the other side, I have therefore felt compelled to the conclusion that this instrument here must be regarded as within the formula "transfer on sale" within Sch. 1. In reaching that conclusion, I regret to find that I differ from the conclusion at which BUCKLEY, J., arrived. He put his conclusion briefly thus (22):

"I think that the problem really comes down to this: can Parliament, H by some Act unconnected in any way with the Stamp Act, 1891, make some transaction which is not in the contemplation of law really a sale at all because it lacks the consensual element a sale for the purposes of the Stamp Act? Now, no doubt, if the Companies Act, 1948, had said: 'and every transfer of shares carried out in this way shall be deemed to be a sale for the purposes of the Stamp Act', that would clearly achieve that I result: but is the effect of s. 209 such that a transaction under that section is to be treated as a sale notwithstanding that it does not contain any such clear reference to the Stamp Act as that?"

As I say, with diffidence due to my respect for the judge, I have been unable to accept that conclusion, and I base myself essentially on this, that we are not, as it seems to me, considering the transaction, so to say, in vacuo and asking the question whether it could properly be said that Mrs. Bell sold her shares

(21) [1955] 2 All E.R. 345; [1955] A.C. 696. (22) [1961] 2 All E.R. at p. 362.

within the meaning of the common law that attaches to that phrase, but whether the instrument executed constitutes a "transfer on sale" within Sch. 1. It seems to me, answering the question of BUCKLEY, J., that the Companies Act, 1948, by the machinery it has created, and particularly by the statutory authority given here to the agent, Mr. Baldock, to execute on Mrs. Bell's behalf, has brought into being that which ex facie in all its essential characteristics and effect is and becomes a transfer on sale of Mrs. Bell's stock. I therefore accept the first part of the argument of counsel for the Crown and would hold that he succeeds in establishing the liability to stamp duty of this document.

However, counsel for the Crown also proffered, as I said earlier, an alternative argument based on s. 12 of the Finance Act, 1895 (23). The argument, put quite briefly, is this: The present case is not one falling within para. (a) of that section but within para. (b), and it is said by counsel for the Crown that here by virtue of the Companies Act, 1948, a person has been authorised to purchase property, and, that being so, the case falls within the second case or "other case" in the body of the section,

> "an instrument of conveyance of the property . . . duly stamped with the ad valorem duty payable upon a conveyance on sale of the property."

On the other side it is said that this section was related to a much narrower subject. It is said that, when the section refers in its second line to an Act—"by virtue of any Act"—that must refer to some special Act of Parliament. It is further said that "property" in the two paragraphs must mean the same thing and that what is contemplated and what is alone contemplated is the case where by some special Act a person is authorised (to refer now to para. (b)) to purchase some property specified in that Act, just as in para. (a), the property, it is said, means the property by the Act specifically vested in the person indicated. One cannot, it is said, distinguish between the kinds of property intended in the two parts of the section.

On the section, apart from the case of BRAY, J. (24), which does not, of course, precisely touch this point, other authorities were cited, particularly that of *Eastbourne Corpn.* v. *A.-G.* (25), decided in the House of Lords in 1904, and there is no doubt that in LORD LINDLEY'S speech he expressly stated that the section was confined, and intended to be confined, to purchases expressly authorised by some special Act of Parliament. As counsel for the Crown pointed out, that particular point is not in terms found in any of the other speeches, those of the EARL OF HALSBURY, L.C., LORD MACNAGHTEN and LORD SHAND. On the other hand, in the Court of Appeal it had been made clear that the word "property" should be given the same meaning throughout the section.

Those were the arguments, and there is, I think, force in both. But in all the circumstances, and having come to the conclusion I have on the first point, I think it unnecessary, and on the whole undesirable, that I should express an opinion on the second question under the Act of 1895. I, therefore, would allow the appeal, basing myself on the first submission of counsel for the Crown.

DONOVAN, L.J.: When the legislature, by s. 209 of the Companies Act, 1948, empowers the transferee company to appoint an agent on behalf of a dissenting shareholder for the purpose of executing a transfer of his shares against a price to be paid by the transferee company and held in trust for the dissenting shareholder, it is clearly ignoring his dissent and putting him in the same position as if he had assented. For the purpose of considering whether this results in a sale, one must, I think, bear that situation in mind, and regard the dissent of the shareholder as overridden by an assent which the statute imposes on him, fictional though this may be. Thus, in the context of s. 209, the transfer becomes in law a conveyance on sale.

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(23) See p. 1111, letter D, ante.
(24) *A.-G.* v. *Felixstowe Gas Light Co.*, [1907] 2 K.B. 984. (25) [1904] A.C. 155.

A This conclusion in my opinion does not run counter to what was said in the House of Lords in *Kirkness* v. *John Hudson & Co., Ltd.* (26) where, in terms of the statute there under consideration, property belonging to other persons was declared to vest on a specified date in the British Transport Commission against payment of compensation. This may be no more than a difference of machinery but machinery may make the very difference between a sale and a mere expro-
B priation against compensation. VISCOUNT SIMONDS, I venture to think, implies as much when he says (27) that he gets no assistance from the cases decided under the Stamp Acts.

In the circumstances I, too, find it unnecessary to say anything about the alternative point raised by the Crown on s. 12 (b) of the Finance Act, 1895. I agree that the appeal should be allowed.

C

DANCKWERTS, L.J.: I also agree. It seems to me that for the purposes of the Stamp Act, 1891, a transfer of shares may be "a conveyance or transfer on sale" where a price is received for the shares, even though the transferor was compelled to sell against his or her will and the price was not fixed with the assent of the transferor. *John Foster & Sons, Ltd.* v. *Inland Revenue Comrs.* (28),
D *Great Western Ry. Co.* v. *Inland Revenue Comrs.* (29), and *A.-G.* v. *Felixstowe Gas Light Co.* (30) are authorities in favour of that result and are, I think, impossible for us to ignore. Where there is a transfer of property from one person to another for money, LINDLEY, L.J., said in the first of these cases (31):

> "What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is
E not a mortgage. I do not know what it is unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the Stamp Act, for stock or marketable securities."

In *Kirkness* v. *John Hudson & Co., Ltd.* (26) VISCOUNT SIMONDS suggested the words "compulsory acquisition", but in that case the problem which the House
F of Lords had to decide was in respect of a different statutory provision and in a different context, and, as has been pointed out, VISCOUNT SIMONDS (27) referred to two of the cases that I have mentioned and cast no doubt on the correctness of the decisions in those cases viewed as decisions under the Stamp Acts. It seems to me that a sale may not always require the consensual element mentioned in BENJAMIN ON SALE (8th Edn.), at p. 2, and that there may in truth be a
G compulsory sale of property with which the owner is compelled to part for a price against his will. The effect of the statute in such a case is to say that the absence of the transferor's consent does not matter and the sale is to proceed without it. Thus, s. 209 (3) of the Companies Act, 1948, provides for a transfer of a dissenting shareholder's shares for money, by a person selected to be the agent of the shareholder, and in my opinion the transfer in the present case was
H a transfer on sale within the meaning of the Stamp Act, 1891. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Coward, Chance & Co.* (for the respondent company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(26) [1955] 2 All E.R. 345; [1955] A.C. 696.
(27) [1955] 2 All E.R. at p. 350; [1955] A.C. at p. 710.
(28) [1894] 1 Q.B. 516.
(29) [1894] 1 Q.B. 507.
(30) [1907] 2 K.B. 984.
(31) [1894] 1 Q.B. at p. 528.

R. *v.* GUEST, *Ex parte* METROPOLITAN POLICE COMMISSIONER.

[VACATION COURT IN CHAMBERS (Widgery, J.), August 24, 1961.]

Magistrates—Examining magistrates—Remand—Adjournment granted at request of Crown before any evidence called—Whether magistrate has discretion to remand accused in custody or must remand on bail—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 6 (1), *s.* 105 (1).

Where a magistrates' court, sitting in the capacity of examining justices, remand an accused person under the Magistrates' Courts Act, 1952, s. 6 (1)*, before beginning to inquire into the offence charged, they have a discretion under s. 105 (1)† of that Act to remand the accused person in custody or on bail, and there is no overriding requirement that bail is to be granted in all cases where sworn evidence connecting the accused person with the crime has not yet been given (see p. 1120, letter E, post).

[As to powers of remand by examining magistrates, see 10 HALSBURY'S LAWS (3rd Edn.) 364, 365, para. 664; and for cases on the subject, see 14 DIGEST (Repl.) 170, *1332*, 173, *1366*, 223, 224, *1863-1869*.

For the Magistrates' Courts Act, 1952, s. 6 and s. 105, see 32 HALSBURY'S STATUTES (2nd Edn.) 427, 504.]

Motion in chambers.

This was a motion in chambers by the Commissioner of Police of the Metropolis for an order of mandamus directing the metropolitan magistrate sitting at West London Magistrates' Court to hear and determine, according to law, the question whether the respondents, certain accused persons, should be remanded in custody or on bail pending the completion of committal proceedings.

The case is reported by leave of WIDGERY, J.

J. H. Buzzard for the applicant.

J. Yahuda, K. A. Richardson, D. H. Farquharson, Miss J. G. Hall and *Miss N. S. Lethbridge* for the respondents, the accused.

WIDGERY, J.: In this matter counsel moves on behalf of the applicant, the Commissioner of Police of the Metropolis, for an order of mandamus directed to the learned magistrate sitting at West London Magistrates' Court, requiring him to hear and determine, according to law, the question whether the accused should be remanded in custody or on bail pending the completion of criminal proceedings, being proceedings whereby the applicant seeks to have the accused committed for trial on one or more offences, into which I need not go.

Precisely what happened at the magistrates' court is a matter for which I have to rely on the evidence of Sergeant Byers, but I am told that this affidavit has been shown to the learned magistrate and that he does not wish to file any statement of his own to alter or contradict it. From the affidavit of Sergeant Byers, what appears to have happened is this, namely, that the accused were brought before the magistrate on Aug. 22, 1961, and counsel for the Crown applied for a remand until Aug. 26 on the ground that he was not in a position to open the case because the results of fingerprint and certain scientific examinations were not to hand. The question then arose whether the accused should be remanded in custody or on bail over the intervening four days, and, according to Sergeant Byers' affidavit, the learned magistrate said that he took the view, as a matter of law, that he should not—which I think must really mean could not—remand the accused in custody unless and until he had heard some evidence connecting them with the commission of the offence. Later, according to the

* Section 6 (1) is as follows: "A magistrates' court may, before beginning to inquire into an offence as examining justices, or at any time during the inquiry, adjourn the hearing, and if it does so shall remand the accused."

† The relevant part of s. 105 (1) is set out at p. 1119, letter F, post.

A affidavit, the learned magistrate is reported to have said that under no circumstances would he consider remanding the accused in custody unless and until he had heard evidence connecting them with the commission of the offence, but he would be glad to have his decision tested by means of an application for an order of mandamus. It appears to me, therefore, that the learned magistrate had directed himself, as a matter of law, that, unless he had heard evidence B connecting the accused with the commission of the offence, he had no discretion in regard to remanding them in custody, but was required, as a matter of law, to remand them on bail.

The issue which counsel for the applicant invites me to determine is whether there is or is not, in these circumstances, a discretion in the magistrate whereby he may choose between a remand in custody or a remand on bail, and counsel C urges that there is such a discretion and that I should so find. I have had the assistance of a number of references to the early law on this and associated subjects, but it is quite clear that the present position is regulated by the Magistrates' Courts Act, 1952. By s. 6 (1) of that Act, a magistrate may, before beginning to inquire into an offence as examining justice, or at any time during the inquiry, adjourn the hearing and, if he does so, remand the accused. The D magistrates' court for this purpose includes any stipendiary magistrates' court as such. It is not disputed, and, in my judgment, it is clear, that, for the purposes of s. 6, the magistrates' court is sitting in the capacity of examining justices when an accused person is brought before that court charged with an indictable offence, whether the process whereby the accused has been brought before the court is that of summons, arrest with warrant, or arrest without warrant. In E any of these cases, when the accused person is before the magistrate charged with an indictable offence, it is the magistrates' jurisdiction as examining justices which is being exercised, and, according to the literal terms of s. 6 (1), they may adjourn the hearing before beginning to inquire into the offence, and, if they do so adjourn the hearing they must remand the accused. Section 105 (1) of the same Act provides for the procedure on remand, and reads as follows:

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> "Where a magistrates' court has power to remand any person, then, subject to any enactment modifying that power, the court may—(a) remand him in custody, that is to say, commit him to custody to be brought before the court at the end of the period of remand or at such earlier time as the court may require; or (b) remand him on bail, that is to say, take from him a recognisance . . ."

G

As I see this section, the words are clear. Section 6 (1), as it seems to me, provides for a remand before the magistrate has begun to inquire into the offence if a magistrate thinks fit to remand at that time, and s. 105 (1), in its literal terms, appears to give him, the magistrate, a clear choice between a remand in custody and a remand on bail, but it is urged, and urged with force on behalf of the H several accused in this case, that, if that be the literal meaning of the two sections to which I have referred, they cannot possibly have been intended by Parliament to be given such meaning.

I can fairly summarise what has been said by more than one voice and in more than one way on this question by putting it in this way. It is said that there are a number of matters which any court considering the grant of bail must take I into account. It so happens that they are conveniently summarised in para. 203 of ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE & PRACTICE (34th Edn.). The factors set out there are the nature of the accusation, the nature of the evidence in support of the accusation, the severity of the punishment which conviction would entail, and whether the sureties are independent or indemnified by the accused person, and it is said that, if a magistrate—the learned magistrate in this case—has for good reason not even begun to inquire into the offence, then he cannot have the material necessary under these various heads to determine whether bail should be granted or not. It is then said that, if he has not got

the material on which to exercise a discretion on the question, the inevitable consequence must be that bail will be granted. I must confess that it seems to me that, if this is right, it gives rise to serious practical difficulties. I have put the question in the argument that, if that be right, on what terms is bail to be granted? Who will the sureties be, for how much, what will be the conditions of the recognisances? There is no answer to those questions in so far as the terms of the Act are concerned and, in my judgment, the basic fallacy in the argument put forward on behalf of the accused persons in this case is its assumption that there must be admissible evidence given on oath in the normal way on each of the four matters to which I have referred before it is competent in a court to decide on a question of bail.

Counsel for the applicant points out, I think with force, that references in the authorities to the considerations which affect the exercise of a discretionary power to grant bail are in the main, if not universally, references to cases where bail is being granted on committal, and there, of course, the nature of the evidence is well known and recorded. I have no doubt that the nature of the evidence in support of the accusation is one of the matters to which a court at any stage must have regard, but when the question is being considered at such an early stage that the evidence against the accused has not even begun to be the subject of inquiry, the court must do its best on such material as is available. The court may have to consider the matter of bail very early in the inquiry or even before the inquiry has begun on some unsworn information of the kind on which a police officer may sometimes have to act at the stage of apprehension. In brief, it seems to me that the words of the Act are clear, and I find no ambiguity in them. They recognise that the discretion with regard to bail which s. 105 (1) introduces is a discretion which may have to be exercised before the magistrate has begun to hear the matter at all, and I can see no overriding requirement that bail is to be granted in all cases where sworn evidence connecting the accused with the crime has not yet been given. Once having decided that there is a discretion, it is unnecessary for me to emphasise that the exercise of the discretion is a matter for the magistrate. To say he has no power to remand in custody in the circumstances of the present case appears to me to be a misunderstanding of the position. Accordingly, the order for mandamus must go.

Order accordingly. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor, Metropolitan Police* (for the applicant); *Sampson & Co., Baldwin, Fowke & Co., M. Wernick,* and *Lincoln & Lincoln* (for the accused).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

A

E.Y.L. TRADING CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Cross, J.), October 25, 26, November 6, 1961.]

Profits Tax—Chargeable accounting period—Determination by Inland Revenue Commissioners—Interval between company's old and new businesses—Commencement of business as investment company—Last chargeable accounting period—Period before interval—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 54), *s.* 19 (4), *s.* 20 (2) (*a*) (*b*)—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6 *c.* 35), *s.* 35 (1) (*c*).

B

By its memorandum of association a company had powers to carry on various trades or businesses and to invest and deal with its moneys not immediately required as it from time to time determined. It traded as steel stockists until Feb. 19, 1955, when it sold its business and all its fixed and current assets and investments except cash at the bank, which it transferred to a new account (£297,341 17s. 9d. plus interest £305 9s. 8d.). It changed its name, and on Mar. 31, 1955, new directors were appointed who on that day approved transfers of all its shares to new shareholders and resolved that as from that day the company should be an investment company. On Apr. 1 the directors resolved to pay dividends on the shares absorbing nearly £290,000. In June the company made its first new purchase of investments. The company's accounts were made up as formerly to Mar. 31. The Commissioners of Inland Revenue made a determination under s. 20 (2) (b) of the Finance Act, 1937, that the period of $10\frac{19}{28}$ months from Apr. 1, 1954, to Feb. 19, 1955, should be a chargeable accounting period for the purposes of the profits tax; and an assessment of £73,990 profits tax was made on the company in respect of the dividends declared on Apr. 1 as being distributions other than distributions of capital made after the end of the last chargeable accounting period under s. 35 (1) (c) of the Finance Act, 1947. On appeal,

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Held: the assessment must be upheld for the following reasons:

(i) the business of the company did not consist wholly or mainly in the holding of investments or other property within s. 19 (4) of the Finance Act, 1937, on Apr. 1, 1955, despite the decision of the directors the previous day, but only became so when the company actively engaged in the pursuit of profit by holding or dealing in investments in June, 1955; the dividends declared on Apr. 1, 1955, were therefore not referable to a chargeable accounting period in which the business of an investment company was carried on by the company.

G

(ii) distinction must be drawn between accounts of the company and accounts of the business of steel stockists carried on by the company; the latter business ceased to be carried on by the company when it sold the business on Feb. 19, 1955, and the business of an investment company was not begun until June, 1955; accordingly, accounts of the steel stockists' business for successive years ending Mar. 31 had ceased to be made up within s. 20 (2) (b) of the Finance Act, 1937, and the commissioners had power under that enactment to determine the chargeable accounting period beginning on Apr. 1, 1954, and had properly determined it.

H

(iii) the chargeable accounting period so determined was the last chargeable accounting period within the meaning of s. 35 (1) (c) of the Act of 1947, since there was an interval in which the company was not trading after Feb. 19, 1955, the distributions were made in that interval and the accounting period down to Feb. 19, 1955, was the last period in which the company was carrying on a business before the distribution was made.

I

Inland Revenue Comrs. v. *J. B. Hodge & Co.* (*Glasgow*), *Ltd.* (ante, p. 172) distinguished.

Appeal dismissed.

[As to investment companies and chargeable accounting periods for the profits tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 613, 614, para. 1198, and 617, para. 1203.

For the Finance Act, 1937, s. 19 (4), s. 20 (2), see 12 HALSBURY'S STATUTES (2nd Edn.) 375, 376; and for the Finance Act, 1947, s. 35 (1), see ibid., 779.]

Cases referred to:

Briggs (Henry), Son & Co., Ltd. v. *Inland Revenue Comrs.*, Profits tax leaflet No. 34; *affd.* C.A., [1960] 1 All E.R. 800; [1960] 1 W.L.R. 532, 568; *affd.* H.L., [1961] 1 All E.R. 220; [1961] 1 W.L.R. 68; 3rd Digest Supp.

Inland Revenue Comrs. v. *Hodge (J. B.) & Co. (Glasgow), Ltd.*, ante, p. 172; [1961] 1 W.L.R. 1216.

Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against an assessment to the profits tax expressed to be for the chargeable accounting period Apr. 1, 1954, to Feb. 19, 1955, in the sum of £73,990 9s. made up as follows: £138,796 at 22½ per cent., £31,229 2s.; plus distribution charge £94,462 at 7½ per cent. £7,084 13s., £53,091 at ten per cent., £5,309 2s., £151,838 at twenty per cent. £30,367 12s. The grounds of appeal were that the dividend declared by the company on Apr. 1, 1955, did not fall to be included under s. 35 (1) (c) of the Finance Act, 1947, in the gross relevant distributions to proprietors for the chargeable accounting period Apr. 1, 1954, to Feb. 19, 1955, and that therefore the assessment was bad in law and excessive in amount. The company contended: (i) that on Feb. 20, 1955, or some date thereafter before Apr. 1, 1955, the company commenced the trade or business of an investment company, and accordingly was chargeable for the profits tax under s. 19 (4) of the Finance Act, 1937, as a company the functions of which consisted wholly or mainly in the holding of investments or other property; (ii) that the period Apr. 1, 1954, to Feb. 19, 1955, was not an accounting period of the company's trade or business for the purpose of computing the company's liability to the profits tax, and that the provisions of s. 20 (2) (b) of the Finance Act, 1937, were not apt to make it so; and in the alternative (iii) that, if the accounting period Apr. 1, 1954, to Feb. 19, 1955, was a chargeable accounting period of the trade or business of steel stockists carried on by the company, it was not the last chargeable accounting period of the company's trade or business of an investment company, which trade commenced on or before Apr. 1, 1955; and that, accordingly, dividends declared on Apr. 1, 1955, amounting to £288,327 10s. did not fall to be treated under s. 35 (1) (c) of the Finance Act, 1947, as a gross relevant distribution of the chargeable accounting period Apr. 1, 1954, to Feb. 19, 1955, but must be regarded under s. 35 (1) (b) as a distribution of a subsequent chargeable accounting period.

The Crown contended: (i) that the taxpayer company ceased to carry on the trade or business of steel stockists on Feb. 19, 1955, and did not thereafter at any material time carry on any trade or business and it was therefore not chargeable to the profits tax after that date; (ii) that the company was not at any material time assessable to the profits tax under s. 19 (4) of the Finance Act, 1937, as a company the functions of which consisted wholly or mainly in the holding of investments or other property; (iii) that the accounting period Apr. 1, 1954, to Feb. 19, 1955, determined by the Commissioners of Inland Revenue to be a chargeable accounting period of the company's trade or business was properly so determined under s. 20 (2) (b) of the Finance Act, 1937; and (iv) that the accounting period Apr. 1, 1954, to Feb. 19, 1955, was the last chargeable accounting period of the company's trade or business, and, accordingly, the dividends declared on Apr. 1, 1955, amounting to £288,327 10s., fell to be treated under s. 35 (1) (c) of the Finance Act, 1947, as a gross relevant distribution for that chargeable accounting period and s. 35 (1) (b) had no application thereto.

A The commissioners decided: (i) that the trade or business of steel stockists formerly carried on by the taxpayer company ceased on Feb. 19, 1955, and thereafter the company carried on no trade or business until in or about June, 1955, when it purchased shares in Debenhams, Ltd., and Stewarts & Lloyds, Ltd.; (ii) that on Apr. 1, 1955, the company was not assessable to the profits tax under s. 19 (4) of the Finance Act, 1937, as a company the functions of which consisted B wholly or mainly in the holding of investments or other property; (iii) that the accounts of the company made up for the year ended Mar. 31, 1955, were not the accounts of the trade or business carried on by the company for a successive period of twelve months within the meaning of s. 20 (2) (a) of the Finance Act, 1937, because the trade or business formerly carried on by the company had ceased on Feb. 19, 1955, and at Mar. 31, 1955, the date to which the accounts C were made up, the company was not carrying on any trade or business; and, accordingly, the determination of the Commissioners of Inland Revenue that the period Apr. 1, 1954, to Feb. 19, 1955, was to be a chargeable accounting period of the company was correctly made under s. 20 (2) (b) of the Act of 1937; (iv) that the chargeable accounting period Apr. 1, 1954, to Feb. 19, 1955, must be regarded as the last chargeable accounting period within the meaning of s. 35 (1) D (c) of the Finance Act, 1947, and s. 35 (1) (b) had no application thereto. They therefore dismissed the appeal. The taxpayer company appealed by way of Case Stated to the High Court.

R. E. Borneman, Q.C., and *P. J. Brennan* for the taxpayer company.

H. B. Magnus, Q.C., and *A. S. Orr* for the Crown.

E *Cur. adv. vult.*

Nov. 6. **CROSS, J.**, read the following judgment: This is an appeal by E.Y.L. Trading Co., Ltd., the taxpayer company, against an assessment to profits tax in the sum of £73,990 expressed to be made on it in respect of the chargeable accounting period Apr. 1, 1954, to Feb. 19, 1955. The taxpayer company was incorporated under the name of Lye Trading Co. Ltd., on Sept. 2, 1941, with an F authorised share capital of £20,000 divided into twenty thousand shares of £1 each, of which 9,002 shares—8,002 ordinary shares and one thousand five per cent. preference shares—are issued. Clause 3 (a) of its memorandum of association gave it power to carry on a variety of trades or businesses, including that of steel stockists, and cl. 3 (m) empowered it to invest and deal with its moneys not immediately required in such manner as should from time to time be determined. G The company traded as steel stockists until Feb. 19, 1955, when it sold its business and all its fixed and current assets except cash, and its investments in government stocks and quoted and unquoted shares and debentures. As a result of the sale its only asset became a large sum to the credit of its account with the Midland Bank, Ltd.

On Mar. 17, 1955, the company transferred its credit balance, which then H amounted to £297,341 17s. 9d., to the credit of an account in its name with Ansbachers. On Mar. 18, 1955, the company changed its name from Lye Trading Co., Ltd., to E.Y.L. Trading Co., Ltd., and on Mar. 31, 1955, this sum of £297,341 17s. 9d. and an additional sum of £305 9s. 8d., representing interest earned on it since Mar. 17, was transferred to a new account in the books of Ansbachers in the name of E.Y.L. Trading Co., Ltd. On the same day, Mar. 31, 1955, new I directors of the company were appointed, who passed resolutions approving the transfer of the one thousand preference shares and eight thousand of the ordinary shares to Worthex Securities, Ltd., and the two remaining ordinary shares to Worthex Securities, Ltd., and Mr. Henry Lightstone, one of the new directors. It was further resolved that as from that day the company should be an investment company, and that, subject to the declaration of such dividends as the directors should decide, the funds of the company should be dealt with accordingly.

On Apr. 1, 1955, the directors resolved that a dividend of £27 10s. free of tax be paid on the one thousand issued five per cent. preference shares, and that a

dividend of £288,300 free of tax be paid on the ordinary shares of the company. They further resolved that a banking account for the company be opened with the District Bank, Ltd. In pursuance of those resolutions a sum of £288,327 10s. was paid out of the credit balance of £297,647 7s. 5d. to Worthex Securities, Ltd. to cover the dividends, and the balance of £9,319 17s. 5d. was transferred to the credit of an account in the name of the company with the District Bank, Ltd. In or about June, 1955, the company purchased one thousand ordinary shares of 10s. each in Debenhams, Ltd., and 525 ordinary shares of £1 each in Stewarts & Lloyds, Ltd. Several further purchases and sales of investments were made by the company before the date of the profits tax assessments in dispute, and since June, 1955, the company has been treated by the Revenue authorities as an investment company.

The company's accounts are normally made up to Mar. 31 in each year, and a trading and profit and loss account to Mar. 31, 1955, and a balance sheet as at that date were prepared by its accountants. The profit and loss account was credited with the £305 9s. 8d., being the interest credited to the company's account with Ansbachers for the period Mar. 17 to Mar. 31, 1955. The balance sheet as at Mar. 31, 1955, showed under the head of liabilities £9,002 in respect of share capital, and a sum of £288,645 7s. 5d. under the head revenue reserves, undistributed profits. The assets on the other side of the balance sheet consisted of cash at the bank of £297,647 7s. 5d.

On Aug. 14, 1959, the Commissioners of Inland Revenue made, or purported to make, a determination in writing under s. 20 (2) (b) of the Finance Act, 1937, in the following terms:

> " We, the undersigned, being two of the Commissioners of Inland Revenue have had under consideration the question of the accounting periods for profits tax purposes of the trade or business of E.Y.L. Trading Co., Ltd. (formerly Lye Trading Co., Ltd.) for the period from Apr. 1, 1954 to Feb. 19, 1955 and in exercise of the powers conferred upon us by s. 20 (2) (b) of the Finance Act, 1937, hereby determine that the period of $10\frac{19}{28}$ months from Apr. 1, 1954 to Feb. 19, 1955, shall be an accounting period for the purposes of the profits tax ",

and the document was signed by two of the commissioners.

Following on that determination, a notice of assessment and application for payment of profits tax amounting to £73,990 was issued on Sept. 30, 1959. The provisions of the profits tax legislation which are relevant to the determination of this appeal are as follows. The Finance Act, 1937, s. 19, provides (1):

> " (1) There shall be charged, on the profits arising in each chargeable accounting period falling within the years of charge to [the profits tax] from any trade or business to which this section applies, a tax (to be called [the profits tax]) of an amount equal to . . . per cent. of those profits.
>
> " (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom.
>
> " (4) Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society."

Section 20:

> " (1) For the purpose of [the profits tax], the profits arising from a trade or

(1) Subsection (1) is printed as amended prior to its repeal by the Finance Act, 1958, which did not affect its application to the period relevant to the present case; and the name " the profits tax " is substituted for the " national defence contribution " (Finance Act, 1946, s. 44).

A business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of Sch. 4 to this Act . . .

" (2) For the purpose of [the profits tax], the accounting periods of a trade or business shall be determined as follows:—(a) in a case where the accounts of the trade or business are made up for successive periods of twelve months, B each of those periods shall be an accounting period; (b) in a case where the accounts of the trade or business have been made up as aforesaid but have ceased to be so made up, the accounting periods from the end of the last period of twelve months for which they were so made up shall be such periods not exceeding twelve months as the Commissioners of Inland Revenue may determine; (c) in any other case the accounting periods of a trade or C business shall be such periods not exceeding twelve months as the Commissioners of Inland Revenue may determine; and the expression ' chargeable accounting period ' means—(i) any accounting period determined as aforesaid which falls wholly within the years of charge to [the profits tax]."

The Finance Act, 1947, s. 30, provides (2):

D " (2) Subject to the provisions of this Part of this Act, if, in the case of any trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are less than the profits thereof for that period chargeable to the profits tax, the amount chargeable by way of the profits tax in respect of that period shall be reduced by an amount equal to (blank) per cent. of E the difference.

" (3) Subject to the provisions of this Part of this Act, if, in the case of a trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are greater than the profits thereof for that period chargeable to the profits tax, there shall be charged for that period, in addition F to the other profits tax, if any, chargeable therefor, profits tax at the rate of (blank) per cent. on the amount of the difference . . .

" (4) The reductions falling to be made under sub-s. (2) of this section and the charges falling to be made under sub-s. (3) thereof are hereafter in this Act respectively referred to as ' reliefs for non-distribution ' and ' distribution charges '."

G Section 35 (1) reads (2):

" Subject to the provisions of this and the two next succeeding sections, the gross relevant distributions to proprietors for any chargeable accounting period of a body corporate, . . . are the total distributions to the members of the body corporate, . . . not being distributions allowable as deductions H in computing the profits of the trade or business for any period for the purposes of the profits tax, and being either—(a) dividends declared not later than six months after the end of that period which are expressed to be paid in respect of that period or any part thereof; or (b) distributions (other than dividends which, under para. (a) of this subsection, are to be treated as part of the gross relevant distributions to proprietors for any previous chargeable accounting I period) made in the period; or (c) in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period (not being a distribution to which para. (a) of this subsection applies) as is not a distribution of capital, and, for the purposes of para. (c) of this subsection, the distributions which are to be treated as distributions of capital shall not, in the case of distributions made by a body corporate with a share capital, exceed an amount equal to the total

(2) Repealed by the Finance Act, 1958; see footnote (1), ante.

nominal amount of the paid-up share capital thereof together, where the body corporate has issued shares at a premium for cash, with the aggregate of the amounts of the premiums." A

Finally, s. 43 (1) provides that all trades or businesses to which s. 19 of the Finance Act, 1937, applies carried on by the same person shall be treated as one trade or business for the purposes of the enactments relating to the profits tax.

It is agreed between the parties that the following questions fall to be determined in this case: (i) did the functions of the company on Apr. 1, 1955, consist wholly or mainly in the holding of investments or other property within the meaning of s. 19 (4) of the Finance Act, 1937? If they did, then it is conceded by the Crown that the assessment in question cannot be upheld, since the dividends paid on that day would rank as distributions made in a chargeable accounting period under s. 35 (1) (b) of the Finance Act, 1947, and could not be treated as distributions made after the end of the last chargeable accounting period under sub-s. (1) (c). (ii) had the Commissioners of Inland Revenue any power under s. 20 (2) (b) of the Finance Act, 1937, to determine that the period Apr. 1, 1954, to Feb. 19, 1955, should be an accounting period of the company? (iii) assuming that the commissioners had power to determine, and did effectively determine, that this period was an accounting period of the company, was it the last chargeable accounting period of the company within the meaning of s. 35 (1) (c) of the Finance Act, 1947? B C D

The Special Commissioners who heard the case decided all these three points against the company, which has appealed to this court from their decision. *Henry Briggs, Son & Co., Ltd.* v. *Inland Revenue Comrs.* (3), before UPJOHN, J., the Court of Appeal, and the House of Lords, shows that the mere fact that a company owns property and derives some income from it does not without more make it a company whose functions consist in the holding of investments or other property. In this case it can hardly be argued that this company came within the scope of s. 19 (4) in the period between Feb. 19 and Mar. 31, 1955. During that period it held a large credit balance, which for a part of the time was earning interest, but it was carrying on no business and its directors had not apparently decided what, if anything, it was going to do. E F

The real question on this branch of the case is whether the company became a s. 19 (4) company as a result of the resolution passed by the new directors on Mar. 31, or whether, as the Crown contends, it only became a s. 19 (4) company when it began to buy and sell shares in June, 1955. UPJOHN, J., pointed out in the *Briggs* case (4) that a trading company can become a property or investment company almost overnight by selling its trading business and employing the proceeds of sale in the business of a property or investment company. On the other hand, the resolution of the new directors that the company should as from Mar. 31, 1955, be an investment company does not of itself show conclusively that it there and then became one. The resolution amounted to no more than a statement that the company intended to employ such funds as might remain after the declaration of a dividend in the business of an investment company. These funds would necessarily amount at least to £9,002—the issued share capital—and, in fact, slightly more, i.e., £9,319 17s. 5d., was transferred to a new bank account next day so as to be available for use in this new business. This sum appears, however, to have remained idle in that account until June. G H

Can it be said in these circumstances that the company became on Mar. 31 or Apr. 1, 1955, a company whose functions consisted wholly or mainly in the holding of investments or other property? Apart from authority, I should have thought not. The fact that s. 19 (4) says that the holding of investments or property shall be deemed to be a business carried on by the company suggests, to my mind, that the company, to bring itself within this subsection, must be actively engaged I

(3) Profits tax leaflet No. 34; *affd.* C.A., [1960] 1 All E.R. 800; *affd.* H.L., [1961] 1 All E.R. 220.

(4) Profits tax leaflet No. 34 at p. 6.

A in the pursuit of profits by holding or dealing in investments or property. This company certainly did not begin to carry on business as an investment or property company until June, 1955, and I should not have thought that the mere fact that the directors had resolved to employ the balance of its funds in that way brought it within sub-s. (4) until the resolution was acted on. The point appears to be a new one, and there is, so far as I can see, nothing inconsistent with the B view which I have expressed in any of the cases decided under the subsection. I think, therefore, that the commissioners were entitled to hold—and indeed were right in holding—as they did that on Apr. 1, 1955, the company was not one whose functions consisted wholly or mainly in the holding of investments or other property.

Question 2: Down to Mar. 31, 1954, the accounts of the company's business C were admittedly made up for successive periods of twelve months. The company argues that the accounts of its business were also made up for the twelve months period Apr. 1, 1954, to Mar. 31, 1955, and that this period was an accounting period under s. 20 (2) (a) of the Finance Act, 1937. This argument appears to me to confuse the accounts of the company with the accounts of the company's business. No doubt the accounts of the company were made up for the year D Apr. 1, 1954, to Mar. 31, 1955, but the accounts of the company's business were not, and could not be, made up for that period, since the company had ceased to carry on its old business on Feb. 19, 1955, and did not begin to carry on its new business until, at earliest, Mar. 31, 1955. Therefore, in my judgment, the Commissioners of Inland Revenue had power to determine the accounting period of the business as from Apr. 1, 1954. It was argued that, if s. 20 (2) (a) E did not apply, s. 20 (2) (c) applied, and that, therefore, the determination in this case was bad because it was made under s. 20 (2) (b), not s. 20 (2) (c). I do not agree. The accounts of the business had been made up for twelve-monthly periods, but could no longer be so made up and had, therefore, ceased to be so made up. I think that the Special Commissioners reached the right conclusion on this point.

Question 3: Finally it was argued that the expression the "last chargeable F accounting period" in s. 35 (1) (c) of the Finance Act, 1947, means the last period in which the company, in fact, carries on any trade or business, and that the period Apr. 1, 1954, to Feb. 19, 1955, could not possibly be the last chargeable accounting period of this company, because it has admittedly been carrying on business since June, 1955, and has had many chargeable accounting periods since then. This argument, if sound, would lead to astonishing results. No one G can say until a company goes into liquidation whether or not it has finally ceased to trade. However moribund it may seem to be, it may come to life again. On the other hand, it is clear on the authorities that the operation of s. 35 (1) (c) is not confined to cases where the company is in liquidation. How can one possibly say in the case of a company which is not trading and has no current chargeable accounting period, but is not in liquidation, whether any distribution made is H made after the end of its last chargeable accounting period? Counsel for the taxpayer company argued that this would be a question of fact for the commissioners, and that, if they decided on the evidence before them that the company's last trading hour had come, no one would be able to challenge their conclusion. But any company which wished to defeat the Revenue would have the game in its hands. Even though it was carrying on no business when it was assessed to I tax and was, apparently, never going to carry on any business again, it could always start some small business before the case came before the Special Commissioners, and so determine the issue in its favour. I am not prepared to construe this section in a way which would lead to such results unless I am compelled by authority to do so.

Counsel for the company argued that I was so compelled by the decision of the House of Lords in *Inland Revenue Comrs.* v. *J. B. Hodge & Co. (Glasgow), Ltd.* (5). In that case a company had carried on the trade of selling and servicing

(5) Ante, p. 172.

heavy earth-moving equipment from 1941 to Apr. 5, 1950. During this period relief for non-distribution of profits under s. 30 (2) was obtained by it. On Apr. 5, 1950, it sold its trading assets and thereafter carried on business as an investment company. On Mar. 18, 1955, it went into liquidation and it distributed in the liquidation sums in excess of the nominal amount of its share capital. The Crown sought to enforce a distribution charge under s. 35 (1) (c) of the Act of 1947, for the chargeable accounting period Nov. 1, 1954, to Mar. 18, 1955, on the footing that this was the last chargeable accounting period. The company contended that, as the profits which were distributed in the liquidation arose from the former trade which was not being carried on by it during the accounting period in respect of which the assessment was made, this assessment should be discharged. In support of this it was argued that the words "last chargeable accounting period" in s. 35 (1) (c) meant the last accounting period in which the trade which yielded the profits in question was carried on. This argument was rejected by the House of Lords. It was held—partly in reliance on s. 43—that no line should be drawn when one trade ceased and another started, and that it was no bar to a claim to a distribution charge that the profits distributed arose from a trade which was not being carried on during the relevant accounting period.

Counsel for the company relied very strongly in support of the construction which he asked me to place on s. 35 (1) (c) on the following words in the speech of LORD REID in the House of Lords (6):

> "The real flaw in the respondents' argument is, I think, a misconstruction of s. 35 (1) (c). If the last chargeable accounting period there referred to is the last period during which any trade or business is carried on, the scheme works perfectly well. But if it is the last period during which a particular trade was carried on, it leads to an absurd result: it would require 'any distribution' made after that particular trade ceased—which would include distribution of the profits of the new trade—to be included in the gross relevant distributions of the last year of the old trade, and thereby make the whole scheme unworkable."

I do not think that the decision of the House of Lords or the words of LORD REID in any way oblige me to construe the words "last chargeable accounting period" in the way suggested by the company. The House of Lords was dealing with a case in which the company had been carrying on business of one sort or another continuously down to the date of its liquidation, not a case like this where, if I am right on the first point, a distribution has been made in an interval between the ceasing of one business and the starting of another. LORD REID, as I read his words, was saying that, if a company makes a distribution when it is not trading, the last chargeable accounting period for the purpose of s. 35 (1) (c) is the last period before the distribution in which the company was carrying on any sort of trade. He was not saying that, if a company makes a distribution when it is not trading, s. 35 (1) (c) cannot apply unless one can say that it will never trade again.

Junior counsel for the company referred me to several other sections in the Act of 1947 for the purpose of showing that the construction of the words "last chargeable accounting period" contended for by the Crown would lead to anomalies of some sort or another. I was not in every instance satisfied that any difficulties would, in fact, arise, but, even if all counsel's points are good, they would not of themselves justify me in putting on the words "last chargeable accounting period" the construction contended for by the company.

In the result, therefore, I hold that the appeal fails.

Appeal dismissed.

Solicitors: *Mackrell & Co.* (for the taxpayer company); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

(6) Ante, at p. 176.

A

Re STERN'S WILL TRUSTS.
BARTLETT AND ANOTHER *v.* STERN AND OTHERS.

[CHANCERY DIVISION (Russell, J.), November 6, 1961.]

Will—Gift—" Born in the lifetime of " the testator—Special power of appointment—Life interest appointed to a nephew's widow during widowhood if " born in the lifetime " of the testator—En ventre sa mère at death of testator —Whether " born in the lifetime " of the testator.

B

By his will a testator directed his trustees to stand possessed of certain trust funds on trust for such one or more of certain named persons, including his nephew W. and any wife of the nephew who might survive him, for such interests, parts or shares as his trustees should by deed revocable or irrevocable appoint, with trusts over in default of appointment. In exercise of this power the trustees irrevocably appointed a specified part of the trust funds to W. for his life and after his death to any widow born in the lifetime of the testator whom W. might leave him surviving during her widowhood. The testator died on Dec. 25, 1915; and W. died on Dec. 7, 1959, leaving his widow, who was born on July 13, 1916, surviving him.

C

D

Held: W.'s widow was within the reason and motive of the testator's bequest and of the exercise of the power of appointment; therefore the fictional construction that a person en ventre sa mère at a particular date was born at that date, if subsequently born alive, would be applied and W.'s widow was accordingly entitled to the income of the appointed part of the fund during widowhood.

E

Principle stated by LORD RUSSELL OF KILLOWEN in *Elliot* v. *Joicey* ([1935] All E.R. Rep. at p. 589) explained and applied.

Villar v. *Gilbey* ([1907] A.C. 139) considered.

[As to a person en ventre sa mère being treated as born or living, see 34 HALSBURY'S LAWS (2nd Edn.) 298-301, para. 349; and for cases on the subject, see 44 DIGEST 834-836, *6857-6895*.]

F

Cases referred to:

Elliot v. *Joicey*, [1935] All E.R. Rep. 578; [1935] A.C. 209; 104 L.J.Ch. 111; sub nom. *Re Joicey, Joicey* v. *Elliot*, 152 L.T. 398; Digest Supp.

Trower v. *Butts*, (1823), 1 Sim. & St. 181; 1 L.J.O.S.Ch. 115; 57 E.R. 72; 44 Digest 835, *6877*.

G

Villar v. *Gilbey*, [1907] A.C. 139; 76 L.J.Ch. 339; 96 L.T. 511; 44 Digest 836, *6886*.

Adjourned Summons.

This was an application by originating summons dated Apr. 13, 1961, by the plaintiffs, Henry William Charles Bartlett and John Hendrick Stern, the trustees of the will dated Dec. 22, 1915, of Salomon Stern, deceased, who died on Dec. 25, 1915, for determination of the following questions: whether on the true construction of the will and of a deed of appointment dated Dec. 10, 1920, made in exercise of the power in that behalf contained in the will and in the events which had happened the plaintiffs as trustees of the will held certain investments and money (" the fund ") (a) on trust to pay the income to the first defendant during her widowhood and on re-marriage on trust as to both capital and income for the second defendant if she should attain the age of twenty-one years or previously marry and in default of her attaining a vested interest in the fund then in trust for the third defendant absolutely; or (b) on trust for the second defendant if she should attain the age of twenty-one years or previously marry and in default of her attaining a vested interest then in trust for the third defendant absolutely; or (c) on some other and if so what trusts.

H

I

The facts are set out in the judgment.

A. J. Balcombe for the plaintiffs, the trustees. A

B. K. Levy for the first defendant, the widow of Walter Salomon Stern, a nephew of the testator.

G. M. Godfrey for the second and third defendants, contingently entitled.

RUSSELL, J.: The testator, who died on Dec. 25, 1915, made a very long will dated Dec. 22, 1915, which raises a rather puzzling point. To deal only with the relevant provisions of the will, the testator set up what he called a "family fund" of a substantial kind and in the relevant event he gave to his trustees power to appoint that fund "Upon trust for all or such one or more exclusively of the others or other of the following persons". Then he set out a long list of persons, and I leave that for the moment. Then he proceeded: B

> ". . . and for and in such interests, parts or shares, and with such future or other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my trustees shall within twelve calendar months after the expiration of the accumulation period by any deed or deeds revocable or irrevocable in their absolute discretion appoint", C D

and on certain trusts in default of appointment. Among the persons who could benefit by the exercise of that power was

> ". . . my said nephew Walter Salomon Stern, the children or more remote issue of my said nephew Walter Salomon Stern, any wife of my said nephew Walter Salomon Stern who may survive him." E

By a deed of appointment dated Dec. 10, 1920, the trustees exercised their power over the trust fund and so far as is now relevant provided that the trustees should stand possessed of certain parts of the fund in trust to pay the income thereof to Walter Salomon Stern during his life and after his death to any widow born in the lifetime of the testator he might leave him surviving during her widowhood, and after the death or re-marriage of such widow if any to hold the capital fund on trust for all or any the children or child of Walter Salomon Stern who being sons should attain the age of twenty-one or being daughters should attain that age or previously marry and if more than one in equal shares with a gift over and ultimate remainder if there be no such child to the third defendant, Grete Stern [now Grete Coppola]. F

The parties to the present summons are the trustees, the plaintiffs, and the widow of Walter Salomon Stern, the only child of Walter Salomon Stern and Grete Coppola, who are defendants. The second defendant is an infant who has not married. The widow, the first defendant, was born on July 13, 1916, so that it is quite plain, as there is no indication that there was anything unusual about the circumstances of her birth, that she was at the death of the testator on Dec. 25, 1915, en ventre sa mère. The whole question is whether in those circumstances she is entitled to a life interest in what I may describe as the Walter Salomon Stern fund by virtue of an appointment which, as I have indicated, provided that after the death of Walter Salomon Stern his life interest in the fund was to be held on trust to pay the income to any widow born in the lifetime of the testator. G H

As I read the cases, in the ordinary and natural sense of the word "born" the first defendant was not born in the lifetime of the testator. She was at that time only en ventre sa mère. I have been referred to *Elliot* v. *Joicey* (1) for a statement of principle either directly stated in the judgment in that case or to be found from the authorities cited in the course of the judgment. I

On one side it is said that the principle is this: that the strict rule of construction of phrases such as "born in the lifetime of the testator" should be departed

(1) [1935] All E.R. Rep. 578; [1935] A.C. 209.

A from where the result of treating a person en ventre sa mère as being born in fact at that time, will be to confer a direct benefit on the person en ventre sa mère, as would be undoubtedly the case here because the widow would thus get a widow's interest. On the other hand, it is said that on an examination of the cases this benevolent construction of phrases such as " born in the lifetime " or " living at [a particular time] ", in which conception is treated as equivalent to B birth, is limited to the case of class gifts, and a warning is given, more particularly in *Villar* v. *Gilbey* (2) in the House of Lords, that this benevolent construction should not be adopted unless in any particular case authority constrains the court to adopt it. It is said there is, on a review of the authorities, no case in which this type of benevolent construction has been applied except in the case of class gifts.

C As I understand it, the general principle has always been, starting with the civil law cases, that the fictional construction or, as I have called it, the benevolent construction, is to be applied only when the result of its application will be to confer a benefit on the person concerned and therefore it will never be applied, for example, where the result would be to confer a benefit on somebody else. That situation was finally established in this country by the decision of the D House of Lords in *Villar* v. *Gilbey* (2) as it was interpreted in the decision in *Elliot* v. *Joicey* (3).

I find it very difficult to see in reason or in logic why this principle of construction should be limited to what are correctly described as class gifts. Indeed, counsel for the remainderman was in some difficulty in suggesting what logical difference there really was. Suppose, for example, a person belongs to a class E consisting of the children of X born before a particular date, then a child who was en ventre sa mère at that date would, according to the argument, be included among those people who were " born ", conception being the equivalent of birth. If, on the other hand, the principle is limited to class gifts, then a gift to the eldest child of X born before a certain date would not be a case in which it would be permissible to exercise a benevolent construction in favour of the child. That F is the effect of the submission, and it seems to me that it makes nonsense. If one looks at the speech of LORD RUSSELL OF KILLOWEN in *Elliot* v. *Joicey* (4) one finds a summary under four heads. I need not worry about the first head. It is said that the words referring to a person born before a particular date will not in their ordinary or natural meaning include a child who at that time was only en ventre sa mère. The second head is in these words (4):

G

> " The ordinary or natural meaning of the words may be departed from and a fictional construction applied to them so as to include therein a child en ventre sa mère at the relevant date and subsequently born alive if, but only if, such fictional construction will secure to such child a benefit to which it would have been entitled if it had been actually born at the relevant date."

H

It must be noted that the words used are " may be departed from ", not " will be departed from ", but it is possible that the words " may be " were included because there was some indication in the general language used in that case to show that the testator had no intention that the natural meaning should be departed from there at all. The third head states (4):

I

> " The only reason and the only justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as ' born ' before or ' living ' at or ' surviving ' a particular point of time or event, a child en ventre sa mère must necessarily be within the reason and motive of the gift."

That is a phrase which was certainly used, if it did not originate, in the judgment

(2) [1907] A.C. 139. (3) [1935] All E.R. Rep. at p. 586; [1935] A.C. at p. 227.
(4) [1935] All E.R. Rep. at p. 589; [1935] A.C. at p. 233.

of SIR JOHN LEACH, V.-C., in *Trower* v. *Butts* (5) where he stated the law as "fully settled" in regard to gifts to children living at the death of the testator, namely, that a child en ventre sa mère is within such a gift not because such a child answers the description of a child living but because the potential existence of such a child places it plainly within the reason and motive of the gift.

Referring back to the third head of LORD RUSSELL OF KILLOWEN'S summary (6), it should not, in my view, be interpreted as intending to limit the application of the fictional construction to class gifts. I do not see that the speeches in *Elliot* v. *Joicey* (7) are such as to indicate any intention to confine to class gifts the application of what is referred to as a fictional construction. I find it very difficult to see how one can gather the reason and motive of the gift only in the case of a class gift and cannot gather the reason and motive of the gift in a case such as this. Here the reason and motive of the gift seem to me (and I look here at the appointment which is the proper place in which to look) quite plainly to be to confer a benefit on the widow of Walter Salomon Stern. I have no doubt that the reason for introducing a reference to the widow being born in the lifetime of the testator was a fear that the appointment might run into trouble because of the rule against perpetuities. In fact, having regard to the remaindermen in whose favour the appointment was made, it could not have run into any such conflict. There seems to me no particular reason to suppose that the appointors were in fact intending to cut out the widow who was en ventre sa mère at the time laid down. The reason and motive of the gift was to benefit the person, provided that her life interest could not lead to an infringement of the rule against perpetuities: for the purpose of that rule conception is treated as equivalent to birth.

I must confess that, on the state of the authorities, the point is not an easy one, but I do attend to the general condition based on the civil law that a fictional construction will be put on phrases such as this when the result will be to confer directly a benefit under the particular document on the person in question. Accordingly, in my judgment, undeterred by the fact that there is so far as counsel have been able to discover no authority reported on this point, I propose to declare that in the circumstances the first defendant is entitled by virtue of the will and deed of appointment to the income of the fund during her widowhood.

Order accordingly.

Solicitors: *Arthur S. Joseph & Cates* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(5) (1823), 1 Sim. & St. at p. 184.
(6) [1935] All E.R. Rep. at p. 589; [1935] A.C. at p. 233.
(7) [1935] All E.R. Rep. 578; [1935] A.C. 209.

A

Re CLARKE'S WILL TRUSTS.

[CHANCERY DIVISION (Russell, J.), October 27, November 6, 1961.]

Trust and Trustee—Variation of trusts by the court—Investment—Extension of power of investment—Discretion—Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 53), *s.* 1—*Trustee Investments Act,* 1961 (9 *&* 10 *Eliz.* 2 *c.* 62), *Sch.* 1, *Part* 4, *para.* 3.

B

By cl. 18 of his will the testator, who died in 1933, empowered his trustees to invest trust moneys in (i) trustee securities, (ii) the stocks or securities of any British dominion, colony, state or dependency, any foreign government or state, or of any municipal corporation power gas electric light water railway canal dock harbour or local authority in England, Wales, Scotland or any British dominion, etc. if quoted on the London Stock Exchange, and "(iii) . . . the stock or shares (of whatsoever class or description and whether or not fully paid) debentures or debenture stock of any corporation howsoever and wheresoever incorporated if such stock shares debentures or debenture stock in which any investment is made are quoted on the London Stock Exchange or the Stock Exchange or Curb Exchange of New York or Montreal or the Paris Bourse and if (except in the case of debentures or debenture stock) such corporation shall for the five years immediately preceding the date of investment have paid such preferential dividend (if any) as is payable in respect of any class of stock or shares thereof and a dividend at the rate of not less than £5 per centum per annum on all other stock and shares issued thereby or if such last mentioned stock or shares are of no par value but the dividend or interest thereon is payable in dollars then a dividend at the rate of not less than one dollar per share per annum . . . Provided that (a) not more than £2,000 shall be invested in the same security if authorised only by sub-para. (ii) hereof; (b) not more than £1,000 shall be invested in the same security if authorised by sub-para. (iii) hereof . . ." By an order dated Feb. 23, 1959, made under the Variation of Trusts Act, 1958, the amount of £5,000 was substituted for each of the amounts £2,000 and £1,000 in provisos (a) and (b).

C

D

E

F

The trustees of the testator's will applied by originating summons for the court's approval of an arrangement for enlarging the trustees' investment powers by the deletion of the words following "Paris Bourse" in cl. 18 (iii) and the deletion of provisos (a) and (b) thereto. The addresses of two infant respondents were unknown and service on them was not effected.

G

Held: the testator's will enabled trust moneys to be invested, if thought fit, in ordinary shares, and a variation which brought the safeguards which he had imposed on such investment more into line with those imposed by the Trustee Investments Act, 1961, could be approved consistently with that Act, and existing decisions thereafter concerning the exercising of the jurisdiction to vary trusts affecting trustees' investment powers; in the present case it would be beneficial that the quantitative limitation imposed by the testator's will, as subsequently varied, should be removed and the statutory restrictions on investing in "wider range" investments (imposed by Sch. 1, Part 4, para. 3 of the Act of 1961) should be substituted for the testator's requirement as to dividend history, and accordingly an arrangement effecting these variations would be approved on behalf of all respondents, and unborn and unascertained persons, except the two infant respondents who had not been served.

H

I

[As to the investment of trust funds, see 33 HALSBURY'S LAWS (2nd Edn.) 232, para. 415 et seq.; and for cases on the subject, see 43 DIGEST 941-943, *3781-3806.*

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.

For the Trustee Investments Act, 1961, Sch. 1, Part 4, see HALSBURY'S STATUTES (2nd Edn.) Interim Service 768.]

Adjourned Summons.

This was an application by originating summons dated May 16, 1961, by the plaintiffs, Charles Wilfrid Mallard Turner and Midland Bank Executor and Trustee Co., Ltd., the trustees of the will dated Mar. 8, 1933, and two codicils thereto dated June 6, 1933, and Aug. 15, 1933, of the testator, George Edwin Clarke, deceased, for the relief hereinafter mentioned. The testator died in 1933. Clause 18 of his will was, so far as material, as follows:

> "My trustees shall have power to invest all moneys liable to be invested under the trusts of my will:—(i) In or upon any investments for the time being authorised by law as investments of trust money or (ii) In or upon the stocks or securities of any British dominion colony state or dependency or any province thereof or any foreign government or state or of any municipal corporation power gas electric light water railway canal dock harbour or local authority in England and Wales Scotland or any British dominion colony state or dependency if such are quoted on the London Stock Exchange or (iii) In or upon the stock or shares (of whatsoever class or description and whether or not fully paid) debentures or debenture stock of any corporation howsoever and wheresoever incorporated if such stock shares debentures or debenture stock in which any investment is made are quoted on the London Stock Exchange or the Stock Exchange or Curb Exchange of New York or Montreal or the Paris Bourse and if (except in the case of debentures or debenture stock) such corporation shall for the five years immediately preceding the date of investment have paid such preferential dividend (if any) as is payable in respect of any class of stock or shares thereof and a dividend at the rate of not less than £5 per centum per annum on all other stock and shares issued thereby or if such last mentioned stock or shares are of no par value but the dividend or interest thereon is payable in dollars then a dividend at the rate of not less than one dollar per share per annum . . . Provided that (a) not more than £2,000 shall be invested in the same security if authorised only by sub-para. (ii) hereof; (b) not more than £1,000 shall be invested in the same security if authorised by sub-para. (iii) hereof . . ."

By an order dated Feb. 23, 1959, made by HARMAN, J., under the Variation of Trusts Act, 1958, it was ordered that £5,000 should be substituted for the limits of £2,000 and £1,000 laid down in cl. 18 of the will.

At the date of his death the testator owned 125,000 7½ per cent. £1 cumulative preference shares in W. G. Clarke & Sons (1929), Ltd. (hereinafter called "Clarkes"). Three bequests of 25,000, 20,000 and 20,000 respectively of these shares were settled by the will and the remainder (60,000 shares) were comprised in the testator's residuary estate. The administrative provisions of the testator's will included provision that any shares in Clarkes forming part of his residuary estate and subjected to the trust for sale with power to postpone sale applicable thereto should not be sold unless the trustees in their absolute discretion should think fit. Various dispositions left these holdings of 7½ per cent. preference shares at 25,000 and 15,000 and 15,000 and 46,000 respectively making a total of 101,000 such shares. In 1959 Spratt's Patent, Ltd. (hereinafter called "Spratts") offered to acquire all the preference shares in Clarkes in exchange for preference shares in Spratts, and by the order dated Feb. 23, 1959, mentioned earlier, the trustees were authorised to accept the offer and to treat the Spratts shares as authorised investments. In 1961 a scheme of arrangement dated Mar. 27, 1961, provided for the extinction of all the preference share capital in Spratts in exchange for the issue of six per cent. cumulative preference shares in Spillers, Ltd. (which owned all the ordinary share capital of Spratts).

The relief sought by the originating summons was approval by the court under the Variation of Trusts Act, 1958, on behalf of the infant respondents

A and all persons unborn who might become interested in the property settled by the will and codicils of one or other of two alternative arrangements enlarging the trustees' powers of managing and administering the trust property. The arrangements were (i) that cl. 18 of the will as varied by the order dated Feb. 23, 1959, be further varied by deleting that part of cl. 18 (iii) which follows the words "Paris Bourse" and provisos (a) and (b): or (ii) that the trustees be B at liberty to treat as authorised investments the six per cent. cumulative preference shares in Spillers, Ltd. (and all or any cumulative preference stock in Spillers, Ltd. into which such shares might be converted) due to be allotted to the trustees as holders of cumulative preference shares in Spratts under the scheme of arrangement dated Mar. 27, 1961.

The respondents were John Clarke Leuw, Beryl Margery Blackborow, Penelope C Anne Leuw (infant), Peter Leuw (infant), Vanessa Caroline Leuw (infant), Gordon John Cowling (infant), Peter Ian Cowling (infant), Angela Mary Blackborow and Elizabeth Avis Blackborow, all of whom were beneficially interested under the trusts of the will and codicils. The third and fourth respondents had no known address and had not been served with the summons.

D *D. A. Ziegler* for the applicants.

T. A. C. Burgess for the respondents, beneficially interested under the trusts of the will and codicils.

Cur. adv. vult.

Nov. 6. **RUSSELL, J.**, read the following judgment, wherein after setting out the relevant terms of cl. 18 of the testator's will and referring to the order E dated Feb. 23, 1959, and the facts concerning the holding of cumulative preference shares in Clarkes and the shares now representing that holding, he continued: The acquisition of the Spillers shares under the scheme of arrangement was the immediate occasion of this application. The trustees were advised that they would only be entitled to retain £5,000 worth of the Spillers stock under the terms of the will and (though they contemplated reducing the holdings from time F to time as occasion offered) they were anxious having regard to the financial advice tendered to them to be able to retain them. I need not rehearse the evidence on this matter. It suffices to say that I should have been prepared to authorise the retention as expedient, to the extent to which a limited ability to retain them could not be extracted from the interstices of the Trustee Investments Act, 1961, which came into force after the application was launched. G Nor is it necessary for me to probe those interstices on that point.

The question is whether it is a proper case in which to exercise the powers of the court under the Variation of Trusts Act, 1958, which are preserved (1) by the Act of 1961, by deleting generally the restrictions imposed by the testator on the quantity to be invested in any one security and the requirements in relation to dividend history. It was represented that in various ways such restrictions and H requirements were detrimental to the most profitable management of this substantial estate. The first settled legacy is worth now some £55,000 and residue over £220,000.

These points were made. First, on more than one occasion the dividend history requirement (2) had made it impossible for the trustees to concur in the type of re-arrangement which involved acceptance of shares in a newly formed company. I Secondly, the restriction on the size of a holding (2) made it necessary to incur the expense of the approach to the court in connexion with, for example, the Clarke-Spratts and Spratts-Spillers matters. Thirdly, the restriction on the size of a holding made it necessary in the case of a rights issue to consider the value of the current holding and was capable of preventing the subscription to

(1) See the Trustee Investments Act, 1961, s. 15.
(2) See p. 1134, letter E, ante.

such an issue which is generally more desirable than a sale of the rights if cash is available. Fourthly, it was said, a parcel limit of £5,000 was a fetter which, at least in the case of funds of this size in the hands of trustees of this character and experience, was unnecessary and might well be damaging.

As to the first of these points, the addition by s. 9 (1) of the Act of 1961, of a new para. (bb) to s. 10 (3) of the Trustee Act, 1925, while covering types of re-arrangement not previously covered is, I apprehend, still subject by virtue of s. 69 (2) of the Act of 1925, to the expression of a contrary intention in the instrument, which is not overridden by s. 1 (3) of the Act of 1961. No doubt if the trustees, with the guidance of their legal advisers and aided by a liberal application of cold wet cloths, put into operation the Act of 1961, in relation to their trusts, it would be found that this difficulty would in part, though not wholly, be thereby avoided. The same partial remedy is no doubt available on the second of the points above mentioned. So far as the third point is concerned, for reasons similar to those mentioned in connexion with the first point, the provisions of s. 9 (2) of the Act of 1961, would not seem to overcome the problems arising out of the £5,000 limitation in the case of rights issues, which similarly could only be partially solved. As to the fourth point, this difficulty could similarly but only partially be avoided by the application of the Act of 1961.

I am in entire accord with the observations which have fallen from my brethren as to the circumstances in which the court will exercise its jurisdiction to vary investment provisions in the light of the views of the legislature which have so recently found expression (3) in the Act of 1961. But here is, I think, undoubtedly a case in which a variation may be properly made without in any degree conflicting with those views. The testator was content that all should be invested, if thought fit, in ordinary shares. The Act of 1961, in permitting an investment in ordinary shares, (a) placed no fixed limit on the size of investment in any one company, and (b) in requiring a respectable dividend history expressly provided by Sch. 1, Part 4, para. 3, that a company formed to take over the business of another company or other companies or to acquire the securities of or control of another company or companies should have notionally attributed to it the dividend history of that company or of all those companies. In those circumstances a variation of the safeguards imposed by the testator which does no more than bring them in line with the safeguards of a similar character imposed by the Act does not, in my judgment, produce a conflict with the views expressed in the Act. Nor do I think that the fact that in 1959 the application was to extend the quantity limit only to £5,000 should prejudice the present application if it be otherwise justified.

I am not prepared to make in its entirety the order for variation asked for which would abolish wholly the requirement of a sound dividend history. In my judgment, it is beneficial for all concerned that the quantitative limitation should be abolished and that for the present dividend history requirement under cl. 18 (iii) of the will should be substituted the restrictions on investment in the wider range which are imposed by Sch. 1, Part 4, para. 3 of the Act of 1961, together with its attribution of a notional dividend history to a new company formed to take over the business or securities of another company or companies. The wording requires some alteration to fit the fact that the will authorises investment in shares of no par value and in foreign securities, and the following appear to me to be the appropriate variations to be made. Delete the whole of that part of cl. 18 (iii) which follows the words 'Paris Bourse'; delete proviso (a)

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(3) See *Re Cooper's Settlement*, p. 636 ante, and *Re Kolb's Will Trusts*, at p. 815, letter C, ante.

A and proviso (b) of cl. 18 and substitute the proviso set out below (4). These variations make applicable to the wide range of investments authorised by the testator such limitations as are applied by the Act of 1961 to its "wider range" in relation to the size of holding and dividend history and additionally impose the £1,000,000 paid-up capital requirement found in the Act, which addition is acceptable to the parties. I do not consider it necessary to incorporate in the B variation precautionary provisions such as are found in s. 6 of the Act of 1961, having particular regard to the character of the trustees and their normal practice, which they will obviously continue, of obtaining expert guidance.

The order will go in the usual form under the Act of 1958, expressing the opinion that the scheduled arrangement varying the trusts of the will is for the benefit of the infant respondents and all the unborn and unascertained persons C who are or may be interested under the trusts of the will (as further varied by an order which I made under the Act of 1958 on Oct. 27, 1961) and approving the arrangement on behalf of all those persons other than two of the respondents, both of whom are infants and whose whereabouts in the world is totally unknown and on whom no service has at any time been made. This is a case in which the arrangement is equally beneficial to persons who may become interested under D discretionary trusts if forfeitures occur and they need not be separately mentioned.

Order accordingly.

Solicitors: *Hatchett Jones & Co.* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

E

F

(4) Clause 18 (i)-(iii) of the testator's will, as so varied, would read as follows: "18. My trustees shall have power to invest all moneys liable to be invested under the trusts of my will; (i) in or upon any investments for the time being authorised by law as investments of trust money or (ii) in or upon the stocks or securities of any British dominion colony state or dependency or any province thereof or any foreign government or G state or of any municipal corporation power gas electric light water railway canal dock harbour or local authority in England Wales Scotland or any British dominion colony state or dependency if such are quoted on the London Stock Exchange or (iii) in or upon the stock or shares (of whatsoever class or description and whether or not fully paid) debentures or debenture stock of any corporation howsoever and wheresoever incorporated if such stock shares debentures or debenture stock in which any investment is made are quoted on the London Stock Exchange or the Stock Exchange or Curb Exchange of New York or Montreal or the Paris Bourse Provided that (a) money H requiring investment shall not be invested in the manner authorised by sub-para. (iii) hereof (i) if the corporation has a total issued paid-up share capital of less than £1,000,000 or its equivalent at the current rate of exchange and so that in the case of a corporation having shares or stock of no par value such paid-up capital shall be deemed to include the capital sum (other than capital surplus) appearing in the company's published accounts in respect of such shares or stock, and (ii) if the corporation has not in each of the five years immediately preceding the calendar year in which the investment is made paid a dividend on all the shares and stock issued by the corporation I excluding any shares or stock issued after the dividend so declared and any shares or stock which by their terms of issue did not rank for dividend for that year but so that any corporation formed to take over the business of another corporation or other corporations or to acquire the securities (including shares and stock) or control of another corporation or other corporations, or for either of those purposes and for other purposes shall be deemed to have paid a dividend as hereinafter mentioned in any year in which such dividend has been paid by the other corporation or all the other corporations as the case may be."

The proviso substituted as stated in the judgment is the passage beginning with the words "Provided that" in this footnote and continuing to the end.

R. *v.* BERKSHIRE (FOREST) JUSTICES, *Ex parte* DALLAIRE.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Stevenson, JJ.), November 20, 1961.]

Landlord and Tenant—Small tenement—Recovery of possession—Notice to quit—Notice of intended application for warrant for recovery of possession—Notice of intended application signed by housing manager as agent of local authority—Whether latter notice validly signed—Small Tenements Recovery Act, 1838 (1 *&* 2 *Vict. c.* 74), *s.* 1, *s.* 7—*Housing Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 56), *s.* 158 (2), *s.* 166 (2).

D. was a weekly tenant of premises owned by the local housing authority and let to her at a rent exceeding £20 per annum. D.'s tenancy was determined by a notice to quit, signed by the clerk to the authority in accordance with s. 166 (2)* of the Housing Act, 1957. With a view to proceedings to recover possession under the Small Tenements Recovery Act, 1838, which Act was made applicable by s. 158 (2)† of the Act of 1957, notice of intended application under the Act of 1838 was served on D. The notice was signed by the housing manager, as agent for the local housing authority, and the housing manager was not a person authorised to sign notices by s. 166 (2) of the Act of 1957. The justices having issued a warrant for possession, D. applied for certiorari.

Held (ASHWORTH, J., dissenting): the notice of intended application was signed by an agent of the landlord within s. 1‡ and s. 7 of the Small Tenements Recovery Act, 1838, which were applied by virtue of s. 158 (2) of the Housing Act, 1957, and the requirements of s. 166 (2) of the Act of 1957 did not apply; accordingly the notice was validly signed and certiorari would be refused.

[As to authentication of notices made by a local authority under the Housing Act, 1957, see 19 HALSBURY'S LAWS (3rd Edn.) 586, para. 947; and for cases on the subject, see 26 DIGEST (Repl.) 705, 706, *146-150*.

As to recovery of possession of controlled houses, see 19 HALSBURY'S LAWS (3rd Edn.) 594, 595, para. 961.

As to recovery of possession before magistrates, see 23 HALSBURY'S LAWS (3rd Edn.) 710-712, para. 1454.

For the Small Tenements Recovery Act, 1838, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 855.

For the Housing Act, 1957, s. 158, s. 166, see 37 HALSBURY'S STATUTES (2nd Edn.) 441, 445.]

Cases referred to:

Becker v. *Crosby Corpn.*, [1952] 1 All E.R. 1350; 116 J.P. 363; [1952] 1 T.L.R. 1375; 26 Digest (Repl.) 706, *150*.

Shelley v. *London County Council, Harcourt* v. *London County Council*, [1948] 2 All E.R. 898; [1949] A.C. 56; [1949] L.J.R. 57; 113 J.P. 1; 26 Digest (Repl.) 705, *148*.

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* Section 166 (2), so far as material, is set out at p. 1140, letter A, post.

† Section 158 (2) is set out at p. 1139, letter G, post.

‡ Section 1, so far as material, reads: "When and so soon as the term or interest of the tenant of any house . . . held by him at will or for any term not exceeding seven years . . . at a rent not exceeding the rate of £20 a year . . . shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof), any person by whom the same or any part thereof shall be then actually occupied, shall . . . refuse to quit and deliver up possession of the premises or of such part thereof respectively, it shall be lawful for the landlord of the said premises or his agent to cause the person so . . . refusing to quit and deliver up possession to be served . . . with a written notice . . . signed by the said landlord or his agent, of his intention to proceed to recover possession under . . . this Act . . ." The relevant terms of s. 7 are at p. 1139, letter I, post.

A **Motion.**

The applicant, Rose Jane Dallaire, moved for an order of certiorari to bring up and quash a decision of the justices for the Petty Sessional Division of the Forest in the county of Berkshire. The applicant was a weekly tenant of a tenement situated at No. 46, Pennfields, Ruscombe, Berkshire. The tenement was on premises which would not ordinarily have come within the Small Tene-
B ments Recovery Act, 1838, as the rent exceeded £20 per annum, but they came within s. 158 (2) of the Housing Act, 1957, being owned by the local authority, Wokingham Rural District Council, the respondents. The applicant's tenancy was determined on Feb. 13, 1961, by a notice to quit dated Jan. 12, 1961, duly signed by the clerk to the respondents in accordance with s. 166 of the Housing Act, 1957. The applicant neglected or refused to give up possession and on
C Mar. 16, 1961, the respondents served personally on her in the manner prescribed by s. 2 of the Small Tenements Recovery Act, 1838, a written notice under s. 1 of that Act, as extended by s. 158 (2) of the Act of 1957, of the intention to apply to the justices for the issue of a warrant to recover possession of the tenement. The notice of intended application was signed by the housing manager as agent for the local authority. The housing manager was authorised by resolution of
D the local housing authority to serve the notice, and the clerk to the authority was so authorised to instruct a solicitor to act. The justices issued a warrant directing the constables in the district where the applicant's tenement was situated to enter and take possession of her tenement and to eject any persons therefrom.

H. F. Newman for the applicant.
E *John K. Wood* for the respondents, Wokingham Rural District Council.

LORD PARKER, C.J.: In these proceedings, counsel moves on behalf of the applicant for an order of certiorari to bring up and quash a decision dated Mar. 28, 1961, of justices for the Petty Sessional Division of the Forest in the county of Berkshire, whereby they issued a warrant under s. 1 of the Small
F Tenements Recovery Act, 1838. [HIS LORDSHIP stated the facts, and continued:] The point taken in support of certiorari is extremely technical, but it is one of which the applicant is entitled to avail herself if it be good. It is that, whereas she was served with a proper legal notice to quit, the notice of intention to apply for a warrant was not properly signed in that it was signed by the housing manager as agent for the respondent council and not by the clerk to the council
G or his lawful deputy.

Section 158 (2) of the Housing Act, 1957, provides:

> "Where a local authority, for the purpose of exercising their powers under any enactment relating to housing, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain
> H possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined."

If one then looks at s. 1 of the Small Tenements Recovery Act, 1838, one finds that the notice of intention to apply for the warrant may be given by the landlord of the premises or his agent and, by s. 7 of that Act, "landlord" and "agent"
I are defined, and, in particular, it is provided:

> "... the word 'agent' shall be taken to signify any person usually employed by the landlord in the letting of the premises, or in the collection of the rents thereof, or specially authorised to act in the particular matter by writing under the hand of such landlord."

Pausing there, it seems perfectly clear that a notice of intention to apply for a warrant signed by the housing manager to the respondent council was a perfectly good notice. The matter, however, does not rest there, because s. 166 (2) of

the Housing Act, 1957, which is under a different heading not specifically dealing with the powers of the court for housing purposes but dealing generally with notices and orders, provides, so far as is material: A

> "A notice, demand or other written document proceeding from a local authority under this Act shall be signed by their clerk or his lawful deputy; . . ."

B

As I have said, the notice to quit was so signed and properly so signed having regard to the decision of this court in *Becker* v. *Crosby Corpn.* (1). In that case, the notice to quit had itself been signed by the housing manager to the local authority. The housing manager also signed the application of intention to apply for a warrant. That latter point, however, was not dealt with in that case, it being sufficient for the decision therein for the court to hold that a notice to quit, and, as I read it, whether for the purposes of subsequently proceeding under the Small Tenements Recovery Act, 1838, or in any other way, was a notice proceeding from a local authority under the Act, and, accordingly, by virtue of s. 164 (2) of the Housing Act, 1936 [now s. 166 (2) of the Housing Act, 1957], had to be signed by the town clerk or his lawful deputy. The argument in this case proceeds on the basis that that signature ought to persist in all subsequent proceedings in the courts, whether for recovery under the Act of 1838 or in any other way. The argument is that the words in s. 166 (2) of the Act of 1957 "proceeding from a local authority under this Act" are perfectly general, they are wide words and should be read as covering any notice, demand or written document proceeding from the local authority in pursuance of its powers under the Act, including its general powers of management and control. It is said that, looked at in this way, when a notice of application to apply for a warrant is given, it is given pursuant to and in carrying out those general powers of management under this Act. For myself, I think it is a matter of first impression. I find it very difficult to think that s. 158 (2) of the Act of 1957 would have been worded in the way it is if it had been intended that any notice carrying out the provisions of the Small Tenements Recovery Act, 1838, should be signed not as provided in that Act but as provided in s. 166 (2) of the Housing Act, 1957. Section 158 (2), in my judgment, is self-contained, and it is significant that it does not contain any such words as "save as otherwise provided in this Act". It is providing that, even though the rent may be over £20, the local authority may obtain possession thereof, and I quote "under the Small Tenements Recovery Act, 1838, as in the cases therein provided for". In other words, it seems to me that you not only use the procedure set out in s. 1 of that Act, but you read "landlord" or "agent" in the way defined by s. 7 of that Act. In my judgment, s. 166 (2) of the Housing Act, 1957, does not apply to a notice of intended application for a warrant. Accordingly, the justices had jurisdiction to decide as they did, and this application should be refused.

C D E F G

ASHWORTH, J.: To my regret I find myself constrained to express the contrary opinion, and I can state my reasons quite shortly. In the first place, if one looks at s. 166 (2) of the Housing Act, 1957, it seems to me that the document in this case is clearly a notice. Secondly, it proceeds from a local authority, and the question is: Does it proceed from them under this Act? Some guidance, though not conclusive, on that last point is afforded by *Becker* v. *Crosby Corpn.* (1) where, quoting from *Shelley* v. *London County Council* (2), this court said (3): H I

> ". . . the House of Lords decided that, in taking proceedings to recover possession of property to which the Housing Act, 1936, applies, the control and management of which is vested in the local authority, the local authority are exercising their powers under the Act. Therefore, it seems to me difficult to say that when they serve a notice to quit to get possession of such property

(1) [1952] 1 All E.R. 1350. (2) [1948] 2 All E.R. 898; [1949] A.C. 56.
(3) [1952] 1 All E.R. at p. 1351.

A they are not exercising their powers under the Act. The Small Tenements Recovery Act, 1838, indeed, expressly provides that it is only applicable where notice to quit has been served and expired. The corporation served a notice to quit, and took proceedings under the Act of 1838, showing thereby that they were exercising their powers under the Act. Therefore, in my opinion, it is impossible to say that the notice which they served was B not a notice proceeding from a local authority under the Act of 1936."

I agree at once that that was a notice to quit, and it is conceded that a notice to quit requires the signature of the clerk whatever the tenancy and wherever the local authority may contemplate eventual proceedings; but the words used by LORD GODDARD, C.J., in *Becker* v. *Crosby Corpn.* (4) are as wide as the sub-section itself, and it seems to me that these general words, if they are to be cut C down, require some specific limitation. It is, in fact, the converse of the approach taken by LORD PARKER, C.J. Indeed, I am fortified in this in that s. 166 (2) itself includes two limitations on the wide words in the opening sentence because the requirement is not to apply to notices to be served under s. 26 or s. 30 of the Act of 1957, and is not to apply to a notice, demand or other document proceeding from the London County Council.

D But I approach it also from another way. Section 158 was conferring a special power on a local authority to obtain possession of premises under the Small Tenements Recovery Act, 1838, whatever the value or rent of the building "as in the cases therein provided for". It seems to me, with all respect, that to say that that section is self-contained and independent of s. 166 may, perhaps, not give sufficient weight to the fact that, in one respect at least, it is not self-E contained. The reason I say that is this: counsel for the respondents conceded that an essential preliminary to any successful proceedings under the Act of 1838, unless the tenant voluntarily went, was a notice to quit, and it is clear from *Becker* v. *Crosby Corpn.* (5) that s. 166 (2) operates to govern that notice to quit long in advance of the proceedings under the Act of 1838. If that is so, I, for my part, cannot see any reason why it should not govern the second notice. F There can be no difficulty if the clerk has to sign the notice. It is no more difficult for him to sign the notice than to sign the document commencing proceedings.

My third reason is this. Counsel for the respondents said that the proceedings under the Small Tenements Recovery Act, 1838, have been regarded as proceedings under that Act as varied or extended or amended—whatever words G he wishes to choose—by the Act of 1957. But, once one gets the concession that the Act of 1838 is not sufficient of itself, it seems to me that what is required is a notice under the Act of 1957. However, as I understand that my brethren take a different view, the result will be in accordance with the decision of my Lords.

H **STEVENSON, J.:** I have no doubt that this is, as LORD PARKER, C.J., has said, a matter of first impression, and it is manifestly a narrow point. My own first impression agrees wholly with that expressed by LORD PARKER, C.J., and has survived considerable argument and a careful examination of the relevant sections. This problem necessitates construing together the general provision contained in s. 166 (2) of the Housing Act, 1957, and the terms of s. 158 (2) of I that Act. Section 166 (2) provides that a notice proceeding from a local authority under that Act shall be signed by their clerk or his lawful deputy. Section 158 (2), as I read it, prescribes a mode of enforcing the right to possession of a house by reference to and by adopting for the purpose of the Housing Act, 1957, the procedure before justices prescribed by the Small Tenements Recovery Act, 1838. It says that the local authority may obtain possession under the Act of 1838 as in the cases therein provided for. Under s. 1 of the Act of 1838,

(4) [1952] 1 All E.R. at p. 1351. (5) [1952] 1 All E.R. 1350.

the notice of intention to apply for a warrant may be signed by the landlord's agent in the way that the notice in the present case was signed. I cannot think that the general provision contained in s. 166 (2) ought to be construed as subtracting anything from the full significance of the adoption for the purposes of the Housing Act of the powers contained in the Small Tenements Recovery Act, 1838. I, therefore, take the view that the respondent council must succeed on this application, and that the motion must fail.

Motion dismissed.

Solicitors: *Leslie A. Fawke* (for the applicant); *Martin, Nicholson, Hortin & Nash*, agents for *M. Owen Wellbelove*, Reading (for the respondents, Wokingham Rural District Council).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

SUNROSE, LTD. *v.* GOULD.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Davies, L.JJ.), November 14, 1961.]

Landlord and Tenant—Notice to quit—Business premises—Date incomplete—Year of termination of tenancy left blank—Validity of notice—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 25, *s.* 66 (2)—*Landlord and Tenant (Notices) Regulations*, 1957 (*S.I.* 1957 *No.* 1157), *reg.* 4 (vii).

The landlord of business premises to which Part 2 of the Landlord and Tenant Act, 1954, applied, gave notice under s. 25 of that Act to terminate the tenancy in the form prescribed by the Landlord and Tenant (Notices) Regulations, 1957. The notice was dated Jan. 12, 1961, and was correctly filled in except that the year in which the tenancy was to be terminated was left blank. From Note 1 on the back of the form relating to the length of notice required by s. 25 (2) of the Act, it was clear that the intended year of termination must be 1961.

Held: the notice was valid since there was no erroneous statement but, at most, an ambiguity which could be resolved by reference to Note 1 on the back of the form.

Dictum of BARRY, J., in *Barclays Bank, Ltd.* v. *Ascott* ([1961] 1 All E.R. at p. 786) approved.

Decision in *Hankey* v. *Clavering* ([1942] 2 All E.R. 311) distinguished.

Appeal dismissed.

[As to a landlord's notice to terminate a business tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 889, para. 1711.

For the Landlord and Tenant Act, 1954, s. 25 and s. 66, see 34 HALSBURY'S STATUTES (2nd Edn.) 410, 442.

For the Landlord and Tenant (Notices) Regulations, 1957, reg. 4, see 12 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 159.]

Cases referred to:

Barclays Bank, Ltd. v. *Ascott*, [1961] 1 All E.R. 782; [1961] 1 W.L.R. 717.

Bolton's (House Furnishers), Ltd. v. *Oppenheim*, [1959] 3 All E.R. 90; [1959] 1 W.L.R. 913; 3rd Digest Supp.

Doe d. Rodd v. *Archer*, (1811), 14 East, 245; 104 E.R. 595; 31 Digest (Repl.) 498, *6233.*

Hankey v. *Clavering*, [1942] 2 All E.R. 311; [1942] 2 K.B. 326; 111 L.J.K.B. 711; 167 L.T. 193; 31 Digest (Repl.) 599, *7170.*

Mountford v. *Hodkinson*, [1956] 2 All E.R. 17; [1956] 1 W.L.R. 422; 2 Digest (Repl.) 14, *62.*

A **Appeal.**

This was an appeal by the tenant from an order of His Honour JUDGE STEEL, given on Oct. 3, 1961, at Manchester County Court, making an order for possession of premises situate at 1300, Ashton Old Road, Openshaw, Manchester. The facts are set out in the judgment of HOLROYD PEARCE, L.J.

B *K. Backhouse* for the tenant.
H. Heathcote-Williams, Q.C., and *Gerson Newman* for the landlord.

HOLROYD PEARCE, L.J.: The question on this appeal is the validity of a notice under s. 25 (1) of the Landlord and Tenant Act, 1954. That subsection says:

C "The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as the 'date of termination') . . ."

Subsection (2) provides:

D "Subject to the provisions of the next following subsection, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein."

The tenant held the premises for a five-year term due to end on May 5, 1961. By the provisions of s. 24 (1), that tenancy would continue in force until it was E properly terminated by the landlord under the Act. The disputed notice was dated Jan. 12, 1961, and was served by the landlord on the tenant. The learned judge held that it was valid. The document is headed "Landlord and Tenant Act, 1954. Landlord's notice under the Act to terminate business tenancy". It is in the form prescribed by the Act. The relevant details are typed into the blanks contained in it. The landlord's name and address are typewritten into F the blanks intended for them. There follow the printed words:

". . . landlord (*Note* 7) of the above-mentioned premises, hereby give you notice terminating your tenancy on the . . . blank . . . [into which is typed '15th'] day of . . . blank . . . [into which is typed 'July'], 196 . . . blank . . . (*Note* 1)."

G No evidence was called. On the back of the form were the various notes. Note 1 set out the provisions of s. 25 (2) relating to the length of notice required by the Act. From Note 1 it was clear that the intended date must be July 15 next after the date of the notice, namely, July 15, 1961. It reads:

"Under the Landlord and Tenant Act, 1954, a tenancy of premises to which Part 2 of the Act applies continues until it is brought to an end in H accordance with the Act. One of the ways in which it can be brought to an end is by a landlord's notice to terminate the tenancy. As a general rule, that notice must be given not more than twelve nor less than six months before the date specified in it for the termination of the current tenancy of the premises. This date must not be earlier than the date on which apart from Part 2 of the Act the current tenancy would expire or I could be terminated by notice to quit given by the landlord on the date of the notice."

The notes are inserted pursuant to the statute. Section 66 (2) provides:

"Where the form of a notice to be served on persons of any description is to be prescribed for any of the purposes of this Act, the form to be prescribed shall include such an explanation of the relevant provisions of this Act as appears to the Lord Chancellor requisite for informing persons of that description of their rights and obligations under those provisions,"

Regulation 4 of the Landlord and Tenant (Notices) Regulations, 1957, made under the Landlord and Tenant Act, 1954, says: A

> "The forms in the appendix to these regulations, or forms substantially to the like effect, shall be used for the following purposes, that is to say . . . (vii) A notice under the provisions of s. 25 of the Act, being a notice terminating a tenancy to which Part 2 of the Act applies, shall, unless it contains a copy of a certificate given under the provisions of s. 57, s. 58 or s. 60 of the Act, be in Form 7." B

Form 7 is in exactly the same terms as the printed form of termination which was served in this case and has note 1 on the back in the same terms as the note 1 in this case.

Admittedly, if the tenant looked at the note on the back, it would be clear that the only possible year was 1961. But counsel for the tenant in a very full and careful argument contends that the date is not "specified" in accordance with s. 25 (1), since to specify implies certainty and exactitude; and that the giving of a formula does not comply with the necessity to specify, even though the date can be ascertained from the formula. He has to concede that, at common law, notices to quit have been benevolently construed ut res magis valeat quam pereat: see, for instance, *Doe d. Rodd* v. *Archer* (1). Moreover, formulae such as "on the date when your current tenancy may next lawfully be determined" are allowable at common law. He contends, however, that such formulae cannot be applied in a case under this statute since this is a particular and specific kind of notice under this particular statute. He relies on the observations of LORD GREENE, M.R., in *Hankey* v. *Clavering* (2), when he was dealing with a notice to break a lease. LORD GREENE there refused to correct a slip in the notice in which had been inserted Dec. 21 in mistake for Dec. 25. He said (3): C D E

> "Notices of this kind are documents of a technical nature, technical because they are not consensual documents, but, if they are in proper form, they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They must on their face and on a fair and reasonable construction do what the lease provides that they are to do . . . I dissent entirely from the proposition that, where a document is clear and specific, but inaccurate on some matter, such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip." F

That case, however, does not help. For in that case there was an erroneous date, whereas in the present case there is no error but at most an ambiguity caused by a blank. G

Counsel for the tenant tries to distinguish the present case from the authorities which deal with notices to quit at common law by contending that this notice is one which is served, not by the ordinary common law landlord, but by the "competent" landlord under the Act; who may not be the common law landlord at all. This argument has little force. It is true that, by s. 44, the future or reversionary landlord is given, ahead of his time, a right to serve a notice in order that, when he comes into his reversion, the time occupied by the notice shall not be taken out of his reversion. The Act has dealt with the situation by calling him a "competent landlord" and transferring to him the right to give notice to quit, but that creates no relevant difference between notices under this Act and notices to quit at common law. The liberal construction of notices has been extended to notices under the Agricultural Holdings Act, 1948; see *Mountford* v. *Hodkinson* (4). In *Bolton's (House Furnishers), Ltd.* v. *Oppenheim* (5), HODSON, L.J., treats the contents of a notice under the Landlord and Tenant Act, 1954, H I

(1) (1811), 14 East, 245.
(2) [1942] 2 All E.R. 311; [1942] 2 K.B. 326.
(3) [1942] 2 K.B. at p. 329; [1942] 2 All E.R. at p. 313.
(4) [1956] 2 All E.R. 17.
(5) [1959] 3 All E.R. at p. 94.

A as coming within the ordinary principles applicable to common law notices to quit. That case was followed by BARRY, J., in *Barclays Bank, Ltd.* v. *Ascott* (6). He said:

> "As I understand HODSON, L.J.'s judgment, the question which the court really has to consider is whether the notice given by the landlord has given such information to the tenant as will enable the tenant to deal, in a proper way, with the situation (whatever it may be) referred to in the notice. It is clear, I think, from the authorities which have been cited to me that this notice should be construed liberally, and provided that it does give the real substance of the information required, then the mere omission of certain details, or the failure to embody in the notice the full provisions of the section of the Act referred to, will not in fact invalidate the notice."

B

C

I agree with those words of BARRY, J. In the present case, the learned judge rightly held that the notice was a valid document under the Act. I would dismiss the appeal.

WILLMER, L.J.: I agree. In my judgment, for the reasons which the learned county court judge gave, the effect of the notice served in this case, in all the circumstances, was to specify the date on which the tenancy was to come to an end. I agree that it was a valid notice, and that the appeal should be dismissed.

D

DAVIES, L.J.: I also agree. In my judgment, this case is entirely different from the class of case of which *Hankey* v. *Clavering* (7) is an example. What was being sought there was to correct a positive error in the notice. Here that is not so. Here what the learned judge has decided, and what this court is deciding, is whether, when there is a lacuna or ambiguity in one part of the notice, that lacuna can be filled in by reference to the notes on the back. Had this notice in the material part specified 1960 or 1962, it might well have fallen within the principles of the decision in *Hankey* v. *Clavering* (7). But, on the admitted facts, it seems to me that this case is precisely within the words of LORD GREENE, M.R., in that case, when he said (8):

E

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> "It is perfectly true that in construing such a document, as in construing any other document, the court in case of ambiguity will lean in favour of reading the document in such a way as to give it validity . . .",

that is to say, by applying the well-known principle that that is certain which, by reference to all the parts of the document itself, can be rendered certain.

G

I agree that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *W. A. Sando, Parrott & Co.*, agents for *Kirk, Jackson & Co.*, Swinton (for the tenant); *Manches & Co.*, agents for *David Blank, Alexander & Co.*, Manchester (for the landlord).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(6) [1961] 1 All E.R. at p. 786. (7) [1942] 2 All E.R. 311; [1942] 2 K.B. 326.
(8) [1942] 2 All E.R. at p. 314; [1942] 2 K.B. at p. 330.

A

HENTY & CONSTABLE (BREWERS), LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Donovan and Danckwerts, L.JJ.), November 6, 7, 16, 1961.]

B

Stamp Duty—Conveyance on sale—Amalgamation of companies—Shares of brewery company acquired by purchasing company from shareholders—Liquidation of brewery company—Conveyance of brewery company's land to purchasing company—Conveyance by liquidator of brewery company on authority of shareholders—Transfers of shares by vendor shareholders not registered—No evidence whether transfers stamped—Whether conveyance attracted stamp duty as a conveyance on sale —Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54, *Sch.* 1.

C

Acting in pursuance of a sale agreement, dated Apr. 17, 1921, vendor shareholders of a brewery company transferred all their shares in April, 1921, to a purchasing company in return for shares in the purchasing company then allotted to them in payment therefor. The transfers were not registered, nor were they proved to have been stamped. In accordance with the sale agreement the vendors then resolved to wind-up the brewery company voluntarily and they gave authority to the liquidator to transfer assets to which they might be entitled to the purchasing company. Pursuant to this authority the liquidator executed a conveyance dated Dec. 31, 1921, of the brewery company's licensed properties to the purchasing company. On adjudication in 1955 the conveyance was assessed to ad valorem stamp duty as a conveyance on sale. On appeal by way of Case Stated the sale agreement was not impugned as a sham.

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Held: the subject of the sale by the vendor shareholders was their shares, not the brewery company's licensed premises, and, it not being alleged that the sale agreement was merely a cloak for a different transaction, viz., a sale of the licensed premises, the conveyance of these was not a conveyance "upon the sale thereof" within s. 54 of the Stamp Act, 1891, but was only a consequence of the sale of shares; the conveyance, therefore, attracted 10s. stamp duty as a "conveyance or transfer . . . not hereinbefore described" in Sch. 1 to the Stamp Act, 1891, and did not attract ad valorem duty as a conveyance on sale.

F

Decision of BUCKLEY, J. ([1961] 2 All E.R. 372) affirmed.

G

[As to the meaning of "conveyance or transfer on sale" for stamp duty purposes, see 28 HALSBURY'S LAWS (2nd Edn.) 458, para. 973; and for cases on the subject, see 39 DIGEST 278-285, *621-671.*

For the Stamp Act, 1891, s. 54 and Sch. 1 ("Conveyance or transfer on sale"), see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 667.]

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Cases referred to:

Inland Revenue Comrs. v. *Westminster* (*Duke*), [1935] All E.R. Rep. 259; [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; sub nom. *Westminster* (*Duke*) v. *Inland Revenue Comrs.*, 19 Tax Cas. 490; 28 Digest (Repl.) 339, *1505.*

Marine Investment Co. v. *Haviside*, (1872), L.R. 5 H.L. 624; 42 L.J.Ch. 173; 22 Digest (Repl.) 266, *2672.*

I

Oughtred v. *Inland Revenue Comrs.*, [1958] 2 All E.R. 443; [1958] Ch. 678; [1958] 3 W.L.R. 64; *affd.* H.L., [1959] 3 All E.R. 623; [1960] A.C. 206; [1959] 3 W.L.R. 898; 3rd Digest Supp.

Appeal.

The respondent company presented a deed to the Commissioners of Inland Revenue, on Nov. 16, 1955, for their opinion as to the stamp duty with which it was chargeable. The deed was a deed of conveyance of freehold and leasehold

A properties made between a brewery company in liquidation and its liquidator and the respondent company and was executed on Dec. 31, 1921, on paper bearing an impressed 10s. stamp. The commissioners were of opinion that by the deed of conveyance the assets of the brewery company in liquidation comprised therein were conveyed by the direction of the shareholders of that company to the respondent company in consideration of the issue to the shareholders of shares in B the respondent company. The commissioners inferred as a matter of fact from the circumstances that it had been contemplated and agreed between the shareholders and the respondent company that a sale agreement made between them providing for the sale of the shares in the brewery company in liquidation to the respondent company should be completed, not by registering the respondent company as shareholders in the brewery company, but by a conveyance or transfer by the C liquidator by the direction of the shareholders of the property comprised in the conveyance. The commissioners were therefore of the opinion that the deed of conveyance was a "conveyance or transfer on sale" for the purposes of the Stamp Act, 1891, and they assessed the instrument with ad valorem duty by reference to that head of charge in Sch. 1 to the Act, the duty amounting to £985 less the 10s. already impressed. The respondent company also paid D penalties under s. 15 (1) of the Act. The respondent company contended that the deed was not a "conveyance or transfer on sale" for the purposes of the Act, but that it was executed for the purposes of conveying or assigning to the respondent company the assets in the brewery company in liquidation to which it was entitled as the beneficial owner of the shares in that company, and that it attracted a fixed duty of 10s. by reference to the head of charge "conveyance E or transfer of any kind not hereinbefore described" in Sch. 1 to the Act. An appeal by the respondent company by way of Case Stated to the High Court was allowed on Mar. 21, 1961 (reported at [1961] 2 All E.R. 372), BUCKLEY, J., holding that the transaction was a sale of shares and not of lands and that the conveyance was not a conveyance on sale liable to ad valorem stamp duty but a conveyance or transfer attracting 10s. stamp duty only. The Crown appealed F to the Court of Appeal.

Sir Lynn Ungoed-Thomas, Q.C., and *E. Blanshard Stamp* for the Crown.

H. E. Francis, Q.C., and *J. P. Brookes* for the respondent company.

Cur. adv. vult.

Nov. 16. The following judgments were read.

G

LORD EVERSHED, M.R.: In this case I have had the advantage of reading in advance the judgments to be delivered by DONOVAN and DANCKWERTS, L.JJ. I agree with their conclusion that this appeal should be dismissed and only state briefly my own reasons for concurrence out of respect for the arguments of counsel for the Crown. The question is whether an indenture of H Dec. 31, 1921, and made between G. S. Constable & Sons, Ltd. (hereafter called the Constable company) and its liquidator of the one part and the respondent company of the other part was a conveyance or transfer on sale under Sch. 1 to the Stamp Act, 1891, and the aiding definition of s. 54 of that Act.

The history begins with an agreement dated Apr. 17, 1921, and made between the six shareholders of the Constable company as vendors of the one part, and I the respondent company of the other part. After recitals, including one that the vendors were proposing to sell their shares in the Constable company to the respondent company on the terms thereafter set out, it was provided (by cl. 1) that the vendors should sell and transfer such shares to the respondent company at the price set out in the first schedule thereto, such price to be satisfied by the issue to the several vendors, credited as fully paid up, of the respective shares in the respondent company also specified in that schedule. Clause 2 provided that the sale should be completed on the following Apr. 25

> "when the said purchase consideration shall be satisfied as aforesaid and thereupon the vendors . . . shall transfer the shares so sold to"

the respondent company. Clause 4 (a) of the agreement, on which the Crown strongly relied, was in the following terms:

> "The vendors hereby agree (a) that as soon as conveniently may be after completion of the sale of the said shares in the Constable company they will procure the Constable company to pass a special resolution that the Constable company be wound up voluntarily and that Beldam be appointed liquidator thereof."

Clause 6 of the agreement provided that, since the purchase prices earlier mentioned had been arrived at without regard to the unlicensed premises of the Constable company (specified in the second schedule), the respondent company should "before completion" give to the Constable company "or its liquidator" irrevocable authority in the distribution of the Constable company's assets to make over such unlicensed premises to the vendors. Counsel for the Crown also relied somewhat on the last two clauses of the agreement, numbered 10 and 11. By the former, the respondent company undertook to pay the costs and expenses of the Constable company's liquidation and also (inter alia) "all stamps . . . in relation to the transfers" of the vendors' shares. By cl. 11 the respondent company

> "shall be entitled to all dividends on the shares in the Constable company in respect of the period commencing Apr. 1, 1920, and to all distribution of capital assets in respect thereof."

The next event in the history is recorded in the minutes of the directors of the respondent company on Apr. 25, 1921. According to that record, it was (first) then resolved that the "completion of the sale and purchase of the shares" in the Constable company should be carried out forthwith; (second), certificates and transfers of all the Constable company's shares having been handed to the board with "forms of authority signed by each shareholder as to the distribution of the assets" of the Constable company, it was resolved that in pursuance of the agreement of Apr. 17 the requisite shares in the respondent company should be issued to the six Constable company shareholders in the proportions there specified credited as fully paid up; and (third), it was resolved that the certificates for the shares so allotted should be sealed and forwarded to the allottees with other consequential matters unnecessary to relate. It has not been suggested that the minute is not an accurate record of what had been and was then done, i.e., it must be taken that the certificates and executed transfers of the Constable company's shares were then in the hands of the respondent company and that on Apr. 25 the respondent company's shares representing the purchase consideration were issued credited as fully paid up to the six Constable company shareholders.

Then eight months later the indenture, which is the subject-matter of this appeal, was executed. The indenture recited: (i) that the Constable company was entitled to the freehold and leasehold assets specified in the first schedule thereto, being that company's several licensed premises; (ii) the passing and confirmation in the previous May of a special resolution for the voluntary winding-up of the Constable company and the appointment of its liquidator; (iii) that each of the six Constable company shareholders had executed an authority to the liquidator to make over in the distribution of the Constable company's assets all assets to which they might as shareholders be entitled to the respondent company; and (iv) that the liquidator had discharged the Constable company's debts and liabilities. By the operative part of the deed it was witnessed that "in consideration of the premises" the Constable company and the liquidator conveyed and transferred the scheduled property to the respondent company.

On those facts the commissioners were of opinion that by the deed of Dec. 31, 1921, the assets therein comprised were conveyed and assigned to the respondent

A company in consideration of the issue to the six Constable company shareholders of the before mentioned fully paid shares in the respondent company. Alternatively, they were of opinion that, having regard to cl. 4 (a) of the agreement of Apr. 17, it had always been intended and contemplated that completion of the agreement for sale should be effected, not by way of registration of the six Constable company's shareholders' transfers and of the respondent company as a B shareholder in the Constable company, but by way of conveyance and transfer of the licensed properties of the Constable company to the respondent company; and they were accordingly of opinion that the indenture ought to have been stamped ad valorem as a conveyance or transfer on sale.

Counsel for the Crown supported both alternative views of the commissioners. The argument had, beyond doubt, considerable attraction at first sight, more C particularly having regard to the facts, undoubted and conceded by counsel for the respondent company, (a) that the consideration moving from the respondent company expressed in the agreement of Apr. 17 was calculated exclusively by reference to the licensed premises conveyed and transferred by the deed of December, and (b) that registration of the transfers executed by the six Constable company shareholders had never been effected and had never been in- D tended. Thus it was the burden of the argument of counsel for the Crown that the property conveyed and assigned by the deed of December in truth, in substance, and in intention, represented that for which the respondent company's share consideration was given; and counsel referred to authority, particularly in *Oughtred* v. *Inland Revenue Comrs.* (1) both in this court and in the House of Lords for the proposition that an instrument may be liable to ad valorem duty E as a conveyance or transfer on sale where it operates as the completion of a pre-existing bargain, although the property transferred by the instrument is not the same property as that which was the subject of the earlier bargain, provided that the former does in truth and in reality "represent" the latter. I do not at all question the validity of that proposition. Nevertheless, I am in the present case satisfied, for the reasons given by DONOVAN and DANCKWERTS, F L.JJ., and BUCKLEY, J., that the proposition cannot here be applied in order to attract liability to ad valorem duty to the indenture of Dec. 31, 1921.

On the view that the Crown's contention should fail, it would follow (and counsel for the respondent company again conceded) that the transfers referred to at the board meeting of Apr. 25 should have borne ad valorem duty as transferring, at any rate, the full equitable property in the six Constable company G shareholders' shares by way of completion of the preceding agreement; and there was discussion before us on the point whether, on the evidence (or absence of evidence) now before the court forty years later, there should be drawn an inference of fact that such transfers had or had not been stamped. On that matter I prefer, for myself, to express no opinion; for it is clear that failure to stamp such transfers cannot, of itself, shift liability to stamp duty to the indenture H of December.

In my judgment the answer to the Crown's contention is, briefly expressed, thus. The agreement on its face contemplated and intended—see cl. 2—that the sale then contracted to be made should be completed on the date specified (viz., Apr. 25 following) by delivery of executed transfers of the shares of the six Constable company shareholders; and cl. 4 (a) consistently provided that I those shareholders should pass the winding-up resolution as soon as conveniently might be *after* completion. That intended scheme of things was strictly effected. On Apr. 25 the executed transfers were in the hands of the directors of the respondent company who then and there caused the issue to the six shareholders of the respondent company's own shares, fully paid up, being the consideration for the first-mentioned transfers. Moreover, there is nothing in the deed of Dec. 31, 1921, referring to the respondent company's share consideration—which

(1) [1958] 2 All E.R. 443; [1958] Ch. 678; *affd.* H.L., [1959] 3 All E.R. 623; [1960] A.C. 206.

had in fact been satisfied eight months before. In my judgment the court would not, on the material before us, be justified, forty years after the event, in construing or seeking to give effect to the transactions of 1921, including particularly the sale agreement of Apr. 17 and the indenture of Dec. 31, otherwise than in accordance with their ordinary sense and (as I think) their plainly expressed intention. I agree with BUCKLEY, J., that the indenture in question was made "in consequence of the sale but not as part of the sale" (2); and I would, therefore, dismiss the appeal.

DONOVAN, L.J.: I will call the two limited companies here concerned the respondent company and the Constable company respectively. The transaction whereby the respondent company bought all the shares in the Constable company is not impugned as a sham. Counsel for the Crown expressly disclaimed any attack on the bona fides of that document. Had the consequent transfers of these shares been registered in the books of the Constable company and duly stamped, then no ad valorem duty would have been attracted by the subsequent conveyance of the licensed premises. It is now conceded that it was never intended so to register these transfers. But, it is said, there is no evidence that they were not duly stamped, and, since they ought to have been stamped, the court should presume that they were. There was, however, no legal obligation on the respondent company to stamp the transfers: there was simply the prospect of future disabilities and disadvantages if they did not. It is true that under s. 17 of the Stamp Act, 1891, there was a penalty of £10 payable if an officer of the Constable company should register the transfers without a stamp, but, as it was never intended to register, that penalty would never be incurred. Under the sale agreement the expense of stamping was to be borne by the respondent company; and, if some £980 had been paid to the commissioners on this account, I find it difficult to believe that there would not be some record of it in the 1921 books of the respondent company. There is no finding that these books have been lost or destroyed. In any event one would think that the respondent company's bank would still have a record of any such payment. When one adds that everybody knew that the Constable company was going to be wound up almost at once, so that the respondent company clearly wanted the licensed premises of the Constable company rather than its shares, I think that the conclusion is reasonably certain that the respondent company refrained not only from registering but also from stamping. If they could get what they really wanted without paying some £1,000 in stamp duty, why spend that money? I have little doubt that that was the approach. Indeed, no other rational explanation of the decision not to register the transfers is in view.

This, however, does not take the Crown home. If one assumes the intention to save stamp duty, still the documents by which the transaction was effected cannot be given something other than their legal effect in order to defeat that intention. The effect of the agreement for the purchase and sale of the shares in the Constable company (which I will call "the share agreement"), plus the written authorities signed by the shareholders in the Constable company and addressed to its liquidator, was to give the respondent company the right to have these licensed premises conveyed to it in the liquidation of the Constable company. But does that mean that these premises were themselves sold? If so, by whom? Obviously the liquidator did not sell them; and the Crown must allege, as it does, that the shareholders of the Constable company sold them. What is the evidence which supports that allegation? The answer given is that it consists in certain stipulations in the share agreement plus the giving of the written authorities just mentioned. The stipulations in the agreement are these: that the Constable company shareholders should, after completion of the sale of the shares, themselves put the Constable company into liquidation, and

(2) [1961] 2 All E.R. at p. 380, letter G.

A that the respondent company should be entitled to all distributions in the winding-up. It is contended that these justify the inference that the true bargain was a sale of the licensed premises against the issue of shares in Henty. The Crown reinforce this claim by pointing to cl. 6 of the agreement, which deals in terms with the unlicensed premises and in effect leaves these to the vending shareholders of the Constable company.

B The first of these stipulations clearly shows that the respondent company did not intend to be registered as the new shareholders in the Constable company. But this can be quite sufficiently explained by an intention to avoid having to stamp the transfers and to avoid confronting the proper officer of the Constable company with any difficulty arising from the provisions (3) of s. 17. The second stipulation really added nothing to the rights of the respondent company, since C that company would on completion of the share transactions be entitled, as against the vendors of the shares, to receive such surplus assets. Neither stipulation, therefore, compels the conclusion that the real bargain was a sale of the licensed premises in return for the issue of shares in the respondent company; and that certainly is not the legal effect of the document.

Similarly with regard to cl. 6: if the price for the shares left the value of the D unlicensed premises out of account, it was quite natural and proper to say that the Constable company shareholders should take these in a liquidation. Finally, the written authorities handed to the respondent company when the share transaction was completed, giving them the rest of the Constable company property distributed in the liquidation, added nothing to the rights which the respondent company already possessed as against the Constable company shareholders.

E It seems to me, therefore, essential to the Crown's case to establish that the share agreement was really a sham. If it could be shown that the bargain was really a sale of licensed premises in return for an issue of shares, the sale of the Constable company shares being a mere simulacrum or cloak to hide the real transaction, then, indeed, the conveyance would be a conveyance on sale. But if the share agreement takes effect according to its terms, the acquisition of the F licensed premises was simply a consequence of the share transaction. Those premises were not themselves the subject of a sale, and so the words in s. 54 "upon the sale *thereof*", are not satisfied.

Since the Crown does not contend that the share agreement is a sham, it follows, in my opinion, that the appeal must fail.

G **DANCKWERTS, L.J.:** The contentions of the Crown, and the liability to ad valorem stamp duty of the conveyance of Dec. 31, 1921, depend on that conveyance being "a conveyance or transfer on sale". It plainly does not purport to be anything of the sort. The conveyance of the freehold hereditaments and the assignment of the leasehold premises in each case is expressed to be "in consideration of the premises". These words must refer back to the H recitals in the deed. These are: (i) a statement of the Constable company's ownership of the freehold and leasehold property; (ii) the special resolution for the winding-up of the Constable company; (iii) the authority given by all the six shareholders of the Constable company to the liquidator to transfer and deliver any assets to which those shareholders might be entitled as shareholders or contributories to the respondent company, or its nominees; and (iv) the fact I of the liquidator having made provision for the debts and liabilities (other than certain mortgages) and the costs of winding-up. This does not indicate that the conveyance is "a conveyance or transfer on sale", and if the claim to stamp duty is to be substantiated, it is necessary to go behind or beyond the terms of the conveyance.

The conveyance was executed some eight months after an agreement of Apr. 17, 1921, made between the six shareholders in the Constable company and George

(3) Section 17 of the Stamp Act, 1891, imposes a penalty for registering an unstamped instrument.

Henty & Sons, Ltd., the respondent company. This was an agreement by the shareholders (cl. 1) to sell and transfer all the shares in the Constable company to the respondent company and an agreement by the respondent company to purchase the same at a price set out in the first schedule, which price was to be satisfied by the issue to the vendor shareholders of a number of shares in the respondent company, such shares being issued as fully paid and ranking for dividend as from Apr. 1, 1920. By cl. 2, the sale was to be completed on Apr. 25, 1921, when the said purchase consideration was to be satisfied as aforesaid and thereupon the vendors and all (if any) other necessary parties were to transfer the shares so sold to the respondent company or its nominees.

This seems to me to be a sale of shares in the Constable company for shares in the respondent company as plainly as could be. But it is contended on behalf of the Crown that certain other provisions in the agreement, combined with the fact that the shares sold to the respondent company were never registered in that company's name, show that the true nature of the transaction was not a sale of the shares but a sale of part of the assets of the Constable company—the licensed premises—which were conveyed and assigned to the respondent company by the conveyance of Dec. 31, 1921. It is not suggested that there was any dishonest pretence about the transaction.

The following clauses of the agreement were relied on in support of this contention: cl. 4 (a), which provides that, as soon as conveniently may be after completion of the sale of the said shares in the Constable company, they will procure the Constable company to pass a special resolution that the Constable company be wound up voluntarily and that William Beldam be appointed liquidator thereof; cl. 10, which provides that the costs of the liquidation, etc., and all stamps and other expenses in relation to the transfers of the shares agreed to be sold should be borne by the respondent company (referred to by the name which it was to acquire of "Henty & Constable, Ltd."); and cl. 11, which provides that the respondent company should be entitled to all dividends on the shares in the Constable company in respect of the period commencing Apr. 1, 1920, and to all distribution of capital sums in respect thereof. It was contended that these provisions showed that registration of the Constable company shares in the name of the respondent company could not have been intended to have been carried out, as, once the company was the registered owner of the shares, the company would have been in a position to secure the matters provided for as registered shareholders, owning all the shares of the Constable company.

The agreement was, however, completed on Apr. 25, 1921, in accordance with its terms. A minute of a directors' meeting in the books of Henty & Constable, Ltd., records (i) a resolution that the completion of the sale and purchase of the shares in the Constable company, provided for by the agreement, be carried out forthwith; (ii) a resolution that certificates and transfers of all the shares in the Constable company having been handed to the board, together with forms of authority signed by each shareholder as to the distribution of the assets of that company (which was not in fact provided for by the agreement), 81,255 shares of £1 each be issued in the proportions therein mentioned to the former Constable company shareholders; and (iii) resolutions that these shares be credited as fully paid up and certificates for the shares be sealed and forwarded to the allottees. After these resolutions had been carried out, it is plain that the agreement of Apr. 17, 1921, had been completed in accordance with its terms, and what was completed was a sale and transfer of the Constable company's shares in consideration of the issue and allotment of the respondent company's shares. Eight months later followed the conveyance of the licensed premises. But this was something which the respondent company was entitled to demand as the owner in equity (though not in law in the absence of registration of the transfers) of the shares in the Constable company. The delay of eight months after the completion of the sale comprised in the agreement is, in my view,

A rather in favour of the respondent company than against it. I do not think that the claim of the Crown can succeed unless they can establish that the sale and purchase of the shares was not a real transaction and was a cloak for a different transaction which would amount to a sale of the licensed premises, and, in my opinion, nothing of that sort has been established.

As it seems to me, the legal position which came about as a result of the B agreement of Apr. 17, 1921, and the completion which took place on Apr. 25, 1921, is quite clear. I see no reason to read into it a different transaction from that which was produced by the sale agreement: see the observations of LORD TOMLIN and LORD RUSSELL OF KILLOWEN in *Inland Revenue Comrs.* v. *Duke of Westminster* (4). The conveyance of Dec. 31, 1921, is, in my opinion, a conveyance and assignment of assets which took place as a result of the sale C of the shares to the respondent company and the rights thereby conferred and was not the transaction which was the subject of the sale agreement.

Another point was taken on behalf of the respondent company—that the Crown had not proved that the transfers of the Constable company shares were not duly stamped. If they were so stamped, a further claim for ad valorem duty could not be made on the conveyance. It is forty years since the transaction D took place and the transfers are not forthcoming now, and, apparently, have been lost or destroyed, and all the persons concerned with the matter appear to be dead. In *Marine Investment Co.* v. *Haviside* (5) LORD CAIRNS says:

> "Now, my Lords, I take it to be clear that if an instrument is lost, and if there should be no evidence given respecting it on one side or the other, the presumption which ought always to be made, and which always would E be made by the court, would be that the instrument was properly stamped."

The onus is plainly on the Crown to show that the transfers were not properly stamped. It is not enough to say that there is no reason to suppose that the transfers were stamped. Nor is it enough to say that the circumstances raise a suspicion that the transfers were not stamped. That is not proof of anything.

In view of the conclusion which I have reached on the other substantial point F in the case, it may not be necessary to express any finally concluded view on this matter. But, for my part, I cannot see any proper evidence that the transfers were not stamped, so as to displace the presumption stated by LORD CAIRNS, and I would think that the statement in para. 6 of the Case Stated, drawing the inference that the transfers were not stamped, was not justified by any evidence. I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue; Robins, Hay & Waters* (for the respondent company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(4) [1935] All E.R. Rep. at pp. 267, 270; [1936] A.C. at pp. 19, 20, 24, 25.
(5) (1872), L.R. 5 H.L. at p. 631.

McMATH *v.* RIMMER BROS. (LIVERPOOL), LTD.

A

[COURT OF APPEAL (Ormerod, Harman and Pearson, L.JJ.), October 26, 27, November 17, 1961.]

Statutory Duty—Breach—Causation—Breach by both employer and employee—Faults not co-extensive—Apportionment of responsibility—Non-compliance with building regulations—Liability for damages shared equally—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 4, *reg.* 29 (4).

B

A ganger with two labourers under his orders was engaged in carrying out emergency repairs to a damaged gateway involving the use of a ladder more than ten feet long. During the absence without authority of the labourer whose job it was to foot the ladder, which could not be securely fixed, the ganger, in order to secure a padstone, which apparently was slipping and which supported a joist and through it a principal of the roof of the premises, knowingly took the risk of climbing the ladder without anyone to foot it. A breach of reg. 29 (4)* of the Building (Safety, Health and Welfare) Regulations, 1948, which required someone to foot the ladder in such circumstances, was thereby committed. The breach of statutory duty was, by virtue of reg. 4*, a breach by the employers and also by the ganger. The ganger fell down the ladder and was severely injured. There was no negligence on his part nor on that of his employers. In an action by the ganger against his employers he was awarded £2,200 damages for personal injuries caused by breach of statutory duty. On appeal,

C

D

Held: there had been a breach of statutory duty both by the plaintiff and by the defendant, but the plaintiff's fault was not co-extensive with that of the defendants, for there was the additional element of the absence of the labourer at the time when he should have been available to foot the ladder, which fault was one for which the defendants were, and the plaintiff was not, in law responsible; accordingly there must be an apportionment of responsibility, and, as there was no preponderance of culpability or causative potency on either side, the responsibility should be shared equally and the damages would be reduced by half to £1,100.

E

F

Principle stated in *Ginty* v. *Belmont Building Supplies, Ltd.* ([1959] 1 All E.R. at pp. 423, 424) approved.

Dicta of DENNING, L.J., as to apportionment of responsibility, in *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* ([1949] 1 All E.R. at p. 632) applied.

G

Appeal allowed.

[As to the inability of a plaintiff to recover damages for breach of statutory duty where the injury is solely due to his fault, see 36 HALSBURY'S LAWS (3rd Edn.) 457, para. 694, and p. 460, para. 700.

As to causation in relation to damages, see 11 HALSBURY'S LAWS (3rd Edn.) 272, para. 449.

H

As to apportionment of damages in cases of contributory negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 90-95, paras. 94-99.

As to the building regulations, see 17 HALSBURY'S LAWS (3rd Edn.) 125-128, para. 206.

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 4, reg. 29 (4), see 8 HALSBURY'S STATUTORY INSTRUMENTS 212, 222.]

I

Cases referred to:

Davies v. *Swan Motor Co.* (*Swansea*), *Ltd.*, [1949] 1 All E.R. 620; [1949] 2 K.B. 291; 36 Digest (Repl.) 171, *921.*

Davison v. *Apex Scaffolds, Ltd.*, [1956] 1 All E.R. 473; [1956] 1 Q.B. 551; [1956] 2 W.L.R. 636; 3rd Digest Supp.

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* The relevant terms of reg. 29 (4) and of reg. 4 are set out at p. 1157, letters D to H, post.

A *Ginty* v. *Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. 414; 3rd Digest Supp.

Jenner v. *Allen West & Co., Ltd.*, [1959] 2 All E.R. 115; [1959] 1 W.L.R. 554; 3rd Digest Supp.

Manwaring v. *Billington*, [1952] 2 All E.R. 747; 24 Digest (Repl.) 1077, *335*.

B **Appeal.**

The defendants appealed against an order of LLOYD-JACOB, J., made on Feb. 22, 1961, at Liverpool, in favour of the plaintiff in an action for damages for personal injuries caused by the alleged negligence or breach of statutory duty of the defendants. The plaintiff was an employee of the defendants, who were building contractors, and the breach of duty alleged and found by the judge C was failure to have a person stationed at the base of a twelve foot wooden ladder at the top of which the plaintiff was working, contrary to reg. 29 (4) of the Building (Safety, Health and Welfare) Regulations, 1948, by reason of which the ladder slipped and the plaintiff was thrown to the ground. The grounds of appeal were that the judge misdirected himself and was wrong in law in holding that the defendants were in breach of duty to the plaintiff, that he ought to have D found negligence or breach of statutory duty on the part of the plaintiff and that the judgment was against the weight of the evidence.

Marven Everett, Q.C., and *I. R. Carmichael* for the defendants.

Edward Wooll, Q.C., and *A. D. Pappworth* for the plaintiff.

Cur. adv. vult.

E Nov. 17. **PEARSON, L.J.**, read the following judgment of the court: This is an appeal by the defendants against a judgment of LLOYD-JACOB, J., given on Feb. 22, 1961, in favour of the plaintiff for £2,200 damages in respect of personal injuries caused by a breach of reg. 29 (4) of the Building (Safety, Health and Welfare) Regulations, 1948. It is common ground that the plaintiff's injuries were caused by a breach of the regulation. He was injured by falling F down a ladder. The ladder was more than ten feet in length, it was not securely fixed at any point, and there was not at the material time any person stationed at the foot of the ladder to prevent slipping. The learned judge decided that the defendants were solely responsible for the accident. On this appeal the defendants have contended that, in the circumstances of the case, the plaintiff should be held to be solely, or, in the alternative, partly, responsible for the G accident. That is the issue in the appeal. There is no appeal with regard to the assessment of the damages.

The defendants are builders. The plaintiff, who was sixty-six years of age at the time of the accident, had been working for the defendants for thirty-eight years, and for the last twenty years he had been a ganger, i.e., a man looking after the labourers on the building site. In the morning of Jan. 12, 1959, the H plaintiff was working for the defendants on a site where they were building a school. At about midday there was an emergency requirement from Messrs. Boote in respect of their premises at Elizabeth Street, Liverpool. They had a large entrance gateway, thirty-six feet wide, fronting on the street. Running horizontally along the top of the gateway was a rolled steel joist, from which the four sliding doors were suspended. Each end of the joist was supported I by a padstone which was strong enough to take the weight without being crushed, and each padstone was built into or supported by the brick wall on its side of the entrance. A vehicle came out of the premises with too high a load, which struck the joist, with the result that one end of it was partly dislodged from the padstone on which it rested and some of the brickwork was displaced so as to bulge outwards. There was a danger that bricks, or even the joist, might fall into the street. Consequently, Messrs. Boote telephoned to the defendants and spoke to the manager. The manager met Mr. William Hanson, the general foreman, and the plaintiff on the building site. He explained to them that

first aid repairs had to be done on that day to Messrs. Boote's premises in order to make them safe until the following day, when permanent repairs would be started. He gave them a drawing which showed how he suggested that the work should be done.

Mr. William Hanson and the plaintiff went by car to Messrs. Boote's premises. A labourer, Mr. Joseph Hanson, who was the brother of Mr. William Hanson, went there in a lorry taking the necessary materials and gear for the temporary repairs, and in particular a long ladder. Another labourer, Mr. Forshaw, was taken to the premises either in the car or in the lorry. Having arrived there and inspected the damaged gateway, Mr. William Hanson and the plaintiff decided that the method suggested by the manager was impracticable, and they decided to secure the joist temporarily by fastening it to a beam or stanchion by means of a Spanish windlass. In addition, the insecure brickwork had to be removed. At about 2.30 p.m. Mr. William Hanson returned to the school building site, leaving the plaintiff and the two labourers to carry out the temporary repair work at Messrs. Boote's premises. They placed the lorry on the pavement to block the passage for pedestrians, who might otherwise come into danger. The long ladder was put in position outside the premises and was used by the plaintiff and Mr. Forshaw to go up on to the roof and inspect the damaged brickwork and begin to remove it. While they were using the ladder, Mr. Joseph Hanson was "footing" it, i.e., standing at the foot of it to prevent slipping. It was not practicable to secure the ladder otherwise, and this footing by Mr. Joseph Hanson was in compliance with the regulation.

After this initial stage, Mr. Forshaw remained continuously on the roof, removing the bricks and throwing them down into the lorry, and the plaintiff came inside the premises, borrowed a shorter ladder which was about twelve to fourteen feet in length, and erected it inside the premises. The plaintiff with the assistance of Mr. Joseph Hanson tied the joist to a neighbouring beam or stanchion by means of a Spanish windlass. While the plaintiff was using the ladder, Mr. Joseph Hanson was duly footing it.

Mr. Joseph Hanson had several tasks. In addition to footing any ladder that was in use, he had to pick up bricks that bounced out of the lorry and to keep away the inquisitive pedestrians who might walk or stand in positions of danger. Nevertheless, under the arrangement which the plaintiff had made with him, Mr. Joseph Hanson did have the duty of footing the ladders as and when that was required. In his examination-in-chief there is this passage:

> "LLOYD-JACOB, J.: You helped him with the windlass. Anything else? A.—To pass the rope over. I had to sit on the boxes to keep the steel rope from twisting. I had to foot his ladder occasionally. *Counsel for the plaintiff:* That is particularly what we want to hear. You had to foot his ladder. Did you foot his ladder? A.—Yes, occasionally. Q.—Why did you foot it only occasionally? A.—Because he was not up there all the time. Q.—No, but do you mean this: when he was up it, you footed it? A.—Yes. Q.—That is right, is it? A.—Yes. LLOYD-JACOB, J.: That, you knew to be your job? A.—Yes."

Mr. William Hanson came back at about 3.40 p.m., and saw and approved the work that had been done, and, after talking to the plaintiff, went away to a telephone for the purpose of reporting to the manager and ordering the materials and gear that would be required on the following day.

At about this time, Mr. Joseph Hanson went to a canteen that was near by, in order to fetch tea for himself and the plaintiff and Mr. Forshaw. The plaintiff did not give Mr. Joseph Hanson permission or authorise him to go away for that purpose, and did not initially know that he had gone away. The evidence was rather indefinite, but, as the learned judge heard and saw the witnesses, it is right to accept his findings. The plaintiff was not responsible for the departure of Mr. Joseph Hanson, who should have remained to foot the ladder if required.

A As Mr. Forshaw was nearing the end of his work, he was removing bricks in the vicinity of the padstone from which one end of the joist had been partly dislodged. The plaintiff, closely observing the padstone, saw, or thought he saw, it slipping. As the padstone supported the joist, and the joist in turn supported a principal of the roof, a slipping of the padstone would be a very serious matter calling for immediate action. The plaintiff believed that it was urgently necessary for him to take a hammer and wedges and go up on the ladder and secure the B padstone by hammering in the wedges. Although he knew that there was nobody present to foot the ladder, and that it was dangerous to climb and work from the unfooted ladder, he decided to take the risk, and did so, with the result that he fell down the ladder and his leg was caught in it and severely injured.

The learned judge decided that there was no negligence on the part of the C defendants and no negligence on the part of the plaintiff, but that there was breach of statutory duty on the part of the defendants, and that they were solely responsible for the accident and liable to the plaintiff for the full amount of his damages. The learned judge did not specifically make any finding on the question, which was raised by the defence, whether the plaintiff had himself committed a breach of the regulations. The judgment, however, implies a D negative answer to that question.

It is necessary to consider the exact terms of the relevant portions of reg. 29 and reg. 4. Regulation 29 (4) provides:

> "Every ladder shall so far as practicable be securely fixed so that it can move neither from its top nor from its bottom points of rest. If it cannot be so securely fixed it shall where practicable be securely fixed at the base E or if such fixing at the base is impracticable a person shall be stationed at the base of the ladder to prevent slipping. Provided that this paragraph shall not apply to a ladder which is not more than ten feet in length and which is not used as a means of communication, if the ladder is securely placed so as to prevent it from slipping or falling."

F Regulation 4 so far as is material provides:

> "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with such of the requirements of regs. 5-30 . . . as affect any workman employed by him."

Then reg. 4 at the end provides:

G

> "It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him and to co-operate in carrying out Parts 2 and 7 of these regulations . . ."

I need not read the rest.

As the ladder could not be securely fixed, the breach of reg. 29 (4) was that H no person was stationed at the base of the ladder to prevent slipping. By virtue of reg. 4, this was a breach of duty by the defendants; but, also by virtue of reg. 4, there was a breach of duty by the plaintiff. There are two ways of arriving at that conclusion. First, although Mr. William Hanson was in control of the work at Messrs. Boote's premises and had given instructions how it was to be done, nevertheless when Mr. William Hanson was absent the plaintiff was I the senior person present, and he was a ganger, and, according to the plaintiff's own evidence, the two labourers would take their orders from the plaintiff and address any query to him. Moreover, the plaintiff was himself going to use the ladder. Certainly, in the absence of Mr. William Hanson, it was for the plaintiff to station a person at the base of the ladder to prevent slipping. Accordingly, the plaintiff's failure to do so was, within the meaning of reg. 4, a failure to "comply with the requirements of such regulations as relate to the performance of an act by him", *Davison* v. *Apex Scaffolds, Ltd.* (1). Secondly, he had in any

(1) [1956] 1 All E.R. at p. 483; [1956] 1 Q.B. at p. 563.

case under reg. 4 a duty "to co-operate in carrying out Parts 2 and 7 of these regulations", and, so far from co-operating in carrying out reg. 29 (4), he knowingly contravened it. A

There being both a breach of duty by the defendants and a breach of duty by the plaintiff, how should the responsibility be allocated or apportioned?

Counsel for the defendants has contended that the plaintiff was the author of his own wrong and debarred from recovering anything from the defendants. B He cited a passage from the judgment in *Ginty* v. *Belmont Building Supplies, Ltd.* (2), as follows:

> "In my view, the important and fundamental question in a case like this is not whether there was a delegation, but simply the usual question: Whose fault was it? I shall refer to some of the decided cases to demonstrate what I have said. If the answer to that question is that in substance and reality the accident was solely due to the fault of the plaintiff, so that he was the sole author of his own wrong, he is disentitled to recover. But that has to be applied to the particular case and it is not necessarily conclusive for the employer to show that it was a wrongful act of the employee plaintiff which caused the accident. It might also appear from the evidence that something was done or omitted by the employer which caused or contributed to the accident; there may have been a lack of proper supervision or lack of proper instructions; the employer may have employed for this purpose some insufficiently experienced men, or he may in the past have acquiesced in some wrong behaviour on the part of the men. Therefore, if one finds that the immediate and direct cause of the accident was some wrongful act of the man, that is not decisive. One has to inquire whether the fault of the employer under the statutory regulations consists of, and is co-extensive with, the wrongful act of the employee. If there is some fault on the part of the employer which goes beyond or is independent of the wrongful act of the employee, and was a cause of the accident, the employer has some liability. I have stated what, in my view, the proper rule is. For this rule several explanations can be given and several bases can be provided, and I will mention three."

C D E F

The judgment then discussed the possible explanations or bases for the rule which could be derived from previously decided cases. Counsel for the defendants also cited *Manwaring* v. *Billington* (3), per MORRIS, L.J., and *Jenner* v. *Allen West & Co., Ltd.* (4). The judgment in *Ginty's* case (5) was given at first instance, but the passage which I have read is fully consistent with and supported by the judgments of this court in *Jenner's* case (6), and in the opinion of this court is a correct statement of the law. G

In the instant case, the facts show that the plaintiff was to some extent the author of his own wrong, but it cannot be said that the defendants' breach of duty consisted of and was co-extensive with the plaintiff's breach of duty. There was the additional and independent element that, when the time came for a person to be stationed at the base of the ladder to prevent slipping, Mr. Joseph Hanson, to whom that task had been assigned, was absent and not available. The defendants are, and the plaintiff is not, responsible for Mr. Joseph Hanson's default in this respect. It was objected by counsel for the defendants that Mr. Joseph Hanson's default in absenting himself without obtaining permission from or informing the plaintiff had not been pleaded by the plaintiff. But the point is sufficiently covered by the allegation in the statement of claim that H I

> "the defendants, their servants or agents, were guilty of breach of statutory duty in that they . . . failed to have a person stationed at the base of the said ladder in accordance with reg. 29 (4) of the said regulations."

(2) [1959] 1 All E.R. at pp. 423, 424.
(3) [1952] 2 All E.R. at p. 750.
(4) [1959] 2 All E.R. at pp. 120, 121, 125.
(5) [1959] 1 All E.R. 414.
(6) [1959] 2 All E.R. 115.

A Mr. Joseph Hanson's default was not a separate matter, but only an element in the defendants' failure to have a man stationed at the base of the ladder.

Accordingly, as the defendants' breach of duty was not confined to and co-extensive with the plaintiff's breach of duty, but included also the additional element of Mr. Joseph Hanson's default, there must be an apportionment of responsibility. As there is no preponderance of culpability or causative potency B on either side (*Davies* v. *Swan Motor Co. (Swansea), Ltd.* (7)), the responsibility should be shared equally. Accordingly, the appeal will be allowed and the damages will be reduced by half from £2,200 to £1,100.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Arthur Taylor & Co.*, agents for *Mace & Jones*, Liverpool (for the C defendants); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiff).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D

SMITH v. LEECH BRAIN & CO., LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), November 14, 15, 16, 17, 1961.]

Damages—Remoteness of damage—Negligence—Foreseeability—Type, but not E *extent, of injury foreseeable—Burn on person in pre-malignant condition—Development of cancer resulting in death—Whether defendants liable in damages for loss of expectation of life and under Fatal Accidents Acts.*

S. was employed by the defendants as a labourer and galvanizer. Part of his work consisted in lowering articles into a tank of molten metal and flux and subsequently removing them. Whilst he was so engaged, a piece F of molten metal spattered out and burned his lip. He later contracted cancer, underwent operations, and died. It was found that the defendants had been negligent, and that the burn was the promoting agency, promoting cancer in tissues which already had a pre-malignant condition. His widow, suing as administratrix and on her own behalf and on behalf of dependent children, claimed damages under the Law Reform (Miscellaneous Provisions) G Act, 1934, for loss of expectation of life, and under the Fatal Accidents Acts, 1846 to 1908, on the basis of the burn resulting in cancer causing S.'s death.

Held: for the purpose of assessing damages a tortfeasor took his victim as he found him, and the decision in *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock & Engineering Co., Ltd.* ([1961] 1 All E.R. 404) did not over-H ride this principle; accordingly, since the type of injury which S. suffered, was reasonably foreseeable, the defendants were liable for the damages claimed, although they could not reasonably have foreseen the ultimate consequences of the initial injury, viz., that the burn would cause cancer from which S. would die.

Principle stated by KENNEDY, J., in *Dulieu* v. *White & Sons* ([1901] I 2 K.B. at p. 679) applied.

Overseas Tankship (U.K.), Ltd. v. *Morts Dock & Engineering Co., Ltd.* ([1961] 1 All E.R. 404) considered.

Per LORD PARKER, C.J.: sitting as a trial judge I should treat myself as able to follow, in the light of the arguments in *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock & Engineering Co., Ltd.* ([1961] 1 All E.R. 404), decisions of the Court of Appeal prior to *Re Polemis and Furness, Withy & Co., Ltd.*

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(7) [1949] 1 All E.R. at p. 632; [1949] 2 K.B. at p. 326.

([1921] All E.R. Rep. 40) rather than that decision itself (see p. 1162, letter C, post). A

[As to remoteness of damage in negligence, see 11 HALSBURY'S LAWS (3rd Edn.) 278, para. 459; and 28 HALSBURY'S LAWS (3rd Edn.) 98, para. 106; and for cases on the subject, see 17 DIGEST (Repl.) 114, 115, *268-276*.]

Cases referred to: B

Arpad, The, [1934] All E.R. Rep. 326; [1934] P. 189; 103 L.J.P. 129; 152 L.T. 521; 18 Asp. M.L.C. 510; Digest Supp.

Dulieu v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 17 Digest (Repl.) 122, *335*.

Overseas Tankship (U.K.), Ltd. v. *Morts Dock & Engineering Co., Ltd.* (*The Wagon Mound*), [1961] 1 All E.R. 404; [1961] A.C. 388; [1961] 2 W.L.R. 126. C

Polemis and Furness, Withy & Co., Ltd., Re, [1921] All E.R. Rep. 40; [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 15 Asp. M.L.C. 398; 36 Digest (Repl.) 38, *185*.

Smith v. *London & South Western Ry. Co.*, (1870), L.R. 6 C.P. 14; 40 L.J.C.P. 21; 23 L.T. 678; 36 Digest (Repl.) 37, *184*. D

Thorogood v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.

Action.

The plaintiff, Mary Emma Smith, as administratrix of the estate of her deceased husband, William John Smith, claimed, in an action commenced by writ dated Mar. 11, 1955, damages from the defendants, Leech Brain & Co., Ltd. under the Fatal Accidents Acts, 1846 to 1908*, and the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff's husband was a labourer and galvanizer employed by the defendants at the Glaucus Iron Works, Poplar. The articles to be galvanized were lowered into a tank containing molten metallic zinc and flux. The method used depended on the size of the article. All articles were first dipped in hydrochloric acid and the larger articles were then lowered into the tank by means of an overhead crane, from a position behind a sheet of corrugated iron. On Aug. 15, 1950, the plaintiff's husband was operating the overhead crane, using the corrugated iron sheet supplied, when a piece of molten metal or flux struck and burned his lower lip. The burn was treated at the time but he thought nothing of it. Ultimately the place where the burn had been began to ulcerate and get larger. He consulted his general practitioner who sent him to hospital where cancer was diagnosed. Treatment by radium needles enabled the lip to heal and destroy the primary growth. Subsequently, however, secondary growths were observed. Thereafter he had some six or seven operations, and he died of cancer on Oct. 14, 1953. E F G

LORD PARKER, C.J., found that the defendants were negligent, that there had been no contributory negligence on the part of the plaintiff's husband, and that the burn was the promoting agency, promoting cancer in tissues which already had a pre-malignant condition as a result of his having worked at gas works, where he would have been in contact with tar or tar vapours from 1926 to 1935. H

The case is reported only on the question of remoteness of damage.

Martin Jukes, Q.C., and *A. C. H. de Piro* for the plaintiff. I

Stephen Chapman, Q.C., and *J. D. May* for the defendants.

LORD PARKER, C.J.: I am confronted with the recent decision of the Privy Council in *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock & Engineering Co., Ltd.* (1). For convenience, that case is always referred to as *The Wagon*

* The subsequent amendments of the Act of 1846 and repeal of the Act of 1908 by the Fatal Accidents Act, 1959, are irrelevant to the present case.

(1) [1961] 1 All E.R. 404; [1961] A.C. 388.

A *Mound.* But for *The Wagon Mound* (2), it seems to me perfectly clear that, assuming negligence proved, assuming that the burn caused in whole or in part the cancer and the death, this plaintiff would be entitled to recover. It is said on the one side by counsel for the defendants, that, although I am not strictly bound by *The Wagon Mound* (2) since it is a Privy Council case, I should treat myself as free, using the arguments to be derived from that case, to say B that other cases in the Court of Appeal have been wrongly decided, and, particularly, that *Re Polemis and Furness, Withy & Co., Ltd.* (3) was wrongly decided, and that a further ground for taking that course is to be found in the various criticisms that have from time to time in the past been made by members of the House of Lords in regard to *Re Polemis* (3). On the other hand, it is said by counsel for the plaintiff that I should hold that *Re Polemis* (3) was rightly decided C and, secondly, that, even if that is not so, I must treat myself as completely bound by it. Thirdly, he said that in any event, whatever the true view is in regard to *Re Polemis* (3), *The Wagon Mound* (2) has no relevance at all to this case.

For my part, I am quite satisfied that the Judicial Committee in *The Wagon Mound* (2) did not have what I may call, loosely, the "thin skull" cases in mind. D It has always been the law of this country that a tortfeasor takes his victim as he finds him. It is unnecessary to do more than refer to the short passage in the decision of KENNEDY, J., in *Dulieu* v. *White & Sons* (4), where he said:

> "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually E thin skull or an unusually weak heart."

To the same effect is a passage in *The Arpad* (5). But quite apart from those two references, as is well known, the work of the courts for years and years has gone on on that basis. There is not a day that goes by where some trial judge does not adopt that principle, that the tortfeasor takes his victim as he F finds him. If the Judicial Committee had any intention of making an inroad into that doctrine, I am quite satisfied that they would have said so.

It is true that, if one takes the wording in the advice given by VISCOUNT SIMONDS in *The Wagon Mound* (2) and applies it strictly to such a case as this, it could be said that they were dealing with this point. But, as I have said, it is, to my mind, quite impossible to conceive that they were, and, indeed, it has been G pointed out that they disclose the distinction between such a case as this and the one which they were considering, when they comment on *Smith* v. *London & South Western Ry. Co.* (6). LORD SIMONDS, in dealing with that case in *The Wagon Mound* (7), said this:

> "Three things may be noted about this case: the first, that, for the sweeping proposition laid down, no authority was cited; the second, that H the point to which the court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind . . ."

In other words, LORD SIMONDS is clearly there drawing a distinction between the question whether a man could reasonably anticipate a type of injury, and the I question whether a man could reasonably anticipate the extent of injury of the type which could be foreseen. The Judicial Committee were, I think, disagreeing with the decision in *Re Polemis* (3) that a man is no longer liable for the type of damage which he could not reasonably anticipate. The Judicial Committee were not, I think, saying that a man is only liable for the extent of damage which

(2) [1961] 1 All E.R. 404; [1961] A.C. 388.
(3) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560. (4) [1901] 2 K.B. at p. 679.
(5) [1934] All E.R. Rep. at p. 331; [1934] P. at pp. 202, 203.
(6) (1870), L.R. 6 C.P. 14. (7) [1961] 1 All E.R. at p. 409; [1961] A.C. at p. 416.

he could anticipate, always assuming the type of injury could have been anticipated. That view is really supported by the way in which cases of this sort have been dealt with in Scotland. Scotland has never, as far as I know, adopted the principle laid down in *Re Polemis* (8), and yet I am quite satisfied that they have throughout proceeded on the basis that the tortfeasor takes the victim as he finds him.

In those circumstances, it seems to me that this is plainly a case which comes within the old principle. The test is not whether these defendants could reasonably have foreseen that a burn would cause cancer and that Mr. Smith would die. The question is whether these defendants could reasonably foresee the type of injury which he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends on the characteristics and constitution of the victim. Accordingly, I find that the damages which the plaintiff claims are damages for which these defendants are liable. Before leaving that part of the case, I should say, in case the matter goes further, that I would follow, sitting as a trial judge, the decision in *The Wagon Mound* (9); or rather, more accurately, I would treat myself, in the light of the arguments in that case, able to follow other decisions of the Court of Appeal, prior to *Re Polemis* (8), rather than *Re Polemis* (8) itself. As I have said, *Re Polemis* (8) has been criticised by individual members of the House of Lords, although followed by the Court of Appeal in *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.* (10). I should treat myself as at liberty to do that, and, for my part, I would do so the more readily, because I think that it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth. It would be lamentable if a court sitting here had to say that, while the common law in the Commonwealth and Scotland has been developed in a particular way, yet we in this country, and sitting in these courts, are going to proceed in a different way. However, as I have said, that does not strictly arise in this case.

[His Lordship assessed the damages, and awarded £1,500 under the Law Reform (Miscellaneous Provisions) Act, 1934, and £1,564 17s. under the Fatal Accidents Acts, 1846 to 1908.]

Judgment for the plaintiff.

Solicitors: *Nutt & Oliver* (for the plaintiff); *Goldingham, Wellington & Co.* (for the defendants).

[*Reported by* Kathleen J. H. O'Brien, *Barrister-at-Law.*]

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(8) [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.
(9) [1961] 1 All E.R. 404; [1961] A.C. 388.
(10) [1951] 1 All E.R. 682; [1951] 2 K.B. 537.

A

CHOW YOONG HONG v. CHOONG FAH RUBBER MANUFACTORY.

[PRIVY COUNCIL (Lord Denning, Lord Devlin and Mr. L. M. D. de Silva), October 26, December 4, 1961.]

B *Privy Council—Malaya—Moneylender—Loan transaction—Bills purchased at discount—Post-dated cheques maturing on same day as bills given as collateral security—Purchaser not a bank or discount house—Whether contract for the repayment of money lent—Malayan Moneylenders Ordinance,* 1951 (*No.* 42 *of* 1951), *s.* 15, *s.* 16.

Money—Loan—Bills purchased at discount—Post-dated cheques given as collateral C *security—Purchaser not a bank or discount house—Whether contract for repayment of money lent—Whether moneylending transaction.*

The plaintiff and the defendants who carried on business at Kuala Lumpur as a wholesale dealer in textiles and as a manufacturer of rubber shoes respectively, had out-station customers from whom they received out-station cheques for goods supplied. These cheques took from seven to ten D days to clear, depending on the station, and could not be drawn on until they were cleared. The defendants, however, had an arrangement with their bank whereby for a special charge they were allowed to draw on the credit of their out-station cheques at once. On Feb. 17, 1958, the defendants then being in need of ready cash, the plaintiff gave them a number of his out-station cheques totalling $6,964·33 (which the defendants were able to draw E on immediately under the arrangement with their bank subject to paying the special charge), the plaintiff receiving in exchange from the defendants their cheque for the same amount post-dated to Feb. 24, 1958. Seven similar transactions took place in February, 1958, and in each case the plaintiff in exchange for his out-station cheques received a cheque from the defendants post-dated by about a week. In March, 1958, a second group of transactions F took place between the parties, this time relating to the defendants' out-station cheques which usually were post-dated. Again the defendants needed immediate cash and in this second group of transactions they arranged that the plaintiff should purchase their out-station cheques at a discount calculated at the rate of 8 cents per $100 per day of the period between the date of the transaction and the maturity of the out-station cheque. Where the plaintiff G was doubtful about the credit-worthiness of the defendants' out-station customer he required the defendants to give as collateral security their own post-dated cheque maturing the same day as the out-station cheque. In the course of the second group of transactions the defendants issued eight such post-dated cheques as collateral security. The sixteen post-dated cheques drawn by the defendants in favour of the plaintiff in the course H of the two groups of transactions, in February and in March, 1958, were all dishonoured on presentation. In an action by the plaintiff suing on the sixteen dishonoured cheques the defendants contended that the contracts pursuant to which the cheques were issued were contracts for the repayment of money lent by the plaintiff so as to fall within the Malayan Money-lenders Ordinance, 1951, and that as the plaintiff was not a licensed money-I lender and there was no written memorandum of the contracts the contracts were, under the ordinance, unenforceable.

Held: none of the transactions amounted to a contract for the repayment of money lent, and there was therefore no defence to the plaintiff's claim, since, with regard to the second group of transactions, their true nature was the purchase of bills at a discount which was a business quite distinct from moneylending and the fact, as here, that the buyer was neither a bank nor a discount house did not alter the nature of the transactions; and with regard to the first group of transactions, there was nothing which could be

represented as a lending of money and the promise to repay it, though the plaintiff may have made a profit out of the transactions. A

Olds Discount Co., Ltd. v. *John Playfair, Ltd.* ([1938] 3 All E.R. 275) applied.

Appeal allowed.

[**Editorial Note.** On the aspect that discounting bills is not lending, the observations of TUCKER and SOMERVELL, L.JJ., in *Inland Revenue Comrs.* v. *Rowntree & Co., Ltd.* ([1948] 1 All E.R. at p. 486, letter D, and p. 487, letters B and C) lend further support to the conclusion reached in the present case. B

As to the nature of loans, see 27 HALSBURY'S LAWS (3rd Edn.) 13, para. 15; and as to what constitutes the business of moneylending under the Moneylenders Acts, 1900 to 1927, see 27 HALSBURY'S LAWS (3rd Edn.) 18, 19, paras. 26, 27; and for cases on the latter subject and on evidence of lending transactions, see 35 DIGEST 202, *282-286*, and pp. 209, 210, *354-359*.] C

Cases referred to:

Olds Discount Co., Ltd. v. *John Playfair, Ltd.*, [1938] 3 All E.R. 275; 159 L.T. 332; Digest Supp.

Sadhu Singh v. *Sellathurai*, (1955), 21 M.L.J. 117.

Appeal. D

Appeal by Chow Yoong Hong from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (HILL, Ag.C.J., GOOD and RIGBY, JJ.), dated Aug. 1, 1959, allowing the appeal of the respondents, Choong Fah Rubber Manufactory, from a judgment of the trial judge, ONG, J., dated Mar. 31, 1959, whereby he gave judgment for the appellant against the respondents for $31,112·06 being the amount of sixteen cheques issued to the appellant by the respondents which were dishonoured on presentation. The respondents submitted that the contracts under which the cheques were given were for the repayment of money lent within the meaning of the Malayan Moneylenders Ordinance, 1951, and that, since the appellant was not a licensed moneylender and there was no memorandum in writing, the contracts, by virtue of s. 15 and s. 16 of the ordinance, were unenforceable. The facts are set out in the judgment of the Board. E F

W. W. Stabb for the appellant.

E. F. N. Gratiaen and *J. A. Baker* for the respondents.

LORD DEVLIN: This is an appeal from a judgment of the Court of Appeal at Kuala Lumpur setting aside an order of the High Court that the defendants, the present respondents, should pay the plaintiff, the present appellant, the sum of $31,112·06 in respect of dishonoured cheques drawn by the defendants and payable to the plaintiff. G

The plaintiff and the defendants carry on business at Kuala Lumpur, the one as a wholesale dealer in textiles and the other as a manufacturer of rubber shoes. Their dealings together, which they have had since 1954, appear to have been financial rather than commercial and arose, perhaps, from the fact that the defendants' cashier was the plaintiff's nephew. In this action the plaintiff is suing the defendants on sixteen cheques drawn by the defendants in February and March, 1958, in favour of the plaintiff and on presentation dishonoured. H

The cheques were given to the plaintiff in the course of certain transactions whose nature it is necessary to investigate and determine. The investigation is made difficult by the fact that at the trial neither side told the truth. The trial judge found that the two chief witnesses for the defendants, their managing partner and cashier, were " entirely unworthy of credit "; he was not impressed by the demeanour of the plaintiff and on one important issue he expressly rejected his evidence. Fortunately, in regard to the first eight cheques, D.3 to 10, a number of essential facts was not in dispute and their Lordships will, therefore, consider first the evidence relating to the cheque D.3, the first of this group. I

A In the course of his business the plaintiff received from his customers a number of out-station cheques which would take several days to clear—between seven and ten according to the station from which they came; and the plaintiff could not draw on them until they were cleared. The defendants, however, had a special arrangement with their bank whereby for a special charge they were allowed to draw on the credit of such cheques at once. Accordingly, on a number of occasions B in and after 1954, the plaintiff indorsed over to the defendants a quantity of his out-station cheques and the defendants gave him their own cheque in exchange. On Feb. 17, 1958, the plaintiff gave to the defendants fifteen out-station cheques, totalling $6,964·33 and in exchange the defendants gave him their cheque for the like amount post-dated to Feb. 24, 1958. This is the cheque D.3. Seven other similar transactions took place between Feb. 21 and Feb. 28. In each case C the plaintiff got a cheque post-dated by about a week.

So far the evidence is agreed. But while the plaintiff says that the post-dating of the cheques did not matter to him since the out-station cheques in his account would have taken several days to clear, the defendants say that the plaintiff charged them interest. Whether the interest was payable in respect of the whole period of the post-dating or only for the extra days, if any, over and above the D time taken for clearance when the plaintiff was actually out of his money, when and how the interest was paid and at what rate were matters which the defendants' witnesses left uncertain. In the type of transaction which characterised the second group of cheques, the defendants say that the plaintiff charged interest at the rate of 8 cents per $100 per day. But these points are not now of much importance, for the trial judge expressly rejected the whole of the defendants' evidence (which E the plaintiff had denied) relating to the payment of interest.

In relation to the second group of cheques, D.11 to D.18, there was a sharp conflict of evidence. The plaintiff said that these cheques were given to him as the price of goods sold: this was the part of the plaintiff's evidence that the trial judge expressly rejected. The defendants said that these transactions also related to out-station cheques, but that this time the transfer of the cheques F was the other way round. The defendants had also out-station customers who paid by cheque for goods sold to them. These cheques were usually post-dated; they appear to have been drawn before delivery of the goods. The defendants wanted to obtain immediate cash and so they got the plaintiff to discount them. The discount charged was calculated at the rate of 8 cents per $100 per day of the period between the date of the transaction and the maturity of the cheque. G In any case in which the plaintiff was doubtful about the credit-worthiness of the defendants' customer, he required the defendants to give, as collateral security, their own post-dated cheque maturing the same day as the customer's. The eight cheques in the second group were all of them cheques given by the defendants in fulfilment of this requirement.

These being the essential facts which emerged in evidence, their Lordships H turn now to consider the defence to the claim. The onus was on the defendants to prove that there was no consideration for the cheques for which they were sued. They sought to do this by means of an allegation that the contracts in pursuance of which the cheques were given were unenforceable. Sections 15 and 16 of the Moneylenders Ordinance, 1951, provide that no contract for the repayment of money lent shall be enforceable if it is lent by an unlicensed moneylender I or if there is no memorandum in writing. It is not disputed that in the present case there was no licence and no memorandum, so that what the defendants had to prove in order to make out the defence pleaded was, first, that the contracts to which the cheques related were contracts " for the repayment of money lent ", and, secondly, that the plaintiff was a moneylender within the meaning of the ordinance.

Their Lordships will consider first the question whether the second group of contracts were contracts for the repayment of money lent; and they answer that they were not. In giving this answer their Lordships bear in mind that

the plaintiff's version of these transactions was expressly rejected by the trial judge; and they have assumed that the defendants' version, which was not expressly and totally rejected by the trial judge, is the true one. The business of buying bills at a discount, that is, for their value at the date of purchase, is well known and is quite distinct from moneylending. Nowadays the buyer is usually a bank or a discount house, but the fact that he cannot be put into either of those categories does not alter the nature of the transaction, neither does the designation of the discount as interest. There is here no loan of money and no promise of repayment. Their Lordships' conclusion on this point is in accordance with the decision of BRANSON, J., in *Olds Discount Co., Ltd.* v. *John Playfair, Ltd.* (1), that a purchase of book debts for a specific sum was not a moneylending transaction.

The only feature of these transactions of the second group that makes it possible even to argue that they are moneylending transactions is the post-dated cheques given by the defendants. These are represented in the argument for the defendants as promises of repayment and the cash paid for the customers' cheques is said to be a loan. Their Lordships are satisfied that the post-dated cheques do not affect the nature of the transactions. A buyer of a bill naturally wants to have recourse to the seller of it as well as to the drawer; and in the ordinary way he will obtain this because the seller will also be an indorser of the bill. Their Lordships would suppose that when the out-station cheques were transferred to the plaintiff, they were indorsed by the drawees, that is, the defendants. If so, it is difficult to see what added advantage the plaintiff got from the post-dated cheques; and in any event they could not have done more than put the defendants in the ordinary position of indorsees. In *Olds Discount Co., Ltd.* v. *John Playfair, Ltd.* (1) the seller of the book debts also gave as security bills drawn on himself and that was an added advantage to the buyer; but that did not in the judgment of BRANSON, J. (2) affect the nature of the transaction.

In relation to the first group of cheques counsel for the defendants has advanced an argument that accepts the judge's finding that no additional payments, whether by way of interest or otherwise, were made by the defendants to the plaintiff. " Interest " is defined in s. 2 of the ordinance as including

> " any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan."

Counsel for the defendants seeks to bring his case within these words by demonstrating that although the post-dated cheques given by the defendants in each case were nominally equal to the out-station cheques exchanged for them, the post-dated cheques were in reality of greater value and that the excess is " interest " within the meaning of the definition. The first post-dated cheque (D.3) was for $6,964·33 and this was the exact total of the out-station cheques taken in exchange. But, counsel submits, the cash value of the out-station cheques was $6,964·33 minus x, —x representing the amount of the special charge which the defendants had to pay their bankers in order to draw on the out-station cheques; thus, he says, the post-dated cheque D.3 was worth more than the fifteen out-station cheques. Their Lordships with respect regard this argument as fanciful. If the cash value of the fifteen out-station cheques on Feb. 17 is to be taken as $6,964·33 minus x, then by the same token the cash value on Feb. 17 of the cheque post-dated to Feb. 24 is $6,964·33 minus y, —y being the appropriate discount. Since there is no evidence in this case showing whether x was greater or less than y, it is impossible to say which is the larger sum.

Even if the post-dated cheques did produce an excess, that is not " interest " within the definition unless there is a loan. As in the case of the second group of transactions, their Lordships have looked in vain in this first group for anything that can fairly be represented as a lending of money by the plaintiff and

(1) [1938] 3 All E.R. 275. (2) [1938] 3 All E.R. at p. 280.

A the promise to repay. The fundamental error that underlies the defendants' case on both groups of cheques is that because they were, so they say, in need of ready cash, and because the plaintiff supplied them with it and made, if he did, a profit out of doing so, therefore there was a loan and a contract for its repayment. There are many ways of raising cash besides borrowing. One is by selling book debts and another by selling unmatured bills, in each case for less than their B face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was BRANSON, J. (3), that transactions of this sort can easily be used as a cloak for moneylending. The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise C money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed on was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly.

D Counsel for the defendants has submitted that the transactions in the second group at least were shams. Why else, he argues, did the plaintiff invent a false story about the sale of goods? In other circumstances this might be a very strong point; but it is no use to the defendants' case unless they produce evidence showing that the true nature of the transaction was that of a loan. It is impossible to do more for the defendants (and it does not appear that the trial judge was E prepared to do as much) than to accept in full their version of these transactions which shows the purchase of bills at a discount and nothing more. When payment is made before due date at a discount, the amount of the discount is no doubt often calculated by reference to the amount of interest which the payer calculates his money would have earned if he had deferred payment to the due date. But that does not mean that discount is the same as interest. Interest postulates F the making of a loan and then it runs from day to day until repayment of the loan, its total depending on the length of the loan. Discount is a deduction from the price fixed once and for all at the time of payment. It appears to their Lordships to be very improbable that if the plaintiff was truly a moneylender and there were truly loans for which the post-dated cheques were only a form of security, he would have been content that the rate of discount which he con- G sidered remunerative should apply only until maturity of the cheques (never in any of the sixteen cases longer than a month) and thereafter, if the security proved valueless, to take until repayment only such rate of interest as the court awarded.

Accordingly, the defendants having failed to prove that in any of these transactions there was a contract for the repayment of money lent, there is no defence H to the claim and on this ground the judgment of ONG, J., should be restored. The Board have not, however, arrived at their conclusion in the same way as ONG, J., arrived at his. As their Lordships have said, the defence pleaded raised two questions. The first is the one that their Lordships have just determined that there was no " money lent "; and the second, which would arise only if the first I had been determined otherwise, whether the plaintiff was a moneylender within the meaning of the ordinance. But in the courts below the judges appear to have thought that in every case there was a contract for the repayment of money lent and that the real question to be decided was whether the plaintiff was a moneylender. The notes of the argument at the trial show that Dr. Teh for the plaintiff took the point about " money lent " clearly in his closing speech. His submission reads:

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(3) [1938] 3 All E.R. 275.

> "What is a moneylending transaction? As regards D.3 to D.11 defendants came to ask for out-station cheques of plaintiff to whom defendants gave own cheque in exchange. Defendants could use those cheques by special arrangement with bank. Submit that is not moneylending."

Nevertheless, the trial judge in his judgment said:

> "There is only one question in issue between the parties whether or not the plaintiff was a 'moneylender' within the meaning of the Moneylenders Ordinance, 1951."

The Court of Appeal likewise dealt only with this question; and in dealing with it concerned themselves very closely with the true meaning and effect of s. 3 of the ordinance. This section is not in their Lordships' opinion in the circumstances of this case of great significance, but in view of the different approach by the judges in the Federation of Malaya, they think it desirable to make some comment on it.

Section 3 provides that

> "any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender."

The effect of this section has been considered by THOMSON, J., in *Sadhu Singh* v. *Sellathurai* (4) in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to a carrying on of business.

This presumption is of little value to the defendants in this case. If they can prove that any one of these transactions was a loan at interest, they can prove a large number of similar transactions; and there is indeed no doubt that there was a course of business of the same sort between the parties going back to 1954 and other evidence of similar transactions with other persons—ample evidence to show without recourse to the presumption that the plaintiff was a moneylender within the ordinance. However, both the courts below dealt with the case by considering whether under s. 3 the burden of proof had shifted. ONG, J., held that before it shifted the defendants must prove that interest was collected from them by the plaintiff, which they had failed to do; the Court of Appeal appear to have thought that the burden of proof shifted because the defendants had given prima facie evidence of payment of interest and that, as the plaintiff's answer to that was rejected, his case failed. Counsel for the defendants submitted that the reasoning in the Court of Appeal was wrong; and since their Lordships have heard argument on the point, they think it right to express their conclusion on it.

It appears to their Lordships that if a defendant gives evidence that the plaintiff lent a sum of money at interest, that may be prima facie evidence—such as to make it necessary or desirable for the plaintiff to call evidence in answer to it—but it does not put any legal burden on to the plaintiff unless the evidence is accepted. If, at the end of the day, after hearing all the evidence on both sides, the judge does not accept it, that is to say, if he refuses to find that the plaintiff lent a sum of money at interest, then there is no presumption

(4) (1955), 21 M.L.J. 117.

A under s. 3 that the plaintiff is a moneylender: for the simple reason that the defendant has failed to *establish* that fact which he must *establish* if he relies on s. 3, namely, that the plaintiff lent a sum of money in consideration of a larger sum being repaid. But if at the end of the day the judge holds that that fact has been established, that is, that the plaintiff did lend a sum of money at interest, then there is a compelling presumption that the plaintiff is a moneylender and the B judge must hold him to be so unless on the rest of the evidence in the case the plaintiff has established that he is not a moneylender.

Their Lordships have only made these observations in case they may be of help in the future: but it is sufficient for the decision of this case that in their opinion the cheques in this case were not given for the "repayment of money lent" but rather for the purchase or discounting of other cheques. The Money-C lenders Ordinance affords therefore no defence to them and the plaintiff is entitled to judgment.

Their Lordships will accordingly report to the Head of the Federation of Malaya that in their opinion this appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of ONG, J., for the plaintiff restored and that the costs of the appeal in the Court of Appeal and of this D appeal should be paid by the respondents.

Appeal allowed.

Solicitors: *Lawrance, Messer & Co.* (for the appellant); *T. L. Wilson & Co.* (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

E

MACFOY *v.* UNITED AFRICA CO., LTD.

F [PRIVY COUNCIL (Lord Denning, Lord Devlin and Mr. L. M. D. de Silva), October 23, November 27, 1961.]

Privy Council—Sierra Leone—Practice—Pleading—Delivery in long vacation—Statement of claim—Whether a nullity or irregularity.

Practice—Pleading—Delivery—Long vacation—Irregularity—Statement of claim delivered in long vacation—No defence filed within time allowed—Judgment G *signed in default of defence—Whether statement of claim void or voidable—Whether judgment should be set aside—R.S.C., Ord.* 64, *r.* 4, *Ord.* 70, *r.* 1.

The delivery of a statement of claim in the long vacation is an irregularity, and thus is voidable if the court in its discretion under R.S.C., Ord. 70, r. 1, so orders; but it is not a nullity and, unless it is set aside by order of the court, it remains good and will support a subsequent judgment in default H of defence (see p. 1173, letters A and C, post).

During the long vacation of 1958 the plaintiffs, having properly issued a writ for moneys alleged to be due for goods supplied to which the defendant entered an appearance, delivered and filed a statement of claim. Delivery of the statement of claim during the long vacation was a breach of R.S.C., Ord. 64, r. 4 and r. 5*, which were applied by rules of court in Sierra Leone. I The defendant having failed to deliver a defence within the time allowed, such period being reckoned from the end of the long vacation, the plaintiffs signed judgment against him in default of defence. Subsequently the defendant applied to have the judgment set aside, and for a stay of execution, on the ground that he had a good defence on the merits of the claim. He did not then suggest that the judgment was a nullity but treated it as a regular judgment and swore an affidavit giving reasons why he was too late

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* The terms of R.S.C., Ord. 64, r. 4 and r. 5, are printed at p. 1172, letter B, post.

to file a defence. The applications were dismissed and the defendant appealed to the West African Court of Appeal. On the hearing of the appeal on June 1, 1959, the defendant for the first time took the point that the delivery of the statement of claim in the long vacation was a nullity and that all subsequent proceedings were therefore void. The appeal was dismissed. On appeal to Her Majesty in Council,

Held: whether the judgment in default of defence should be set aside was a matter for the discretion of the court, the delivery of the statement of claim in the long vacation being a voidable act, not a nullity; in the circumstances of this case, the West African Court of Appeal had rightly exercised their discretion (see p. 1173, letter G, post).

Appeal dismissed.

[As to the delivery of a statement of claim, see 30 HALSBURY'S LAWS (3rd Edn.) 21, 22, para. 40; and as to when pleadings may be delivered, amended or filed in the long vacation, and as to the effect of the long vacation in the computation of time, see the ANNUAL PRACTICE, 1962, at pp. 1812, 1813.

As to the effect of non-compliance with rules of court, see 30 HALSBURY'S LAWS (3rd Edn.) 399, 400, paras. 748, 749; and for cases on the subject, see DIGEST (Practice) 969-973, *5044-5071*.]

Cases referred to:

Anlaby v. *Praetorius*, (1888), 20 Q.B.D. 764; 57 L.J.Q.B. 287; 58 L.T. 671; Digest (Practice) 131, *1195*.

Craig v. *Kanssen*, [1943] 1 All E.R. 108; [1943] K.B. 256; 112 L.J.K.B. 228; 168 L.T. 38; 2nd Digest Supp.

Appeal.

Appeal by Benjamin Leonard MacFoy against a judgment of the West African Court of Appeal (HURLEY and AMES, Ag. Jg.A., and WATKIN-WILLIAMS, J.), dated June 5, 1959, dismissing an appeal by the appellant from the judgment of BAIRAMIAN, C.J., dated Jan. 9, 1959, whereby he dismissed an application by the appellant to set aside judgment in default of defence obtained by the respondents, the United Africa Co., Ltd., against the appellant on Sept. 29, 1958. The facts are set out in the judgment of the Board.

E. F. N. Gratiaen and *T. O. Kellock* for the appellant.

Mark Littman, Q.C., for the respondents.

LORD DENNING: The question in this case is: what is the effect of delivering a statement of claim in the long vacation?

In Sierra Leone the long vacation runs from July 15 to Sept. 15. On Aug. 16, 1958, during the long vacation, the United Africa Co., Ltd. issued a writ in the Supreme Court of Sierra Leone against B. L. MacFoy. It was indorsed with a claim for £5,690 15s. 9d. for goods supplied. It was duly served, and on Sept. 2, 1958, the defendant entered an appearance. On Sept. 5, 1958, still during the long vacation, the plaintiffs delivered and filed a statement of claim in which they alleged that the defendant was indebted to them in the sum of £5,690 15s. 9d. for oil products supplied to him, which he had sold to the public and had not paid for. The long vacation ended on Sept. 15, 1958. More than ten days elapsed thereafter and no defence was delivered by the defendant. On Sept. 29, 1958, the plaintiffs signed judgment against the defendant in default of defence. The judgment ran as follows:

> "The defendant not having delivered any defence herein it is this day adjudged that the plaintiffs recover against the said defendant £5,690 15s. 9d. and damages to be assessed."

In November, 1958, the defendant applied to set aside the judgment. He also applied for a stay of execution. These applications were heard by BAIRAMIAN, C.J., on Jan. 9, 1959. The defendant did not suggest that the judgment

A was a nullity and void. He treated it as a regular judgment but sought to set it aside because he said he had a good defence on the merits as to all but £250. He swore an affidavit setting out the reasons why he was too late to file a defence. But the chief justice dismissed his applications. Execution was levied and his goods sold.

On Mar. 14, 1959, the defendant gave notice of appeal to the West African B Court of Appeal. The appeal was heard on June 1, 1959, by HURLEY and AMES, Acting Judges of Appeal, and WATKIN-WILLIAMS, J. On the hearing of the appeal the defendant for the first time took the point about the delivery of the statement of claim in the long vacation. He said that it was a nullity and that all subsequent proceedings were void. On June 5, 1959, his appeal was dismissed. He now appeals, by special leave, to Her Majesty in Council.

C There is no question that all the earlier steps, prior to the statement of claim, were properly taken during the long vacation. The writ was duly issued on Aug. 16, 1958. It was duly served. On Sept. 2, 1958, the defendant duly entered an appearance. But what then was to happen about pleadings? The Supreme Court Rules (1) provide by Ord. 16, r. 1, that

> "Within ten days after appearance, the plaintiff shall deliver to the D defendant a statement of his claim . . . and shall forthwith file a copy thereof with the court";

and by Ord. 16, r. 2, that

> "The defendant shall within ten days of the delivery of the statement of claim deliver to the plaintiff his defence . . . and forthwith file a copy thereof E with the court."

In case of default of pleading the Supreme Court Rules provide by Ord. 23, r. 1, that if the plaintiff does not deliver a statement of claim "within the time allowed for that purpose" the defendant may apply to dismiss the action for want of prosecution: and by Ord. 23, r. 2, that

> F "If the plaintiff's claim be only for a debt or liquidated demand and the defendant does not, within the time allowed for that purpose deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed with costs."

Such are the times set by the rules for pleadings, but do those times run during the long vacation? There is no express provision in the Rules of the Supreme G Court of Sierra Leone as to what can be done in vacation. Order 44, r. 1, simply says that

> "The vacations to be observed in the Supreme Court shall be three in every year, viz., the long vacation, the Christmas vacation, and the Easter vacation. The long vacation shall commence on July 15 and terminate on Sept. 15; the Christmas vacation shall commence on Dec. 23 and terminate H on Jan. 4; and the Easter vacation shall commence on the Wednesday before Easter and terminate on the Saturday after Easter."

But there is no provision as to what can or cannot be done in vacation.

It was suggested to their Lordships that, as nothing was said, the times for pleading ran during the vacation: but their Lordships cannot accept this view. Their Lordships think that the position is covered by Ord. 52, r. 3, which says I that:

> "Where no other provision is made by these rules, the procedure, practice and forms in force in the High Court of Justice in England on Jan. 1, 1957, so far as they can be conveniently applied, shall be in force in the Supreme Court."

Their Lordships think this rule brings into operation in Sierra Leone the procedure

(1) Viz., of Sierra Leone.

and practice of the High Court in England as to pleadings during the long vacation. This is to be found in Ord. 64, r. 4 and r. 5 of the Rules of the Supreme Court. A

R.S.C., Ord. 64, r. 4, sets out some special causes in which pleadings may be amended, delivered or filed during the last eleven days of the long vacation and then says:

> "... but pleadings shall not be amended, delivered, or filed during any other part of such vacation, unless by direction of the court or a judge." B

R.S.C., Ord. 64, r. 5, says that:

> "Save as in the last preceding rule mentioned, the time of the long vacation in any year shall not be reckoned in the computation of the times appointed or allowed by these rules for amending, delivering, or filing any pleading unless otherwise directed by the court or a judge." C

Applying R.S.C., Ord. 64, r. 5, to the present case it is quite plain that, if the statement of claim was validly delivered and filed on Sept. 5, 1958, the time for defence would not start to run until the end of the long vacation, namely, Sept. 15, 1958. The defendant would then have ten days to deliver his defence, that is, he would have until Sept. 25, 1958. He did not deliver it within that time and the plaintiffs were therefore entitled to sign judgment as they did on Sept. 29, 1958. D

So the whole question is whether the statement of claim was validly delivered and filed on Sept. 5, 1958. There is no doubt that it was a breach of the rules for it to be delivered in the long vacation: for it is quite well settled in England, either by the terms of R.S.C., Ord. 64, r. 4, or by the practice of the court (see the note in the ANNUAL PRACTICE (2) to Ord. 20, r. 1) that in such a case as this pleadings are not to be delivered or filed during any part of the long vacation except by direction of the court or a judge. The plaintiffs did not comply with this rule. They delivered the statement of claim in the long vacation and filed it without any direction of the court or a judge. E

What is the effect of this non-compliance? The framers of the rules inserted special provisions to deal with non-compliance. Order 50, rr. 1 to 4 of the Rules of the Supreme Court of Sierra Leone are in identical terms with Ord. 70, rr. 1 to 4 of the Rules of the Supreme Court of England. Rule 1 says that: F

> "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court ... shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court ... shall think fit." G

This rule would appear at first sight to give the court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, not to proceedings which are a nullity: for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court without going under the rule; see *Anlaby* v. *Praetorius* (3), and *Craig* v. *Kanssen* (4). H

The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was *void* and not merely *voidable*. The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. I

(2) See the ANNUAL PRACTICE, 1962, at p. 492. (3) (1888), 20 Q.B.D. 764.
(4) [1943] 1 All E.R. 108; [1943] K.B. 256.

A So will this judgment collapse if the statement of claim was a nullity. But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been B done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.

No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? Suppose for instance C in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? Could he afterwards have applied to dismiss the action for want of prosecution, asserting that *no* statement of claim had been delivered? Clearly not. That shows that the delivery of a statement of claim in the long vacation is only voidable. It is not void. It is only an irregularity and not a nullity. It is good until avoided. In D this case, the statement of claim not being avoided, it took effect at the end of the long vacation and the time for defence then began to run. Likewise when the plaintiffs signed judgment in default of defence, that too was voidable but not void. It was not a nullity. It was therefore a matter for the discretion of the court whether it should be set aside or not.

Once this stage is reached, it becomes plain that there is no ground for inter- E fering with the decision of the West African Court of Appeal. As they pointed out:

> "The defendant knew when the statement of claim was delivered to him, and he knew it was then vacation. He made no application in the court below to set aside the statement of claim as having been delivered irregularly; he did not raise the point in any way until he appeared in this court to argue F the appeal, over eight months after the statement of claim had been delivered. Instead of applying to have the statement of claim set aside, he allowed judgment to go against him by default and then moved to have the judgment set aside. In that application, he proceeded on the basis that the judgment was a regular and subsisting one. In support of the application, he made an affidavit with the object of showing that he had a defence on the merits, G and set out certain averments intended to establish a basis of fact for that contention. At the hearing of the application he appeared by counsel, and the application was argued on the merits of the defence."

In the light of the history, it is well within the discretion of the Court of Appeal to refuse to set aside the judgment.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondents.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Linklaters & Paines* (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

A

I. & H. CAPLAN, LTD. *v.* CAPLAN AND ANOTHER.

[HOUSE OF LORDS (Lord Reid, Lord Cohen, Lord Keith of Avonholm, Lord Jenkins and Lord Guest), October 3, 4, 5, December 6, 1961.]

Landlord and Tenant—New tenancy—Business premises—Terms of new tenancy—Holding—Property to be comprised in new tenancy—Proper date for designating holding—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 32 (1).

B

In an application by a tenant for the grant of a new tenancy under Part 2 of the Landlord and Tenant Act, 1954, the proper time for the designation by the court under s. 32 (1) of that Act* of the property which constitutes the holding is the date of the order for the grant of the new tenancy and not the date when such an order is asked for (see p. 1176, letter H, post).

C

[As to the property to be comprised in a new business tenancy under the Landlord and Tenant Act, 1954, see 23 HALSBURY'S LAWS (3rd Edn.) 898, para. 1723.

For the Landlord and Tenant Act, 1954, s. 32, see 34 HALSBURY'S STATUTES (2nd Edn.) 417.]

D

Appeal.

Appeal by the tenants, I. & H. Caplan, Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., HARMAN and DONOVAN, L.JJ.), dated Nov. 15, 1960, discharging an order of LLOYD-JACOB, J., dated Feb. 15, 1960, whereby he dismissed the appellant company's application for a new tenancy of business premises under Part 2 of the Landlord and Tenant Act, 1954, and ordering that the case be referred back to the Chancery Division to determine whether at the date of the order and in the events which had happened (including events since Feb. 15, 1960) the appellant company were entitled to a grant of a new tenancy of the premises or some and if so what part thereof under s. 24 and s. 29 of the Act of 1954. The facts are set out in the opinion of LORD REID.

E

F

Michael Albery, Q.C., and *Jeremiah Harman* for the appellant company.

L. A. Blundell, Q.C., and *K. R. Bagnall* for the respondents.

Their Lordships took time for consideration.

Dec. 6. The following opinion was read.

LORD REID: My Lords, the appellant company is tenant of premises in Peel Square, Barnsley, the respondents being the landlords. At least until April, 1960, the appellant company carried on business there as outfitters and, accordingly, it is admitted that, at least until then, Part 2 of the Landlord and Tenant Act, 1954, applied. The appellant company held the premises under an oral lease on a yearly tenancy. On Dec. 23, 1958, the respondents gave notice to determine the tenancy on June 24, 1959. They stated that they would oppose any application under the Act of 1954 for the grant of a new tenancy on the ground that they intended to carry on business in the premises. On Apr. 14, 1959, the appellant company applied to the High Court by originating summons for the grant of a new tenancy for fourteen years at a rent of £2,300; the rent under the existing tenancy was £750 per annum. By order made in the Barnsley District Registry, it was ordered that the issue as to the intention of the respondents so to occupy the premises should be tried as a separate issue. This was adjourned into court and tried on Feb. 15, 1960, by LLOYD-JACOB, J., who decided the issue in favour of the respondents. The parties then agreed that the originating summons should be treated as adjourned from the registry, and LLOYD-JACOB, J., thereupon made an order dismissing it with costs. The appellant company now contends that its consent to this course being taken was in some way conditional. I can find nothing to support this contention.

G

H

I

* Section 32 (1) is set out at p. 1175, letter F, post.

A By notice of appeal on Apr. 29, 1960, the appellant company sought to have the judgment set aside and sought an order that it be entitled to a new tenancy. Thereupon, on July 14, 1960, the respondents sought an order that the appeal should be struck out on the ground that the appellant company had ceased to carry on business in the premises and had no intention of resuming business there. This the appellant company denied, and no order was made except as B to costs. On Nov. 15, 1960, the Court of Appeal made the order against which the present appeal is taken. In order to understand it, it is necessary to have in mind certain of the provisions of the Act of 1954 but, in view of the course which I shall move that your Lordships should take, I shall not attempt to deal fully with any of the relevant sections except s. 32. If your Lordships agree to remit the case to a judge of the Chancery Division it will be for him to deal with C the other sections in light of the facts which may be proved before him.

In general terms, the position is that s. 23 (1) applies the statutory provisions to any tenancy where the property comprised in it includes premises occupied by the tenant for the purposes of a business carried on by him. Section 24 provides that such a tenancy shall not come to an end unless terminated in accordance with the provisions of the Act and permits the tenant to apply for a D new tenancy if the landlord has given notice under s. 25 to terminate the existing tenancy. I have already stated that the appellant company did so apply on Apr. 14, 1959, and it is common ground that, at that date, the Act did apply and the appellant company's application was properly made. Section 30 sets out the grounds on which the landlord can oppose such an application. The respondents relied on that set out in sub-s. (1) (g). The decision of LLOYD-JACOB, E J., on this was reversed by the Court of Appeal and there is now no appeal against that part of their order.

The Court of Appeal had then to consider the application of s. 32 (1) which is in these terms:

> "Subject to the next following subsection, an order under s. 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new F tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order."

The word "holding" is used in a special sense and is defined (1) in s. 23 (3). G Again in general terms the result is that the tenant is not entitled to have included in the new tenancy any part of the premises which is occupied neither by him nor by a person employed by him and so employed for the business purposes set out in s. 23 (1). So any part sub-let to a stranger must be excluded. If no business is being carried on at the date when the "holding" has to be designated, then there is no "holding" and, therefore, there is nothing which can be the H subject of a new tenancy. I may add that difficult questions may arise if, for example, there is a temporary cessation of business at the time when the holding has to be designated, and there may be a question whether the business at that date must be the same or a similar business to that which was being carried on at the date of the tenant's application. I express no opinion about any of these matters as they may arise before the judge to whom the case is remitted. It would, I think, be very undesirable to prejudge any of these matters before the I facts are ascertained.

The only question which has to be decided and the only question which, in my view, can properly be decided in this appeal is the proper time for designating the holding under s. 32. The position when the Court of Appeal made their

(1) By s. 23 (3), ". . . the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

order was that there had been no inquiry into the facts except on the question of the respondents' intention with reference to s. 30 (1) (g). The appellant company maintained that, once that issue had been decided in its favour, it was entitled to a new tenancy although there would have to be inquiry into the facts before its terms could be decided. The respondents maintained that the appellant company was not entitled to any new tenancy because the facts would show that the tenancy had already ceased to be a holding protected by the Act and that there was in fact no "holding" at that date. The Court of Appeal ordered that the case be referred back to the Chancery Division to determine

> "Whether at the date of this order and in the events which have happened (including events since the said Feb. 15, 1960) the [appellant company] are entitled to a grant of a new tenancy of the said holding or some and if so which part thereof under s. 24 and s. 29 of the Landlord and Tenant Act, 1954."

Admittedly the use of the word "holding" here is a slip—what was meant was the premises held under the old tenancy. In a nutshell, the appellant company's objection to this order is that the question should not have been "whether at the date of this order . . ." but should have been "whether at the date of the order for the grant of a new tenancy . . ." It maintains that the order of the Court of Appeal was not "an order for the grant of a new tenancy" within the meaning of s. 32, and that that section expressly provides that the holding must be designated "by reference to the circumstances existing at the date of the order", i.e., the order for the grant of a new tenancy. It says that that date has not yet arrived.

The reason why this is of crucial importance is that the appellant company is apprehensive that the facts as at the date of the order of the Court of Appeal may show that, at that date, its tenancy did not comply with the requirements of s. 23 (1), but it is confident that the facts now and when an order for the grant of a new tenancy comes to be made will show that its existing tenancy then does comply with those requirements. The greater part of the judgments in the Court of Appeal consisted of an examination of the facts with regard to the respondents' intention, and, as I have said, there is no appeal against their judgment on that question. The reason why they decided that the date of their order is the appropriate date under s. 32 is given in a sentence by LORD EVERSHED, M.R.:

> "In the special circumstances of this case I think, therefore, that there is no escape from the result that we should treat the date of this hearing as being the date when the [appellant company] have asked, and asked for the first time, for the grant of a new tenancy, so that this date will be the relevant date on which to determine such matters as, what is the holding; what should be the rent; what should be the term, etc."

I doubt whether the first time that the appellant company asked for the grant of a new tenancy was in fact at the hearing before the Court of Appeal but, whether that be so or not, I do not agree that that is the proper date under s. 32. It specifies the date of an order for the grant of a new tenancy, not the date when such an order is asked for, which, owing to appeals or other causes of delay, may be long before the order is granted. The policy of the Act appears to be that not only the extent of the holding but also the rent, duration and other terms of the new tenancy should be determined as nearly as may be at the time when the new tenancy is granted, and this seems right because circumstances may alter and the tenancy ought not to be granted in light of obsolete conditions. It is quite true that s. 32 cannot be applied with literal accuracy because there may have to be some small interval between the hearing of the evidence and the making of an order, but circumstances are unlikely to change in so short a time. If for any reason any considerable time elapses and either

A party maintains before the order is made that there has been a material change, then it may be necessary to take further evidence. In the present case, if on the remit after taking evidence the judge decides to make an order for the grant of a new tenancy, he will make it in light of that evidence. If he were to refuse to make such an order but his decision were reversed on appeal, it might then become necessary to supplement that evidence, but any such complication seems B unlikely. The provision of s. 32 requiring the facts to be determined at the date of judgment and the order of the court is unusual, but one can see the reason for it and it must, in my view, be complied with so far as it is possible to do so.

It only remains to notice a further argument for the respondents. They maintain that a tenant is not entitled to the grant of a new tenancy unless the existing tenancy complied with the requirements of s. 23 (1) not only at the C date of the application for a new tenancy and at the date of the order granting a new tenancy but also throughout the intervening period. They say that if at any time during this interval the tenancy does not comply with these requirements, the protection of the Act flies off and any proceedings under the Act, such as an application for a new tenancy, abate and cannot be revived by any subsequent change of circumstances. Again, I do not propose to express any D opinion about this. If the facts proved in the inquiry make this argument relevant, it will be dealt with by the judge to whom the case is remitted.

On the matter of costs, the Court of Appeal awarded to the appellant company its whole costs down to Feb. 15, 1960—that must stand. They also awarded half the costs in the Court of Appeal—that must now be the whole costs of that appeal. And as the appellant company is successful in its appeal to this House E it must have its costs in this House.

My Lords, I am asked by my noble and learned friends, **LORD COHEN, LORD KEITH OF AVONHOLM** and **LORD GUEST,** who cannot be present here today, to say that they concur in the speech which I have just read.

LORD JENKINS: My Lords, I concur.

Appeal allowed.

Solicitors: *Kanter, Jules & Co.*, agents for *Keeble Hawson, Steele Carr & Co.*, Sheffield (for the appellant company); *Vizard, Oldham, Crowder & Cash*, agents for *Pye-Smith & Son*, Sheffield (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

WHITE & CARTER (COUNCILS), LTD. *v.* McGREGOR.

A

[HOUSE OF LORDS (Lord Reid, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Hodson), July 17, 18, 19, 20, December 6, 1961.]

Contract—Repudiation—Election not to accept repudiation—Effect—Contract remains fully effective—Innocent party entitled to perform contract and enforce contractual rights—Contract for advertisements to be exhibited over three years commencing at a future date—Advertiser expressly repudiated contract on the day on which it was made—Contractor published advertisements in accordance with contract and claimed payment in full—No step taken to minimise loss to advertiser—Whether contractor entitled to recover payment.

B

C

If one party to a contract wrongfully repudiates it and the other party does not accept the repudiation, the contract survives and the rights of the innocent party are preserved; accordingly he can perform his part of the contract and can recover on that footing, for there is no duty on him to vary the contract at the behest of the other party so as to deprive himself of its benefit (see p. 1183, letter H, p. 1185, letter E, and p. 1193, letters E and G, post).

D

Langford & Co., Ltd. v. *Dutch* (1952 S.C. 15) disapproved.

QUAERE (per LORD REID) whether, if the innocent party has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, the court will enforce against the party in default any additional burden involved by the innocent party's electing to perform the contract (see p. 1183, letter D, post).

E

Dictum of LORD WATSON in *Graham* v. *Kirkcaldy Magistrates* ((1882), 9 R. (Ct. of Sess.) at p. 91) considered.

On June 26, 1957, the respondent's sales manager, without specific authority from the respondent, entered into a contract with the appellants whereby the appellants agreed to advertise the respondent's business on litter bins which they supplied to local authorities. The contract was for a period of three years from the date of the first advertisement display. The payment stipulated was payable by instalments annually in advance, the first instalment being due seven days after the first display. The contract contained a condition that in the event of any breach of the contract including failure to pay an instalment the whole amount due for the three years, which was the sum of £196 4s., immediately became payable. Later on the day of June 26, 1957, when the respondent heard of the contract, he wrote to the appellants to cancel it. The appellants, who had not yet taken any steps to carry out the contract, nevertheless refused to accept the cancellation and proceeded to prepare advertisement plates which they exhibited on the bins on Nov. 2, 1957, and continued to display during the following three years. In due course the appellants demanded payment of the first instalment under the contract and, when the respondent refused to pay, the appellants sued him, in accordance with the condition in the contract, for the full sum of £196 4s. due for the three years.

F

G

H

Held (LORD MORTON OF HENRYTON and LORD KEITH OF AVONHOLM dissenting): the appellants were entitled to recover the contract price since the contract survived the respondent's unaccepted repudiation, the appellants had completed their part of the contract and there was no duty on them to vary it so as to deprive themselves of the benefit of it.

I

Appeal allowed.

[As to repudiation of contract, and as to the effect of breach of contract and the remedies therefor, see 8 HALSBURY'S LAWS (3rd Edn.) 203-206, paras. 344-348. For cases on the subject, see 12 DIGEST (Repl.) 377-394, *2960-3043.*]

A Cases referred to:

Avery v. *Bowden*, (1855), 5 E. & B. 714; 119 E.R. 647; *affd.* Ex.Ch. (1856), 6 E. & B. 953, 962; 26 L.J.Q.B. 3; 28 L.T.O.S. 145; 119 E.R. 1119, 1122; 12 Digest (Repl.) 381, *2978.*

Braithwaite v. *Foreign Hardwood Co.*, [1905] 2 K.B. 543; 74 L.J.K.B. 688; 92 L.T. 637; 10 Asp. M.L.C. 52; 12 Digest (Repl.) 491, *3695.*

B *Frost* v. *Knight*, (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 12 Digest (Repl.) 380, *2973.*

Golding v. *London & Edinburgh Insurance Co., Ltd.*, (1932), 43 Lloyd's Rep. 487.

Graham v. *Kirkcaldy Magistrates*, (1882), 9 R. (Ct. of Sess.) 91; 28 Digest (Repl.) 791, *284.*

Heyman v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B.

C 241; 166 L.T. 306; 2 Digest (Repl.) 492, *435.*

Hochster v. *De La Tour*, (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 118 E.R. 922; 12 Digest (Repl.) 377, *2960.*

Howard v. *Pickford Tool Co., Ltd.*, [1951] 1 K.B. 417; 3rd Digest Supp.

Howie v. *Anderson*, (1848), 10 D. 355.

International Correspondence Schools, Ltd. v. *Irving*, 1915 S.C. 28.

D *Johannesburg Municipal Council* v. *Stewart & Co.* (*1902*), *Ltd.*, 1909 S.C. 860; *revsd.* [1909] W.R. 161; 2 Digest (Repl.) 448, *149.*

Johnstone v. *Milling*, (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 12 Digest (Repl.) 377, *2961.*

Karsales (*Harrow*), *Ltd.* v. *Wallis*, [1956] 2 All E.R. 866; [1956] 1 W.L.R. 936; 26 Digest (Repl.) 666, *35.*

E *Langford & Co., Ltd.* v. *Dutch*, 1952 S.C. 15.

Mersey Steel & Iron Co. v. *Naylor, Benzon & Co.*, (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 12 Digest (Repl.) 378, *2966.*

National Cash Register Co. v. *Stanley*, [1921] 3 K.B. 292; 90 L.J.K.B. 1220; 125 L.T. 765; 26 Digest (Repl.) 668, *44.*

Ross v. *M'Farlane*, (1894), 21 R. (Ct. of Sess.) 396.

F *White & Carter* (*Councils*), *Ltd.* v. *A. R. Harding*, (May 21, 1958), unreported.

Wright v. *Melville*, (1828), 3 C. & P. 542; 172 E.R. 538; 3 Digest (Repl.) 100, *273.*

Appeal.

Appeal by White & Carter (Councils), Ltd. against an interlocutor of the Court

G of Session (the Lord Justice-Clerk (Lord Thomson), Lord Patrick, Lord Mackintosh and Lord Strachan), dated Nov. 29, 1960, refusing an appeal by the appellants from an interlocutor of the Sheriff Court at Dumbarton, dated Mar. 15, 1960, whereby an action raised by the appellants (the pursuers) claiming payment of the full sum (£196 4s.) due under a contract made by the respondent (the defender), William McGregor, with the appellants for the display of advertise-

H ments of the respondent's business on the appellants' litter bins for a period of three years was dismissed. On the day on which the contract was made, and before the appellants had taken any steps to carry the contract into effect, the respondents repudiated it but the appellants refused to accept the repudiation and went on to perform their part of the contract. The question arose whether in these circumstances the appellants were entitled to carry out the contract and

I sue for the contract price or whether their only remedy was to sue for damages for breach of the contract. The relevant facts are stated in the opinions of Lord Reid (p. 1180, post) and of Lord Hodson (p. 1191, letter F, post).

R. Johnston, Q.C. (of the Scottish Bar) and *J. G. Wilmers* for the appellants.

R. A. Bennett, Q.C., and *J. J. Clyde* (both of the Scottish Bar) for the respondent.

Their Lordships took time for consideration.

Dec. 6. The following opinions were read.

LORD REID: My Lords, the pursuers supply to local authorities litter bins which are placed in the streets. They are allowed to attach to these receptacles plates carrying advertisements and they make their profit from payments made to them by the advertisers. The defender carried on a garage in Clydebank and in 1954 he made an agreement with the pursuers under which they displayed advertisements of his business on a number of these bins. In June, 1957, his sales manager made a further contract with the pursuers for the display of these advertisements for a further period of three years. The sales manager had been given no specific authority to make this contract and when the defender heard of it later on the same day he at once wrote to the pursuers to cancel the contract. The pursuers refused to accept this cancellation (1). They prepared the necessary plates for attachment to the bins and exhibited them on the bins from Nov. 2, 1957, onwards (2).

The defender refused to pay any sums due under the contract and the pursuers raised the present action in the Sheriff Court craving payment of £196 4s. the full sum due under the contract for the period of three years. After sundry procedure the sheriff-substitute on Mar. 15, 1960, dismissed the action. He held that the sales manager's action in renewing the contract was within his apparent or ostensible authority and that is not now disputed. The ground on which he dismissed the action was that in the circumstances an action for implement of the contract was inappropriate. He relied on the decision in *Langford & Co., Ltd.* v. *Dutch* (3) and cannot be criticised for having done so.

The pursuers appealed to the Court of Session (4) and on Nov. 29, 1960, the Second Division refused the appeal. The present appeal is taken against their interlocutor of that date. That interlocutor sets out detailed findings of fact and, as this case began in the Sheriff Court, we cannot look beyond those findings. The pursuers must show that on those findings they are entitled to the remedy which they seek.

The case for the defender (now the respondent) is that, as he repudiated the contract before anything had been done under it, the appellants were not entitled to go on and carry out the contract and sue for the contract price: he maintains that in the circumstances the appellants' only remedy was damages, and that, as they do not sue for damages, this action was rightly dismissed.

The contract was for the display of advertisements for a period of 156 weeks from the date when the display began. This date was not specified but admittedly the display began on Nov. 2, 1957, which seems to have been the date when the former contract came to an end. The payment stipulated was 2s. per week per plate together with 5s. per annum per plate both payable annually in advance, the first payment being due seven days after the first display. The reason why the appellants sued for the whole sum due for the three years is to be found in cl. 8 of the conditions:

> "8. In the event of an instalment or part thereof being due for payment, and remaining unpaid for a period of four weeks or in the event of the advertiser being in any way in breach of this contract then the whole amount due for the 156 weeks or such part of the said 156 weeks as the advertiser shall not yet have paid shall immediately become due and payable."

A question was debated whether this clause provides a penalty or liquidated damages but on the view which I take of the case it need not be pursued. The clause merely provides for acceleration of payment of the stipulated price if the

(1) The contract, itself, stated that it could not be cancelled by the advertiser, viz., the respondent, see p. 1191, letter G, post.

(2) It was found by the Court of Session and the Sheriff Court that the appellants made no effort to minimise their loss by procuring another advertiser to take up the advertising space included in the contract.

(3) 1952 S.C. 15.

(4) [1961] S.L.T. 144.

A advertiser fails to pay an instalment timeously. As the respondent maintained that he was not bound by the contract he did not pay the first instalment within the time allowed. Accordingly, if the appellants were entitled to carry out their part of the contract notwithstanding the respondent's repudiation, it was hardly disputed that this clause entitled them to sue immediately for the whole price and not merely for the first instalment.

B The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract whether C or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect.

In *Howie* v. *Anderson* (5) Anderson sold shares to be delivered on Jan. 8, 1847: on Oct. 31, 1846, his agent intimated to Howie that he refused to go on with the transaction. Howie refused to accept this repudiation. Anderson pleaded that Howie ought to have gone into the market and bought other shares on Oct. 31 D but it was held that damages must be awarded on the price ruling on Jan. 8. The Lord Justice-Clerk (LORD HOPE) said (6):

> "I do not understand exactly what is meant by the plea that the contract was broken and at an end on Oct. 31, merely because the defender, in pursuance of his scheme of acting wrongfully, gave notice that he would not fulfil the contract . . . He had no power to alter the date of the fulfilment E of the contract: He had no power to affect the extent of the rights and claims of the pursuer, as on the date when the contract was to be fulfilled. That very intimation was a wrongful act,—the commencement of the wrong which was consummated by the actual failure of delivery on Jan. 8. The bargain continued to subsist as a binding contract to be fulfilled at the proper time by the defender, after his intimation of Oct. 31, exactly as if that F intimation had not been made."

LORD MEDWYN said (7):

> ". . . the defender cannot plead that the buyer was bound to go into the market to make a new time-bargain, merely because this might have lessened the damages to him if he acted improperly in refusing to implement G the bargain. The breach was properly on Jan. 8, because that was the day on which it was to be fulfilled by delivery of the stock."

I need not refer to the numerous authorities. They are not disputed by the respondent but he points out that in all of them the party who refused to accept the repudiation had no active duties under the contract. The innocent party's option is generally said to be to *wait* until the date of performance and then to H claim damages estimated as at that date. There is no case in which it is said that he may, in face of the repudiation, go on and incur useless expense in performing the contract and then claim the contract price. The option, it is argued, is merely as to the date as at which damages are to be assessed. Developing this argument, the respondent points out that in most cases the innocent party cannot complete the contract himself without the other party doing, allowing I or accepting something, and that it is purely fortuitous that the appellants can do so in this case. In most cases by refusing co-operation the party in breach can compel the innocent party to restrict his claim to damages. Then it was said that even where the innocent party can complete the contract without such co-operation it is against the public interest that he should be allowed to do so. An example was developed in argument. A company might engage an expert to go abroad and prepare an elaborate report and then repudiate the contract

(5) (1848), 10 D. 355. (6) (1848), 10 D. at p. 357. (7) (1848), 10 D. at p. 359.

before anything was done. To allow such an expert then to waste thousands of pounds in preparing the report cannot be right if a much smaller sum of damages would give him full compensation for his loss. It would merely enable the expert to extort a settlement giving him far more than reasonable compensation.

The respondent founds on the decision of the First Division in *Langford & Co., Ltd.* v. *Dutch* (8). There an advertising contractor agreed to exhibit a film for a year. Four days after this agreement was made the advertiser repudiated it but, as in the present case, the contractor refused to accept the repudiation and proceeded to exhibit the film and sue for the contract price. The sheriff-substitute dismissed the action as irrelevant and his decision was affirmed on appeal. In the course of a short opinion the Lord President (LORD COOPER) said (9):

> "It appears to me that, apart from wholly exceptional circumstances of which there is no trace in the averments on this record, the law of Scotland does not afford to a person in the position of the pursuers the remedy which is here sought. The pursuers could not force the defender to accept a year's advertisement which she did not want, though they could of course claim damages for her breach of contract. On the averments the only reasonable and proper course, which the pursuers should have adopted, would have been to treat the defender as having repudiated the contract and as being on that account liable in damages, the measure of which we are, of course, not in a position to discuss."

The Lord President cited no authority and I am in doubt what principle he had in mind. In the earlier part of the passage which I have quoted he speaks of forcing the defender to accept the advertisement. Of course, if it had been necessary for the defender to do or accept anything before the contract could be completed by the pursuers, the pursuers could not and the court would not have compelled the defender to act, the contract would not have been completed, and the pursuers' only remedy would have been damages. But the peculiarity in that case, as in the present case, was that the pursuers could completely fulfil the contract without any co-operation of the defender. The Lord President cannot have meant that because of non-acceptance the contract had not been completely carried out, because that in itself would have been a complete answer to an action for the contract price. He went on to say that the only reasonable and proper course which the pursuers should have adopted would have been to treat the defender as having repudiated the contract, which must, I think, mean to have accepted the repudiation. It is this reference to "the only reasonable and proper course" which I find difficult to explain. It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way and that a court will not support an attempt to enforce them in an unreasonable way. One reason why that is not the law is no doubt because it was thought that it would create too much uncertainty to require the court to decide whether it is reasonable or equitable to allow a party to enforce his full rights under a contract. The Lord President cannot have meant that.

The only principle I can think of which he may have had in mind is the principle invoked by LORD WATSON in a well-known passage at the beginning of his speech in *Graham* v. *Kirkcaldy Magistrates* (10):

> "It appears to me that a superior court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course."

But LORD WATSON went on to say (10):

> "In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary

(8) 1952 S.C. 15. (9) 1952 S.C. at p. 18.
(10) (1882), 9 R. (Ct. of Sess.) at p. 91.

A means of enforcing their legal rights. There are, so far as I know, only three decided cases in which the Court of Session, there being no facts sufficient to raise a plea in bar of the action, have nevertheless denied to the pursuer the remedy to which in strict law he was entitled. These authorities seem to establish, if that were necessary, the proposition that the court has the power of declining, upon equitable grounds, to enforce an admittedly B legal right: but they also show that the power has been very rarely exercised."

Langford & Co., Ltd. v. *Dutch* (11) is indistinguishable from the present case. Quite properly the Second Division followed it in this case as a binding authority and did not develop LORD COOPER's reasoning: they were not asked to send this C case to a larger court. We must now decide whether that case was rightly decided. In my judgment it was not. It could only be supported on one or other of two grounds. It might be said that, because in most cases the circumstances are such that an innocent party is unable to complete the contract and earn the contract price without the assent or co-operation of the other party, therefore in cases where he can do so he should not be allowed to do so. I can D see no justification for that.

The other ground would be that there is some general equitable principle or element of public policy which requires this limitation of the contractual rights of the innocent party. It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to E enforce a stipulation he cannot in general enforce it: so it might be said that if a party has no interest to insist on a particular remedy he ought not to be allowed to insist on it. And, just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalise the other party by taking one course when another is equally advantageous to him. If I may revert to the example which I gave of a company engaging an expert to prepare an elaborate report F and then repudiating before anything was done, it might be that the company could show that the expert had no substantial or legitimate interest in carrying out the work rather than accepting damages: I would think that the de minimis principle would apply in determining whether his interest was substantial and that he might have a legitimate interest other than an immediate financial interest. But if the expert had no such interest then that might be regarded as a proper G case for the exercise of the general equitable jurisdiction of the court. But that is not this case. Here the respondent did not set out to prove that the appellants had no legitimate interest in completing the contract and claiming the contract price rather than claiming damages, there is nothing in the findings of fact to support such a case, and it seems improbable that any such case could have been proved. It is, in my judgment, impossible to say that the appellants H should be deprived of their right to claim the contract price merely because the benefit to them as against claiming damages and reletting their advertising space might be small in comparison with the loss to the respondent: that is the most that could be said in favour of the respondent. Parliament has on many occasions relieved parties from certain kinds of improvident or oppressive contracts, but the common law can only do that in very limited circumstances. Accordingly, I I am unable to avoid the conclusion that this appeal must be allowed and the case remitted so that decree can be pronounced as craved in the initial writ.

LORD MORTON OF HENRYTON: My Lords, the facts of this case have already been fully stated. It is plain that the respondent (defender in the action) repudiated the contract of June 26, 1957, immediately after his sales manager had entered into it and some months before the time for performance

(11) 1952 S.C. 15.

of it by the appellants, and persisted in his repudiation throughout. Notwithstanding this, the appellants proceeded with the preparation of plates advertising the respondent's garage business and, as the sheriff-substitute held, they

> "made no effort to procure another advertiser to take up the advertising space included in said contract and thus minimise their loss."

The plates were first exhibited on the litter bins on Nov. 2, 1957, and they remained on display during the whole of the contract period of 156 weeks. The respondent throughout made it clear that he did not want the advertisements and refused to pay for them. The present action is brought to recover £196 4s., the full sum payable under the contract. Alternatively, the appellants claim the same sum as liquidated damages. The respondent contends that in the circumstances of the present case the only remedy of the appellants was damages, to be assessed according to ordinary principles.

My Lords, I think that this is a case of great importance, although the claim is for a comparatively small sum. If the appellants are right, strange consequences follow in any case in which, under a repudiated contract, services are to be performed by the party who has not repudiated it, so long as he is able to perform these services without the co-operation of the repudiating party. Many examples of such contracts could be given. One, given in the course of the argument and already mentioned by my noble and learned friend, LORD REID, is the engagement of an expert to go abroad and write a report on some subject for a substantial fee plus his expenses. If the appellants succeed in the present case, it must follow that the expert is entitled to incur the expense of going abroad, to write his unwanted report, and then to recover the fee and expenses, even if the other party has plainly repudiated the contract before any expense has been incurred.

It is well established that repudiation by one party does not put an end to a contract. The other party can say "I hold you to your contract, which still remains in force". What, then, is his remedy if the repudiating party persists in his repudiation and refuses to carry out his part of the contract? The contract has been broken. The innocent party is entitled to be compensated by damages for any loss which he has suffered by reason of the breach, and in a limited class of cases the court will decree specific implement. The law of Scotland provides no other remedy for a breach of contract, and there is no reported case which decides that the innocent party may act as the appellants have acted. The present case is one in which specific implement could not be decreed, since the only obligation of the respondent under the contract was to pay a sum of money for services to be rendered by the appellants. Yet the appellants are claiming a kind of inverted specific implement of the contract. They first insist on performing their part of the contract, against the will of the other party, and then claim that he must perform his part and pay the contract price for unwanted services. In my opinion, my Lords, the appellants' only remedy was damages, and they were bound to take steps to minimise their loss, according to a well-established rule of law. Far from doing this, having incurred no expense at the date of the repudiation, they made no attempt to procure another advertiser, but deliberately went on to incur expense and perform unwanted services with the intention of creating a money debt which did not exist at the date of the repudiation.

The only cases cited in which a claim of the kind now put forward has been considered are *Langford & Co., Ltd.* v. *Dutch* (12), when it was rejected by the Court of Session, and *White & Carter (Councils), Ltd.* (that is, the present appellants) v. *A. R. Harding* (13). The latter case is, I think, distinguishable from the present case but if it cannot be distinguished it was, in my opinion, wrongly decided by the Court of Appeal. The former case is directly in point, and was, in my opinion, rightly decided, and rightly followed by the Court of Session in the present case.

The facts in *Langford's* case (12) have been stated by my noble and learned

(12) 1952 S.C. 15. (13) (May 21, 1958), unreported.

A friend, LORD REID (14). The Court of Session held (15) that the law of Scotland did not "afford to a person in the position of the pursuers the remedy which is here sought". These words are quoted from the short opinion of the Lord President (LORD COOPER), and he continued (15):

> "the pursuers could not force the defender to accept a year's advertisement which she did not want, though they could of course claim damages for her breach of contract."

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These two sentences embodied, I think, the basis of the learned Lord President's opinion, but he added (15):

> "On the averments the only reasonable and proper course, which the pursuers should have adopted, would have been to treat the defender as having repudiated the contract and as being on that account liable in damages, the measure of which we are, of course, not in a position to discuss."

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My Lords, I think that this last sentence was merely a comment on the behaviour of the pursuers, which applies with equal force to the appellants in the present case. The course of action followed by the appellants seems to me unreasonable and oppressive, but it is not on that ground that I would reject their claim. I would reject it for the reasons which I have already given.

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In my opinion the appellants' alternative claim for the same sum of £196 4s. as liquidated damages should be rejected for the reasons which will shortly be given by my noble and learned friend LORD KEITH OF AVONHOLM.

I would dismiss the appeal.

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LORD TUCKER: My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend, LORD HODSON. I am in complete agreement with the reasons he gives for allowing the appeal.

LORD KEITH OF AVONHOLM: My Lords, the issue in this case is of some general importance in contract law. It is whether, where one party has contracted to perform certain services for money price to be paid by the other contracting party he can, when his time of performance arrives, insist on performing these services so as to earn his price, against the will of the other party who wrongfully insists on repudiating the contract.

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Much argument and citation of authority was advanced on the topic of anticipatory repudiation. That, in my view, was largely beside the point. There is no doubt that there was here an anticipatory repudiation, for the contract was repudiated by the defender the very day it was made and some months before it could come into operation. But the pursuers did not choose to act on that repudiation and sue the defender for what has sometimes been called an anticipatory breach. The real question at issue is what were the rights of parties when the contract fell to be put into operation, the defender having maintained his repudiation throughout.

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I should first state the submission made by counsel for the pursuers (the appellants) in the words used by him.

> "Where one party to a contract intimates that he refuses to implement the obligations he has undertaken the innocent party has the option of accepting the repudiation and rescinding the contract and availing himself at once of the remedies open to him *or* he may ignore the repudiation and wait until time for performance arrives before setting in train proceedings for remedy. The innocent party has truly a choice. He is not compelled to accept repudiation. The guilty party cannot rid himself of his contractual liability or limit his liability under the contract by repudiating it and insisting that such repudiation be accepted by the innocent party. If the innocent party chooses not to accept he may go on and await the date of the performance

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(14) See p. 1182, letter B, ante. (15) 1952 S.C. at p. 18.

by the guilty party and if it is not tendered his rights as at that date are preserved to him."

There are certain refinements in this submission and certain questions which it does not answer. A number of cases were cited which were intended to illustrate the submission. These are all cases where the successful litigant obtained damages, or escaped damages, in actions for breach of contract. The appellants, it is to be observed, are suing primarily for a debt, not for damages for breach of contract. Nor is there any difficulty in seeing, in the circumstances of the cases what was the date or time of performance. In many of the cases it was either the date of tender and refusal to take delivery of the subject-matter of the contract (*Braithwaite* v. *Foreign Hardwood Co.* (16); or the date of failure to deliver (*Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (17); *Johnstone* v. *Milling* (18); *Howie* v. *Anderson* (19); *Avery* v. *Bowden* (20)). I take one case in this branch of law for a passage relied on by counsel for the appellants in *Frost* v. *Knight* (21). A man had promised to marry a lady in two years. Before that time elapsed he intimated that he did not intend to abide by his promise. An action of damages for breach was raised within the two years. COCKBURN, C.J., stated the alternative option in these words (22):

> "The promisee, if he pleases, may treat the notice of intention [to repudiate] as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance."

There could be no difficulty here about the date of performance. It was on the expiry of the two years. But there is some ambiguity in the words "the time when the contract is to be executed". Do they mean the time when the contract is to become operative by the action of either of the parties, as the case may be, or the time when the defaulting party would have been bound to carry out his obligations under the contract? In the latter case there may be two times of performance, the time when the complaining party has to perform his obligations on the one hand and the time when the defaulting party has to perform his on the other. This dichotomy does not come to the surface in any of the cases, so far as I have observed. The position again is stated quite generally in a passage in MAYNE on DAMAGES (11th Edn.), p. 141, in a chapter entitled "Time to which damages are calculated":

> "If before the time for performance arrives one party absolutely and definitely repudiates the contract, the other party is entitled to wait till the time arrives, and then bring his action, or to treat the contract as broken and sue for the breach at once."

If I understand aright, counsel for the appellants would read time of performance as time of performance by the defender after the appellants had discharged their part of performance under the contract. Their claim then becomes a claim not for damages for breach of contract but for a debt due by the defender under the contract. In other words, there would be an anticipatory repudiation by the defender which the appellants were not bound to accept as a breach of contract and which did not cease to be anticipatory until the moment when the defender was due to make payment under the contract. This, I think, goes beyond anything that has been decided in the cases where anticipatory repudiation has been considered. It makes an arbitrary distinction and one differing in its consequences according as performance is first called for under the contract from the repudiating party, or from the other party. In the former case there is a plain breach of contract making the repudiating party liable in damages, unless where a claim for specific

(16) [1905] 2 K.B. 543.
(17) (1884), 9 App. Cas. 434.
(18) (1886), 16 Q.B.D. 460.
(19) (1848), 10 D. 355.
(20) (1855), 5 E. & B. 714.
(21) (1872), L.R. 7 Exch. 111.
(22) (1872), L.R. 7 Exch. at p. 112.

A implement is available. In the latter case, according to the submission made, he is liable contractually for a debt, at least where the consideration for performance by the other party is expressed in money. The law of Scotland has always stressed the mutuality of contracts and it should follow, in my opinion, that the consequences of breach of contract by either party should correspond. I would state the position in the case of an anticipatory repudiation not accepted by the B other party as a breach of contract thus: If the contract is to take operative effect in the first place by performance of the repudiating party and he maintains his repudiation by refusing, or failing to give performance, the other party has a cause of action for either damages or specific implement. If performance is first to be given by the other party and the time for his performance has arrived he must tender performance, in the sense of showing that he is now ready and able C to give performance, and if this tender is still rejected by the repudiating party his only cause of action again arises to him as at that date.

I would refer first to contracts for the sale of goods which were touched on in the course of the debate, for the reason that one of the remedies provided to the seller by the Sale of Goods Act, 1893, is an action for the price (23). This, however, applies only in two cases. One is where the property in the goods has D passed to the buyer. But property cannot pass without the intention of the buyer as well as that of the seller and, except in some such cases as fraud or lack of consensus in idem or breach of contract by the seller, no question of repudiation can arise. The contract is completed and finished apart from delivery and nothing remains but payment of the price. The only other case is where parties have contracted for payment on a day certain irrespective of delivery or the E passing of property. This is a clear case of a contractual debt unconditioned by any question of performance by the other party. A much closer parallel with the present case is a contract to sell future or unascertained goods. In this case there can be no appropriation of, and therefore passing of property, in the goods without the assent of both buyer and seller. If therefore the buyer repudiates the contract before appropriation, or refuses his assent to appropriation, there can be no pass- F ing of property. The seller is then confined to an action of damages for breach of contract. This, of course, is a rule of statute. But the Act is largely declaratory of English law, though not of Scots law. So the rule can only be treated as an analogy, but it is an analogy which seems to me to make a hole in the principle contended for by the appellants.

Repudiation of a contract is nothing but a breach of contract. Except where G it is accepted as an anticipatory breach and as a ground for a claim of damages, a repudiation can never be said to be accepted by the other party except in the sense that he acquiesces in it and does not propose to take any action. Otherwise he founds on it as a cause of action.

The late Professor Gloag in his work on Contract (2nd Edn.), p. 592, considering the rights arising on breach of contract said:

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> "The primary rights of the creditor in a contractual obligation may be said to be to secure performance by invoking the assistance of the court to compel it, or, where that remedy is inappropriate, to obtain compensation in damages."

It may be said that the learned author has here in mind an obligation other than the mere payment of money. But payment of money is often linked with I another obligation as, for instance, to accept delivery and the courts will not enforce acceptance of delivery unless in certain cases where they may order specific implement. They will merely give damages for failure to take delivery. Nor will they give a decree ad factum praestandum for the payment of money. Here the appellants are saying that they will do something which the courts will not enforce—that they will force their services on an unwilling defender and then sue him for the price.

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(23) See s. 49 of the Sale of Goods Act, 1893.

This point receives additional force in the circumstances of this case. The contract was to come into operation on Nov. 2, 1957, when the previous contract expired. But it involved, in the absence of other advertising matter supplied by the defender, the display by the appellants of at least the name, business and address of the advertiser. I should hesitate to say that any contractor was entitled to display these particulars of the defender against his wish, even if the withholding of his assent be in breach of contract.

Some play was made by counsel for the appellants with an expression used by ASQUITH, L.J., in *Howard* v. *Pickford Tool Co., Ltd.* (24) that "An unaccepted repudiation is a thing writ in water . . ." A graphic phrase, or expression, has its uses even in a law report and can give force to a legal principle, but it must be related to the circumstances in which it is used. Howard was a managing director with a six years contract of service. He thought that the company with which he was serving had shown by the conduct of its chairman that it no longer intended to be bound by its agreement. He brought an action which, as amended, sought a declaration that the company by so acting had repudiated the contract and excused the plaintiff from further performance of his obligations under it. EVERSHED, M.R., said (25):

> "It is quite plain . . . that if the conduct of one party to a contract amounts to a repudiation, and the other party does not accept it as such but goes on performing his part of the contract and affirms the contract, the alleged act of repudiation is wholly nugatory and ineffective in law."

ASQUITH, L.J., said (24):

> "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind."

The declaration was held to be academic and the claim struck out. These observations must be read in the light of the facts to which they relate. They were directed to an alleged repudiation unaccepted by the man who said there was a repudiation before any cause of action had arisen. At best the case was no more than one of an intended repudiation, for performance was going on. The servant was still serving and the employer was continuing to employ him. What the court was saying was that the plaintiff had at that time no cause of action. But in the case of repudiation of a contract when performance is tendered, or due to be given by the other party, the repudiation cannot be said to be writ in water. It gives rise immediately to a cause of action. This does not involve acceptance of the repudiation. There has been a breach of contract which the complaining party denies the other had any right to commit. I know of no authority for saying that the offended party can go quietly on as if the contract still continued to be fully operative between both parties. He is put to his remedy at the date of the breach. It has been said that when an anticipatory repudiation is not treated as a cause of action the contract remains alive. It does until the contract would become operative, when the repudiation, if still maintained, then becomes a cause of action and all pleas and defences then existing are available to the respective parties.

The party complaining of the breach also has a duty to minimise the damage he has suffered, which is a further reason for saying that after the date of breach he cannot continue to carry on his part of an executory contract. A breach of a contract of employment will serve to illustrate the nature of this duty. A person is engaged to serve for a certain period, say three months, to commence at a future date. When that date arrives the prospective employer wrongfully refuses to honour the engagement. The servant is not entitled to see out the three months and then sue the recalcitrant employer for three months' wages. He must take steps by seeking other employmemt to minimise his loss. It is true, of course, that a servant cannot invoke a contract to force himself on an unwilling master, any

(24) [1951] 1 K.B. at p. 421. (25) [1951] 1 K.B. at p. 420.

A more than a master can enforce the service of an unwilling servant. But if the appellants' contention is sound, it is difficult to see why, by parity of reasoning, it should not apply to a person who keeps himself free to perform the duties of his contract of service during the whole period of the contract and is prevented from doing so by the refusal of the other contracting party. Yet in *Hochster* v. *De La Tour* (26) from which the whole law about anticipatory repudiation stems, B LORD CAMPBELL, C.J., plainly indicated that if the courier in that case, instead of accepting as he did the repudiation of his engagement as a cause of action, before it was due to commence, had waited till the lapse of the three months of the engagement he could not have sued as for a debt. The jury, he said (27), would be entitled to look at all that might "increase or mitigate the loss of the plaintiff down to the day of trial". There is no difference in this matter between C the law of England and the law of Scotland (*Ross* v. *M'Farlane* (28)).

I now turn to two cases which were relied on by the appellants' counsel, which may seem to come nearer the present case, but which, I think, are clearly distinguishable.

The first is *Wright* v. *Melville* (29). There a man hired a phaeton selected by himself for a period of five weeks at five guineas a week. After he had had it for D two or three days he took it back saying he would take another, which he did not do, and afterwards refused to pay the stipulated hire. BEST, C.J. (29), charged the jury that if the plaintiff had sold the phaeton within the five weeks (which was alleged) he could not recover, but as he did not appear to have done so he was entitled to the stipulated five guineas a week. Verdict was entered accordingly. This plainly was a contract of hire for a fixed period which had been E commenced and under which rent then became due. There was no question of repudiation or breach at the date of performance. The case was distinguished in *National Cash Register Co.* v. *Stanley* (30) for this reason, as is stated in the case which I next mention.

The other case is *White & Carter (Councils), Ltd.* v. *A. R. Harding* (31) in which MORRIS, L.J., gave the judgment of the court with which LORD EVERSHED, F M.R., and ORMEROD, L.J., agreed. Copies were provided during the hearing of this appeal. The form of contract there was identical with that in the present case. The contractors were the present appellants. But the circumstances in which the claim arose were different. The advertiser, the defendant, entered into the contract on Nov. 13, 1956. Nothing was done under the contract until May 8, 1957, when the advertising plates were first displayed by the contractors. The defendant G was then asked for payment under the contract and as he refused to pay he was sued in Westminster County Court for the full 156 weeks under condition 8 of the contract (32) and judgment issued against him. On two separate occasions, one in November, 1956, and the other in April, 1957, before the plates had been exhibited, he asked to be released from his contract, but the plaintiffs did not agree to do so. MORRIS, L.J., held that there had been no termination or repudiation H of the contract by the defendant prior to the exhibition of the plates, only requests to be released. Some two months after the display of the plates the defendant wrote to the plaintiffs with a cheque for £81 which he asked to be accepted in payment for the first year's advertising. He also asked to be allowed to withdraw from the remainder of the contract. The plaintiffs refused to accede to this and returned the cheque for £81. The learned lord justice in these circum- I stances held that the claim was a claim for debt, under the contract, and upheld the judgment of the county court judge. He referred to *National Cash Register Co.* v. *Stanley* (30) and to *Karsales (Harrow), Ltd.* v. *Wallis* (33) in which that case was approved. Of *National Cash Register Co.* v. *Stanley* (30) he said:

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(26) (1853), 2 E. & B. 678.
(27) (1853), 2 E. & B. at p. 691.
(28) (1894), 21 R. (Ct. of Sess.) 396.
(29) (1828), 3 C. & P. 542.
(30) [1921] 3 K.B. 292.
(31) (May 21, 1958), unreported.
(32) Condition 8 was identical with condition 8 of the contract in the present case which is printed at p. 1180, letter H, ante.
(33) [1956] 2 All E.R. 866.

"That seems to me, if I may say so with respect, to have been an entirely correct decision. The payment there was to be for use and hire of the register. The defendant refused to take the register. He refused to have the use of it and refused to hire it. Therefore the provisions of the contract were not put into operation; they were not put into operation because of the defendant's own breach, for which the remedy lay in damages."

In my opinion the case relied on is on its facts quite a different case from the present and is of no assistance to the appellants.

This brings me to *Langford & Co., Ltd.* v. *Dutch* (34). I took part in the judgment in that case, though the only opinion delivered in the case was given by the Lord President (LORD COOPER), with whom I and the other judges of the division concurred. The judgment was not a reserved judgment and the case was not, I think, so fully argued as the case now before your Lordships. It is, if rightly decided, determinative of the present appeal and is, so far as I am aware, the only other case in which the question raised on this appeal has ever been considered. The circumstances were practically indistinguishable from those in the present case and the pursuers were suing as here for recovery of a debt under their contract. The Lord President said (35) that the only reasonable and practical course, which the pursuers should have adopted, would have been to treat the defenders as having repudiated the contract and as being on that account liable in damages. He made reference (36) to the absence of any specialty in the case which would justify the pursuers in claiming the remedy which they sought. What he had in mind, I think, were circumstances like those in *International Correspondence Schools, Ltd.* v. *Irving* (37) which he referred to (36) as highly special on its facts. I do not need to go further than to summarise the circumstances of that case in the Lord President's own words (36):

". . . the contract there in question was one for the provision of tuition by a correspondence course, and the tuition offered was in terms of the contract a unum quid, while the circumstances disclosed that part-delivery of this unum quid had already been effected before the respondent first declined to proceed further with the contract."

International Correspondence Schools (37) was thus governed by the same reasoning as prevailed in *Wright* v. *Melville* (38) and *White & Carter (Councils), Ltd.* v. *A. R. Harding*. It is unnecessary to consider whether the case was rightly decided. Even if it were it has no application, in my opinion, to the present case. I have reconsidered the decision in *Langford & Co., Ltd.* v. *Dutch* (34) in the light of the further argument on this appeal. I have come to the conclusion that it was rightly decided and that the Second Division in the present case was bound to follow it.

I find the argument advanced for the appellants a somewhat startling one. If it is right it would seem that a man who has contracted to go to Hong Kong at his own expense and make a report, in return for a remuneration of £10,000, and who, before the date fixed for the start of the journey and perhaps before he has incurred any expense, is informed by the other contracting party that he has cancelled or repudiates the contract, is entitled to set off for Hong Kong and produce his report in order to claim in debt the stipulated sum. Such a result is not, in my opinion, in accordance with principle or authority and cuts across the rule that where one party is in breach of contract the other must take steps to minimise the loss sustained by the breach.

It may be put also in another way, that the pursuers are precluded from carrying on with their performance by the notice from the defender, albeit in breach of contract, that he does not intend to pay them if they do. The Lord President (LORD DUNEDIN) said very much this in *Johannesburg Municipal Council* v. *Stewart & Co. (1902), Ltd.* (39) in the following passage:

(34) 1952 S.C. 15. (35) 1952 S.C. at p. 18. (36) 1952 S.C. at p. 19.
(37) 1915 S.C. 28. (38) (1828), 3 C. & P. 542. (39) 1909 S.C. at p. 877.

A "When two parties are bound together under contract, of course each must perform to the other his mutual stipulations. If one of the parties is in breach of a stipulation of the contract, what is the position of the other? . . . If the stipulation which is broken goes to the root and essence of the contract the other party is entitled to say—now you have so broken the contract that I am entitled to say that it is at an end through your fault, I shall not perform B any more of my stipulations, because you have precluded me, and I shall claim damages."

There remains for consideration the alternative case made for the appellants on condition 8 of the contract (40). Their claim is that in respect of the defender's repudiation and breach of contract he is liable in damages and that under the clause the damages are fixed at three years' rent which they say is liquidated C damages, and not a penalty. But the clause, in my opinion, is only intended to take effect after the contract comes into operation. This is clear in the first event mentioned in the clause, because there can be no failure of payment until the advertising plates have been displayed in terms of the agreement. This could not happen on the hypothesis, which must be accepted on this part of the case, that the pursuers were not entitled to go on with the contract. The clause is, D in my opinion, just a debt clause ancillary to the conditions for the payment of rent and providing for instant payment of the whole rent in the event of failure in punctual payment of the instalments. No very convincing suggestions were given as to what was meant to be covered by the second event. But, in my opinion, this also must refer to some breaches in the course of performance of the contract, which will again involve instant payment of the full rent. I fail to see how E the clause can be at one and the same time a contractual clause sounding in payment of debt and a damages clause for repudiation of the contract. The clause accordingly has, in my opinion, no operation here and I find it unnecessary to consider whether, if it had, it is a clause for liquidate damages, or for a penalty.

I would dismiss the appeal.

F **LORD HODSON:** My Lords, the main business of the appellants is the supply of litter receptacles to town councils in urban areas throughout Great Britain. They are paid not by the councils but by advertisers who enter into agreements with them in accordance with a standard form of contract.

In 1954 the same parties entered into a contract whereby the appellants agreed to give the respondent the use of advertising space on certain bins in G Clydebank during a period of three years at a weekly rental. This contract expired in November, 1957. On June 26, 1957, a new contract was signed, in the case of the respondent by the hand of Mr. Ward, his sales manager, providing that the respondent agreed to take from the appellants advertising sites in fixed positions on Clydebank for a period of 156 weeks commencing from the date when the advertisement was first exhibited and to pay to the appellants H 2s. per week per plate, payable annually in advance, together with the sum of 5s. per annum towards the costs of each plate or replacement plate fixed. Payments were to be made direct to the appellants at their office in London, the first payment to be made seven days after the first display of advertisements. The contract was headed by a warning notice that it was not to be cancelled by the advertiser and one of the conditions of the contract (no. 7) was to the same I effect. Control of the advertising matter vested in the appellants (see condition no. 1) and in the last resort the appellants could comply with the contract by exhibiting the name, business and address of the advertiser.

Condition 8 reads as follows:

"In the event of an instalment or part thereof being due for payment, and remaining unpaid for a period of four weeks or in the event of the advertiser being in any way in breach of this contract then the whole amount

(40) Condition 8 is printed at letter I, supra.

due for the 156 weeks or such part of the said 156 weeks as the advertiser shall not yet have paid shall immediately become due and payable." A

Immediately after the signing of the contract the respondent sought to repudiate it by a letter to the appellants of the same date:

" *26th June, 1957.*

" Dear Sirs, B

" We regret that our Mr. Ward signed an order today continuing the lamp post advertisements for a further period of three years. He was unaware that our proprietor Mr. McGregor does not wish to continue this form of advertisement. Please therefore cancel the order."

The appellants did not accept the attempted cancellation and proceeded with the preparation of plates which they exhibited on Nov. 2, 1957, and continued to display during the ensuing 156 weeks. C

In due course the appellants demanded payment in accordance with the contract. When the respondent refused to pay on demand the appellants sued for £196 4s. of which £187 4s. represented the cost of advertising space on twelve sites for 156 weeks at 2s. a week and £9 represented 5s. a year for each plate for the same period. D

The respondent by his answer first denied the contract, saying that Mr. Ward had no authority to order advertising services. He pleaded separatim, esto the contract as binding, it was repudiated on the same day before the appellants had taken any steps to carry it into effect and the respondent thereafter maintained the repudiation. He averred that the appellants should have minimised their loss and were not entitled to proceed as if the contract were in full force and effect. E

The claim of the appellants has always been for a debt due under contract made for good consideration, they being always ready to perform the contract and having performed it according to its terms never having accepted the attempt of the respondent to cancel or repudiate. They succeeded before the sheriff-substitute in proving the authority of Mr. Ward but failed to obtain judgment on the ground that there was an honest mistake by one of the respondent's employees and that the contract was repudiated by him on the day it was entered into and before the respondent had time to do anything about it. F

In the Court of Session (41) it was held that

" the defender not being due and resting owing to the pursuers in the sum sued for decree should not be granted and the action dismissed with expenses." G

Both courts held that they were bound by the decision of the First Division in *Langford & Co., Ltd.* v. *Dutch* (42) to reject the claim and leave the appellants to their remedy if any in damages for breach of contract.

I need not refer to the facts in *Langford & Co., Ltd.* v. *Dutch* (42), which is, in my opinion, indistinguishable from the present case, and accordingly prima facie binding on both courts. The Lord President (LORD COOPER) in that case said (43) that apart from wholly exceptional circumstances the law of Scotland did not afford to a person in the position of the pursuers the remedy sought. They could not force the defender to accept unwanted advertisements though they could claim damages for breach of contract. On the averments the only reasonable and proper course, according to the Lord President, would have been to treat the defender as having repudiated the contract and as being on that account liable in damages. The other members of the First Division agreed with the Lord President. This is tantamount to saying that the pursuers should have accepted the repudiation of the defender which, in my judgment, the appellants, who are in the same position as the pursuers in *Langford & Co., Ltd.* v. *Dutch* (42) cannot be compelled to do. It is settled as a fundamental rule of the law of contract that repudiation by one of the parties to a contract does not itself discharge it. H I

(41) [1961] S.L.T. at pp. 146, 147. (42) 1952 S.C. 15. (43) 1952 S.C. at p. 18.

A See the speech of VISCOUNT SIMON, L.C., in *Heyman* v. *Darwins, Ltd.* (44) citing with approval the following sentence from a judgment of SCRUTTON, L.J., in *Golding* v. *London & Edinburgh Insurance Co., Ltd.* (45):

> "I have never been able to understand what effect repudiation by one party has unless the other party accepts [the repudiation]."

B In *Howard* v. *Pickford Tool Co., Ltd.* (46) ASQUITH, L.J., said: "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind." These are English cases but that the law of Scotland is the same is, I think, clear from the authorities, of which I need only refer to one, namely, *Howie* v. *Anderson* (47) where language to the same effect is to be found in the opinions of the LORD PRESIDENT and LORD MONCRIEFF.

C It follows that, if, as here, there was no acceptance, the contract remains alive for the benefit of both parties and the party who has repudiated can change his mind but it does not follow that the party at the receiving end of the proffered repudiation is bound to accept it before the time for performance and is left to his remedy in damages for breach.

D Counsel for the respondent did not seek to dispute the general proposition of law to which I have referred but sought to argue that if at the date of performance by the innocent party the guilty party maintains his refusal to accept performance and the innocent party does not accept the repudiation, although the contract still survives, it does not survive so far as the right of the innocent party to perform it is concerned but survives only for the purpose of enforcing remedies open to him by way of damages or specific implement. This produces

E an impossible result; if the innocent party is deprived of some of his rights it involves putting an end to the contract except in cases, unlike this, where, in the exercise of the court's discretion, the remedy of specific implement is available.

The true position is that the contract survives and does so not only where specific implement is available. When the assistance of the court is not required the innocent party can choose whether he will accept repudiation and sue for

F damages for anticipatory breach or await the date of performance by the guilty party. Then, if there is failure in performance, his rights are preserved.

It may be unfortunate that the appellants have saddled themselves with an unwanted contract causing an apparent waste of time and money. No doubt this aspect impressed the Court of Session but there is no equity which can assist

G the respondent. It is trite that equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid on a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable so to do. In

H this case it would make an action for debt a claim for a discretionary remedy. This would introduce an uncertainty into the field of contract which appears to be unsupported by authority either in English or Scottish law save for the one case (48) on which the Court of Session (49) founded its opinion and which must, in my judgment, be taken to have been wrongly decided.

The appellants were given leave to amend their claim by praying in the altern-

I ative for the same sum, namely £196 4s. as liquidated damages for breach of contract on the footing that the repudiation must be treated as if accepted. The respondent resisted the alternative claim on the ground that the sum sued for being a penalty and not liquidated damages the appellants were not entitled to decree therefor.

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(44) [1942] 1 All E.R. at p. 340; [1942] A.C. at p. 361.
(45) (1932), 43 Lloyd's Rep. at p. 488.
(46) [1951] 1 K.B. at p. 421.
(47) (1848), 10 D. 355.
(48) Viz., *Langford & Co., Ltd.* v. *Dutch*, 1952 S.C. 15.
(49) [1961] S.L.T. 144.

The only material obligation which the respondent was bound to fulfil was to pay the sum of money claimed and it is difficult to see how damages should be assessed for breach of this obligation. It is, however, unnecessary in view of the opinion which I have expressed to consider the question whether the sum claimed is recoverable as a genuine pre-estimate of probable or possible interest in the due performance of the contract or is irrecoverable as a penalty.

I would allow the appeal.

Appeal allowed.

Solicitors: *Lovell, Son & Pitfield*, agents for *W. H. Creech & Douglas*, Sturminster-Newton, Dorset (for the appellants); *Fairchild, Grieg & Co.*, agents for *Balfour & Manson*, Edinburgh (for the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

R. *v.* COX.

[COURTS-MARTIAL APPEAL COURT (Slade, Glyn-Jones and Thompson, JJ.), October 20, November 7, 27, 1961.]

Court-Martial—Jurisdiction—Civil offence—Act or omission abroad not punishable by law of England—Driving without due care and attention on road in Germany—Whether civil offence within Army Act, 1955 (3 *&* 4 *Eliz.* 2 *c.* 18), *s.* 70 (2)—*Road Traffic Act,* 1960 (8 *&* 9 *Eliz.* 2 *c.* 16), *s.* 3 (1).

Section 70 (1) and (2) of the Army Act, 1955*, are on their true construction, offence-creating enactments, and cover an act committed abroad by a person subject to military law which, if committed in England, would have constituted an offence under s. 3 (1) of the Road Traffic Act, 1960† (see p. 1200, letter A, post).

The appellant, a soldier serving in Germany, was convicted by a court-martial of committing a civil offence contrary to s. 70 of the Army Act, 1955, viz., driving a motor vehicle without due care and attention contrary to s. 3 (1) of the Road Traffic Act, 1960, on a road in Germany. On appeal,

Held: the appellant had been rightly convicted of the civil offence charged because the definition of "civil offence" in s. 70 (2) by including the words "any act or omission . . . which, if committed in England, would be punishable" by the law of England, made the commission of the act or omission abroad rank as an offence; and the new offence so created necessarily involved the notional transfer to England of all the relevant circumstances surrounding the act or omission so that it might be determined whether the act or omission, if it had been committed in England, would have been punishable by English law (see p. 1198, letter F, post).

R. v. *Martin* ([1956] 2 All E.R. 86) and *R.* v. *Naylor* ([1961] 2 All E.R. 932) considered.

Conjunctive construction of s. 70 (2) of the Army Act, 1955, rejected (see p. 1199, letter H, post).

A.-G. for Colony of Hong Kong v. *Kwok-a-Sing* ((1873), L.R. 5 P.C. 179) distinguished.

Appeal dismissed.

[**Editorial Note.** The decision in the present case may be considered with that in *R.* v. *Page* ([1953] 2 All E.R. 1355 at p. 1358, letter D), decided on s. 41 of the Army Act, 1881.

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* Section 70 (2) is set out at p. 1198, letter B, post.

† Section 3 (1), so far as material, reads: "If a person drives a motor vehicle on a road without due care and attention . . . he shall be liable on summary conviction to a fine not exceeding £40 . . ."

A As to offences punishable by English law, committed abroad by a person subject to military law, see 33 HALSBURY'S LAWS (3rd Edn.) 1026, para. 1711.

As to careless driving, see ibid., 625, 626, para. 1055.

For the Army Act, 1955, s. 70, see 35 HALSBURY'S STATUTES (2nd Edn.) 489.

For the Road Traffic Act, 1960, s. 3 (1), see 40 HALSBURY'S STATUTES (2nd Edn.) 714.]

B Cases referred to:

A.-G. for Colony of Hong Kong v. *Kwok-a-Sing*, (1873), L.R. 5 P.C. 179; 42 L.J.P.C. 64; 29 L.T. 114; 37 J.P. 772; 14 Digest (Repl.) 145, *1074*.

R. v. *Jennings*, [1956] 3 All E.R. 429; 40 Cr. App. Rep. 147; [1956] 1 W.L.R. 1497; 3rd Digest Supp.

C *R.* v. *Martin*, [1956] 2 All E.R. 86; [1956] 2 Q.B. 272; 120 J.P. 255; 40 Cr. App. Rep. 68; [1956] 2 W.L.R. 975; 3rd Digest Supp.

R. v. *Naylor*, [1961] 2 All E.R. 932; 45 Cr. App. Rep. 69; [1961] 3 W.L.R. 898.

Appeal.

This was an appeal by Roy Ewart Cox, a sergeant in the Royal Army Pay Corps, attached to No. 220 Signals Squadron (Air Formation), Royal Signals, D stationed at Sundern, Germany, against his conviction on Jan. 20, 1961, at a district court-martial held at Sundern of committing a civil offence contrary to s. 70 of the Army Act, 1955. The facts are set out in the judgment of the court.

G. C. Heseltine for the appellant.

David A. Lloyd for the Crown.

E *Cur. adv. vult.*

Nov. 27. **SLADE, J.**, read the following judgment: The judgment that I am about to deliver is the judgment of the court.

On Jan. 20, 1961, the appellant, Sergeant Roy Ewart Cox, Royal Army Pay Corps, serving with the British Army of the Rhine, was convicted in Germany by a district court-martial of

F "committing a civil offence contrary to s. 70 of the Army Act, 1955, that is to say, driving a motor vehicle contrary to s. 3 (1) of the Road Traffic Act, 1960, in that he at Sundern (Germany) on Sept. 15, 1960, drove a motor vehicle on a road without due care and attention."

He was sentenced to be severely reprimanded. From that conviction he appeals G to this court by leave of the single judge.

His grounds of appeal are as follows: (i) that the charge as laid is not correct in law because it does not disclose an offence under s. 70 of the Army Act, 1955, in that the act particularised is not an act contrary to s. 3 (1) of the Road Traffic Act, 1960, nor is it an act which can be committed in England; (ii) that the charge as laid is not a civil offence within the meaning of s. 70 of the Army Act, 1955. H Neither of these points was taken in *R.* v. *Jennings* (1), which was an appeal to this court in similar circumstances. Indeed, in that case, it seems to have been assumed that the then corresponding section to the present s. 70 of the Army Act, 1955, namely, s. 41 (5) of the Army Act, 1881, was applicable to the Road Traffic Act, 1930, and the sole ground of appeal was that the conviction was invalid because the appellant had not received the warning of intended prosecution required by s. 21 of that Act. In addition to his grounds of appeal, counsel I for the appellant urged that it was not a military necessity to frame the charge against the appellant under s. 70 of the Act of 1955 in that the charge could have been laid under s. 36, but the question which this court has to decide is whether the appellant was rightly convicted of the charge laid under s. 70, and not whether he could have been convicted on some other charge. In support of his grounds of appeal counsel for the appellant made the following submissions: (i) that s. 70

(1) [1956] 3 All E.R. 429.

was not an "offence-creating" section. In support of this submission, counsel cited *R.* v. *Martin* (2); (ii) that the Road Traffic Act, 1960, is in any event mere "domestic legislation" in the sense in which that expression was used by LORD PARKER, C.J., in *R.* v. *Naylor* (3); (iii) that if, contrary to his contention, s. 70 did create a new offence, the words in s. 70 (2) "if committed in England" precluded it from applying to an act which was incapable of being committed in England; (iv) that if, contrary to his contention, the words of s. 70 are capable of the construction put forward by the prosecution, nevertheless so many and such strange anomalies would result from their being held to apply to the Road Traffic Act, 1960, that the court should hold that Parliament cannot have intended them to be so construed, and, accordingly, should put a narrower construction on them. In support of this submission, counsel cited *A.-G. for Colony of Hong Kong* v. *Kwok-a-Sing* (4).

R. v. *Martin* (2) and *R.* v. *Naylor* (3) were both decided on the construction of s. 62 (1) of the Civil Aviation Act, 1949, which reads as follows:

> "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

In *R.* v. *Martin* (2) the defendants were charged on indictment with being in possession of raw opium on a British aircraft flying between Bahrein and Singapore, contrary to reg. 3 of the Dangerous Drugs Regulations, 1953, made under the Dangerous Drugs Act, 1951. In *R.* v. *Naylor* (3), the defendant was charged on indictment with larceny on a British aircraft in flight over the high seas. In each case counsel for the defence moved to quash the indictment on the ground that the court had no jurisdiction to try the offence charged. In *R.* v. *Martin* (2), the prosecution conceded that the possession of raw opium was outside the United Kingdom, and further that reg. 3 of the Regulations of 1953 did not in itself make it an offence to have possession of drugs in a British aircraft abroad. The prosecution contended, however, that, whenever an act which is an offence under English law if committed in England is committed on a British aircraft anywhere in the world, such act was made an offence under English law justiciable in this country by virtue of s. 62 of the Act of 1949. Counsel for the defendant in presenting his argument stated succinctly that the only question to be decided was whether s. 62 was a "venue-creating" or an "offence-creating" section. DEVLIN, J., in the course of the prosecution's argument, said this (5):

> "The question is what is meant by 'offence'. What about a confidence trick; that is not an offence unless committed in England. Really you say that 'offence' means any act which if done in England would be an offence."

In the course of his judgment quashing the indictment, DEVLIN, J., said (6):

> "The prosecution say that, apart from these few statutes [e.g., the Offences against the Person Act, 1861, s. 9 and s. 57, the Offences at Sea Act, 1536, s. 1], s. 62 is the only enactment that can make a criminal act done in the air an offence. Accordingly the prosecution say that s. 62 must be given a construction which is wide enough to make it an offence-creating section. It begins with the words 'Any offence whatever committed on a British aircraft', and, since it thus starts by apparently assuming that the act to be considered is an offence before the words of the section operate on it, the prosecution say the word 'offence' must be construed as if it read 'any act which if done in England would be an offence'. No doubt so wide a construction would sustain the prosecution's submission."

And again (7):

(2) [1956] 2 All E.R. 86; [1956] 2 Q.B. 272. (3) [1961] 2 All E.R. 932.
(4) (1873), L.R. 5 P.C. 179. (5) [1956] 2 Q.B. at p. 278.
(6) [1956] 2 All E.R. at p. 90; [1956] 2 Q.B. at p. 283.
(7) [1956] 2 All E.R. at p. 91; [1956] 2 Q.B. at pp. 284, 285.

A "In my judgment, if the prosecution is to succeed, it can only succeed if a very free construction is applied to the words of the statute. It can only succeed if in lieu of the words 'any offence whatever' there is read 'any act which if done in England would be an offence.' That is a free construction. It is not a construction which emerges from the grammar of the Civil Aviation Act, 1949, and it is not one which I find myself willing to B accept."

Later, DEVLIN, J., said (8):

"I am not saying that s. 62 applies to offences at common law. I have not heard that point argued and it may have to be argued hereafter. What I am saying is that s. 62 does not apply to a statutory offence which by the C terms of the statute that creates it is local and not universal in character."

And (9):

"I wish, therefore, to make it clear that the decision which I have given is a decision which is to be regarded as applying to the particular offence which I have had to consider under the Dangerous Drugs Regulations, 1953."

D In *R.* v. *Naylor* (10) LORD PARKER, C.J., said:

"Of the two rival contentions, one is that the subsection is saying in a shortened form what has already been provided in regard to British ships on the high seas, namely, that any act or omission which constituted an offence if committed in England constitutes an offence if committed on a British aircraft. On the other hand, it is said that the subsection is only E dealing with a matter of jurisdiction and venue, and that one must first find that under English law the acts complained of constitute offences if committed on a British aircraft. The matter was considered by DEVLIN, J., in *R.* v. *Martin* (11), on a motion to quash an indictment containing counts concerning reg. 3 of the Dangerous Drugs Regulations, 1953 (S.I. 1953 No. 499).

F "Before considering that case, I should say that I have come to the clear conclusion that the wide construction contended for should be put on s. 62 (1) of the Civil Aviation Act, 1949. Although the language is not altogether as clear as it should be, I have little doubt that it does cover any acts or omissions which would constitute offences if committed in this country unless—and this is, I think, where *R.* v. *Martin* (11) is in point—they are G contrary to some purely domestic legislation. . . . In my judgment, the approach to this matter is that any act or omission which would constitute an offence if done in England is made an offence if done on a British aircraft, subject to this: if the offence in question is clearly one of domestic application only, then, as in *R.* v. *Martin* (11), s. 62 (1) does not cover that sort of offence. Accordingly, I would dismiss the motion to quash."

H An interesting note on *R.* v. *Martin* (11) appears in 72 LAW QUARTERLY REVIEW, pp. 318, 319.

Counsel for the appellant's next argument was that the words in s. 70 (2) "if committed in England" cannot apply to an act such as driving on a German road which is incapable of being committed in England. He says that it is an essential ingredient of the offence under s. 3 (1) of the Road Traffic Act, 1960, that I the motor vehicle should be driven on a road, and that "road" as defined by s. 257 (1) of that Act, means a road to which the public, i.e., the public in England, have access. It is self-evident that you cannot drive a motor vehicle on a German road in England; but, if that argument is carried to its logical conclusion, it would seem that simple larceny in Germany would be a "civil offence" within

(8) [1956] 2 All E.R. at p. 93; [1956] 2 Q.B. at p. 287.
(9) [1956] 2 All E.R. at p. 93; [1956] 2 Q.B. at p. 288.
(10) [1961] 2 All E.R. at p. 932.
(11) [1956] 2 All E.R. 86; [1956] 2 Q.B. 272.

the meaning of s. 70, but that larceny in a German dwelling-house would not. Before dealing with this argument, it is desirable to analyse s. 70.

Section 70 provides as follows:

> "(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section.
>
> "(2) In this Act the expression 'civil offence' means any act or omission [(a)] punishable by the law of England or [(b)] which, if committed in England, would be punishable by that law; and in this Act the expression 'the corresponding civil offence' means the civil offence the commission of which constitutes the offence against this section."

The letters (a) and (b) have been introduced by this court to facilitate reference hereafter. "Civil offence" means, of course, a civil as opposed to a purely military offence. The words in (a) cover any act or omission punishable by the law of England whether committed in the United Kingdom or abroad. The words in (b) "if committed in England, would be punishable by that law" necessarily pre-suppose that the act or omission relied on as constituting the civil offence (i) was committed abroad and (ii) but for those words could not be punishable by the law of England. Indeed, if this were not so, the act or omission would fall within (a) which covers acts or omissions punishable by the law of England whether committed in or outside the United Kingdom; (b) therefore, necessarily involves the supposition that an act or omission was committed in England which in fact was not so committed.

Unless, therefore, (b) is mere surplusage as being covered by (a), it must create a new offence, namely, an act or omission committed abroad and not punishable by the law of England but which, if it had been committed in England, would have been so punishable. That new offence necessarily involves the notional transfer to England of all the relevant circumstances surrounding the act or omission, so that it may be determined whether the act or omission, if it had been committed in England, would have been punishable by English law. There are, no doubt, acts and omissions committed abroad which are, by their very nature, incapable of being committed in England, and vice versa, e.g., acts which relate solely to some specific place or object, or which are indigenous to, or inseparably connected with, a particular locality. Illustrations of such would be, abroad, smoking in the Louvre, and, at home, exceeding the speed limits in the Royal Parks. There may well be sections of the Road Traffic Act, 1960, which fall within this category. In the present case, however, the essence of the act alleged to constitute the civil offence is the driving of a motor vehicle without due care and attention on a road to which members of the public have access. It is akin to the more serious acts of dangerous driving (s. 2), causing death by dangerous driving (s. 1), and driving under the influence of drink (s. 6). The definition of "road" in the Road Traffic Act, 1960, s. 257 (1) takes the form it does because Parliament was, of course, legislating for the roads of this country. It is to be observed that there are very few acts committed abroad even by a British subject which are punishable by the law of England and which would thus fall within the language of (a); moreover, as counsel for the appellant pointed out, there are persons subject to military law who are not British subjects, and, with the exception of piracy which jure gentium is justiciable anywhere, there is no offence committed by an alien abroad which is punishable in England. To hold, therefore, that the language of (b) is not apt to cover acts or omissions abroad which, if committed in England, would constitute offences against, for example, s. 1, s. 2, s. 3, and s. 6 of the Road Traffic Act, 1960, would seem to deprive s. 70 of the Army Act, 1955, of the effect which, in the opinion of this court, Parliament in enacting it must have intended that it should have in order to regulate the conduct of persons subject to military law who are for the time

A being stationed abroad. In construing s. 70 (2) of the Act of 1955, it is not irrelevant to observe that the corresponding section of the Army Act, 1881, namely, s. 41 (5), used the words " . . . any offence . . . which when committed in English is punishable by the law of England . . .", instead of the words " any act or omission " which are found in s. 70 (2).

We now turn to counsel for the appellant's final submission. As instances of B anomalies which would flow from holding that s. 70 was applicable to the Road Traffic Act, 1960, and cognate legislation, counsel referred us to sections of the Road Traffic Act, 1960. He referred to s. 4 (1) saying that speed limits in Germany might differ from those in England; to s. 19 and s. 20—speeding on restricted roads—and he emphasised particularly the definition of a restricted road in s. 20 (1); to s. 98—driving without a licence issued by a British licensing C authority; and to s. 201 and s. 203 (2)—driving without insurance against third-party risks. Counsel for the appellant said rightly that the policy so required must, by s. 203 (2), be issued by an authorised insurer, that is to say, a person or body of persons carrying on motor vehicle insurance business in Great Britain. Counsel referred to the Highway Act, 1835, s. 78—which requires drivers of wagons or carts, etc., to keep to the left or nearside of the road. He said rightly that the D rule of the road in Germany was to keep to the right.

The court recognises the force of counsel's argument based on these anomalies. We have no doubt that, if the scope of the inquiry were extended beyond the road traffic laws, many more anomalies could be found of which it is unnecessary to give further examples. As I have already said, it may be that the Road Traffic Act, 1960, and the Highway Act, 1835, do contain provisions which are purely E domestic in their application, and which, by their very nature, are intrinsically incapable of being committed abroad, or of being notionally transferred to England for the purpose of applying s. 70 of the Army Act, 1955. Any such provisions will fall to be dealt with if and when the need should arise. At the moment, this court is concerned, and concerned only, with s. 3 of the Road Traffic Act, 1960. In this connexion, it may be observed that, when a statute F requires that something shall be deemed to be that which it is not, it is frequently not difficult to conjure up illustrations which may seem to reduce to absurdity the requirement of the statute; but that does not relieve a court of its duty to make the hypothesis which the statute demands, that is, in the present case, that this motor vehicle was being driven on a road in England whereas it was in fact being driven on a road in Germany.

G Finally, in support of his argument on this point, counsel for the appellant cited to us the decision of the Privy Council in *A.-G. for Colony of Hong Kong* v. *Kwok-a-Sing* (12). He asked us to apply the principle underlying that decision by substituting " and " for " or " in s. 70 (2) of the Army Act, 1955, or by leaving the subsection as it stands but placing a narrow construction on it. As to his first suggestion, it is true that there are cases in which the word " or " in an Act H of Parliament has been construed as " and ", and where " and " has been construed as " or ", but to substitute " and " for " or " in s. 70 (2) of the Act of 1955 would seem to make nonsense of the expression " civil offence ". As to the second suggestion, it is to be borne in mind that the decision in *A.-G. for Colony of Hong Kong* v. *Kwok-a-Sing* (12) was based on the peculiar relationship of Hong I Kong to the mainland of China, and the reasoning underlying the judgment of the Board in that case seems to this court to be wholly inapplicable to the control of Her Majesty's Forces abroad through the instrumentality of military law.

Parliament may well have thought it better to give wide powers to those responsible for the maintenance of discipline and right conduct in the army abroad, trusting them to act fairly and reasonably in the exercise of them, than to attempt what would have been the most difficult task of seeking to define

(12) (1873), L.R. 5 P.C. 179.

with precision each of the acts which, if committed abroad, should be triable by court-martial as a civil offence. This court, accordingly, holds that s. 70 is, on its true construction, an offence-creating section, and that it covers an act committed abroad by a person subject to military law which, if committed in England, would have constituted an offence under s. 3 (1) of the Road Traffic Act, 1960. The appellant was, therefore, rightly convicted of the civil offence with which he was charged. We have, accordingly, dismissed this appeal but, having regard (i) to the importance of the points raised in it; (ii) to the number of trials by courts-martial in which these points have been raised by the defence; and (iii) to the opinion of the Judge-Advocate-General that these points deserved consideration by this court, we have already given leave to appeal to the House of Lords, and have certified in the manner required by s. 1 (2) of the Administration of Justice Act, 1960, as applied to this court by s. 10 of that Act.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Registrar, Courts-Martial Appeal Court* (for the appellant); *Director of Army Legal Services* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Maintenance—Wife—Practice—Application to High Court while magistrates' court's order existing—Copy of maintenance order of magistrates' court to be lodged.

Infant—Maintenance—Divorce Division of High Court—Practice—Application to High Court while magistrates' court's order existing—Copy of maintenance order of magistrates' court to be lodged.

Where there is in force a matrimonial order or an interim order of a magistrates' court for maintenance of the wife and/or the children, and application is made to the Divorce Division of the High Court for an order for maintenance of the wife and/or the children, a copy of the order of the magistrates' court should be lodged in the registry by the applicant prior to the hearing of the application.

B. LONG,
Senior Registrar.

Dec. 1, 1961.

[END OF VOLUME THREE.]

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